IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: SIMPSON CJ, KNELLER JA & NYARANGI Ag JA)

CIVIL APPEAL NO. 66 OF 1983

DAVID MUTURI MWANGI .....APPELLANT

VERSUS

KIIRU ..... RESPONDENT

(Appeal from the judgment and decree of the High Court (Hancox, J as he then was) dated 9th June 1981 in Civil Case No 749 of 1977.)

JUDGMENT

This appeal is from the judgment and decree of the High Court (Hancox, J as he then was) dated 9th June 1981 in Civil Case No 749 of 1977.

By his plaint the respondent as plaintiff claimed the return of land No Chinga/Gikigie/64 in Othaya of 7.3 acres, the subject-matter of an oral agreement between the parties of purchase and sale for a total of Kshs 8,395.00 in May, 1969. The plaintiff averred that Kshs 15,052.50 was agreed as price of development but the defendant puts the figure at Kshs 12,647.50, an amount which includes Kshs 1,095 part of Kshs 8,395. There was a claim of Kshs 8,700 as compensation about which the defence is silent. There is an alternative claim for damages against the defendant.

The plaintiff stated he received a total of Kshs 4,100 as part-payment but the defendant said he paid Kshs 4,300. There was one more significant disagreement in the pleadings. The plaintiff said there was express agreement that the defendant would pay the balance of the purchase price on or before 15th February, 1970 but the defendant denied this and put the plaintiff to strict proof.

The trial judge held that it was a term of the contract that the balance was to be paid on or before the 15th of February, 1970 and that by the ordinary law of contract the plaintiff was entitled to rescind for non-payment of the balance.

Aggrieved by the decision, David Muturi Mwangi appeals to this court on the following grounds:

1. The High Court erred in holding that the plaintiff was entitled to rescind the contract.
2. The High Court erred in holding that the respondent did in fact rescind the contract.
3. The High Court erred in holding that the respondent was entitled to rescind in the absence of any finding that time was of the essence of the contract.
4. The High Court erred in arriving at the decision it did when time was neither in law nor in fact of the essence of the contract.
5. The High Court erred in holding that the respondent was entitled to rescind in the absence of any

notice from the respondent to the appellant making time of the essence of the contract and specifying reasonable period for completion.

6. The High Court erred in holdings that the respondent could rescind an already executed contract.
7. If the respondent was at all entitled to rescind the contract, which the appellant denies, the respondent waived his right of rescission, if any.
8. The High Court erred in not taking into account whether or not the respondent has waived his right of rescission if any, in arriving at its decision.
9. The High Court erred in ordering a "re-transfer" when the appellant was already the registered proprietor.
10. Having held that section 143 of the Registered Land Act, cap 300 did not apply, the court had no jurisdiction to make any order of the re-transfer.
11. The High Court erred in law in ordering a 'retransfer" of the said land to the respondent in all the circumstances of the case.
12. The High court erred in awarding a "re-transfer of the land concerned" instead of awarding the balance of the purchase price and for damages if anything was so due.
13. The plaintiff failed to prove his case.
14. The High Court erred in finding for the respondent in the face of numerous contradictions and gaps in the plaintiff's evidence.

The appellant asks for an order that he pays to the respondent the sum due in respect of the sale of the suit land and that upon payment the respondent do forthwith give vacant possession of the land to the appellant.

Mr Nowrojee for the appellant told the court that the proprietorship of the land has already been transferred to the appellant who is the registered owner since the 6th January, 1970 but that the respondent did not give possession. That means that the appellant was the registered owner by the 20th January the first date on which according to the respondent the appellant had agreed and failed to pay and on the 15th February, the other date to do with the final payment Mr Nowrojee doubted if it could be said that a firm date had been fixed for the payment of the balance of the purchase price in the face of the evidence that payment had to be made on or before 15th February, 1970 or on a reasonable date thereafter. The basis of the judgment was that the respondent could rescind. Mr Nowrojee argued that the situation created by the failure to pay did not allow a party to rescind a contract *ab initio,* there being no fraud, mistake or misrepresentation. It was no more than a simple breach of contract, amounting to a discharge by breach rather than rescission, as a result of which only the future obligations of the parties come to an end and new additional remedies come into existence. The basis of Mr Nowrojee's contention is that there was no rescission and that the prayers which the respondent sought were not available to him.

Mr NP Vohra, for the respondent, urged that the respondent was within his rights in filing the suit to press for judicial rescission because of failure by the appellant to perform a fundamental obligation, that damages would not here be a suitable remedy as the respondent has been in possession of the land and that as the appellant paid only a deposit towards the purchase price, the respondent had not received valuable consideration.

This is an appropriate stage at which to refer to and to comment on the decided cases and text book commentaries relied on by the appellant. Paragraph 1591 on page 876 of *Chitty on Contracts*, 25th Edition, volume one, under the heading Discharge by Breach states:

> "One party to a contract may, by reason of the other's breach be entitled to treat himself as discharged from liability further to perform his own unperformed obligations under the contract…… The rule is usually stated as follows: Any breach of contract gives rise to a cause of action; not every breach gives a discharge from liability. Thus the question ….is whether a party who admittedly has a claim for damages is relieved from further performance by the other party's breach. Secondly although sometimes the innocent party is referred to as "rescinding" the contract and the contract as being "terminated" by the breach, it is clear that the contract is not rescinded *ab initio*. The innocent party or in some cases both parties are excused from further performance of their primary obligations under

> the contract; but there is then substituted for the primary obligations of the party in default a secondary obligation to pay monetary compensation for his non performance." This underlining is mine as are all the others following.

So, applying the learned author's views, and assuming that the appellant was in breach of a term of the contract by failing to pay on 15th February, 1970, the respondent was discharged from further performances under the contract by the appellant's failure of performance to pay the balance of the purchase price. The contract was, however, not extinguished.

What are the consequences of such failure? Paragraph 1629 on page 897 of the same book says it may in particular cases be correct to speak of the exercise by one party of his right to treat himself as discharged as a "rescission" of the contract. However

> "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. Moreover, in principle, only those primary obligations falling due after the date of discharge will come to an end; those which have accrued due at that time may still be enforceable as such."

It would follow from the passages above that the material contract was not rescinded, that the parties were not restored to their positions *ante* the contract but that the contract remains in existence, future obligations come to an end giving way to new or additional remedies. The respondent was entitled to treat himself as discharged from further liability by such failure. That does not apply to the appellant, who is the party in default in the action. Paragraph 1631 of *Chitty* on page 900 states:

> "Upon discharge the primary obligations of the party in default to perform any of the promises made by him and remaining unperformed come to an end as does his right to perform them. But for his primary obligations there is substituted by operation of law a secondary obligation to pay to the other party a sum of money to compensate him for the loss he has sustained as a result of the failure to perform the unperformed primary obligation."

That supports Mr Nowrojee's submission that the land having been transferred and as the suit is not on *quantum meruit* the respondent's remedy is to sue for damages for breach of contract and the damages can be referable to the balance of the purchase price.

In *Photo Production v Securicor Ltd* (1980) AC 827 at page 848 Lord Diplock remarked that, characteristically, commercial contracts are a source of primary legal obligation upon each party to it to procure that whatever has been promised will be done. Lord Diplock continued:

> "….breaches of primary obligation give rise to substituted or secondary obligations on the part of the party in default and … may entitle the other party to be relieved from further performance of his own primary obligations. These secondary obligations of the contract breaker and any concomitant relief of the other party from his own primary obligation also arise by implication of law generally common law….."

As for failure to perform a basic term of contract, Lord Diplock says:

> "Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by ….common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach."

All this means is that the normal consequence of breach in the circumstances such as pertain to this appeal is to pay damages for nonperformance. Rescission is not a remedy for the innocent party.

In his speech Lord Wilberforce (at page 844) referred to the case of *Harbutt* (1970) 1 QB 447 which had

been decided on the principle of 'fundamental breach' thus disregarding modern principles, and said,

> "I have indeed been unable to understand how the doctrine can be reconciled with the well accepted principle of law, stated by the highest modern authority, that when in the context of a breach of contract one speaks of termination what is meant is no more than that the innocent party or in some cases both parties, are excused from further performance. Damages in such cases are then claimed ….A vast number of expressions are used to describe a situation where a breach has been committed by one party of such character as to entitle the other party to refuse further performance….I have come to think that some of these difficulties can be avoided in particular the use of 'rescission' even if distinguished from rescission *ab initio,* as an equivalent for discharge…."

There is a relevant and helpful passage in the speech of Lord Salmon in the case of *Woodar Investment Development Ltd v Wimpey Construction UK Ltd.* (1980) 1 ALL ER 571 where reference is made to what Lord Write said in *Heyman v Darwins Ltd* (1942) AC 356.The passage reads:

> "There is a form of repudiation, however, where the party who repudiates does not deny that a contract was intended between the parties, but claims that it is not binding because of the failure of some condition or the infringement of some duty fundamental to the enforceability of the contract, it being expressly provided by the contract that the failure of condition of the breach of duty should invalidate the contract….But perhaps the common sense application of the word repudiation is to what is called the anticipatory breach of contract where the party by words or conduct evinces an intention no longer to be bound, and the other party accepts the repudiation and rescinds the contract. In such a case, if the repudiation is wrongful and the rescission is rightful, the contract is ended by rescission but only as far as concerns future performance. It remains alive for the awarding of damages …. for the breach which constitutes the repudiation."

The decision in the *Photo Production* case and in *Woodar Investment* (*supra*) fortify the appellant's contention that the appellant's nonperformance through failure to pay as agreed constituted a repudiation of future undertaking upon which the respondent could end the contract as regards future performance and seek damages. This type of rescission could not, however, form a basis for an order to re-transfer the land to the respondent, because the rescission here affects the unperformed obligation which gives rise to secondary obligation and compensation.

Another hurdle to be surmounted before a re-transfer of the land is section 28 of the Registered Land Act (the Act). The rights of the appellant as proprietor may not be defeated except under sub-sections (a) and (b) of section 28. The respondent could not benefit from the two qualifications nor by section 30. As a seller he had no registrable right over the land. His only right was the balance of the purchase price. The parties had entered a valid contract of sale with valuable consideration. The deposit paid by the appellant cannot reasonably be treated as nominal consideration because the deposit was an agreed part of the entire purchase price which was the true valuable consideration. To re-transfer would be to breach section 143 of the Act. The appellant's first registration was not obtained or made by fraud or mistake. Indeed there is no such claim. There can therefore be no valid order of rectification. The trial judge did not find there was a particular date on which the balance of the purchase price had to be paid. The non-payment was by 15th February, 1970 or a reasonable time thereafter. It follows reasonably that the 15th February was not the final date. The discharge which ensured is not determinable on a particular date. As there was no definite provision for the payment of the balance, the appellant was entitled to be served with a notice making time of the essence. The following is what *Halsbury's Laws of England,* 3rd Edition volume 8 paragraph 282 on page 165 says on the point;

> "Notice making time of the essence. In cases where time is not originally of the essence of the contract, or where a stipulation making time of the essence has been waived, time may be made of the essence, where there is unreasonable delay, by a notice from the party who is not in default fixing a reasonable time for completion and stating that, in the event of non-completion within the time so fixed, he intends to enforce or abandon the contract. But

> the time fixed must be reasonable having regard to the position of things at the time when the notice is given, and to all the circumstances of the case."

We find that the appellant is equally on firm ground in arguing in the alternative that time was not of the essence and in consequence he was liable only for payment of damages for non-payment within a reasonable time.

There is one more issue that requires determination. There was a conflict of evidence on the value of the items of property which were sold together with the land. The respondent as plaintiff said the balance including the value of the items was Kshs 28,047.50. The appellant as defendant put the figure at Kshs 15,647.50 and indeed deposited in court from which it was later withdrawn by consent. The trial judge made no finding on the conflict. We have no further evidence with which to resolve the conflict. In the circumstances I would take the lower figure.

The respondent must be deemed to have given vacant possession to the appellant at the time the land was registered in the appellant's name. On the evidence, the respondent's continued possession of land appears to have been a matter of private arrangement between the parties. That then means that on moving out of land, the respondent is not being ordered to carry out any obligation but merely acknowledging that the private arrangement is terminated. However, be that as it may, the obligation to give possession is one which accrued due at the time of discharge and is therefore still enforceable.

For the reasons already stated, I would allow the appeal and set aside the order of the trial judge to re-transfer the suit land. I would order the appellant to pay a sum of Kshs 15,647.50 to the respondent plus interest at 12% from the date of this order only on the ground that the respondent has had the use of the land and could have had in addition the sum of Ksh 15,647.50. Upon full payment I would order the respondent to vacate the suit land with leave to remove any temporary buildings still on the land and give physical possession to the appellant. I would award the costs of the appeal and of the High Court to the appellant.

Kneller JA. I have read the judgments of Nyarangi Ag JA and Simpson, CJ, and agree with them but as we differ from the learned trial judge (Hancox, J as he then was) it is right that I should add my brief reasons for doing so.

The pleadings, evidence, judgment of the learned judge and the grounds of appeal and the submissions of the learned advocates for the parties have been adequately summarized in the other two judgments and it would be a work of supererogation if I were to do the same.

Time was not a pre-condition of this oral agreement and the evidence did not reveal that the parties expressly stipulated that any condition as to time for payment of the purchase price must be adhered to and since it was a sale of land in the years 1969-1970 in the Othaya division the surrounding circumstances, in my view do not reveal it should be considered of the essence. *Hudson v Temple* (1860), ER 735, 738. Although Mwangi, the appellant had not paid Kiiru, the respondent, by October 15 1970 and has not to date paid the balance of the purchase price, Kiiru did not, and still has not, given notice making time of the essence to Mwangi who is in default. The finding of the learned judge on this was, I apprehend, the same.

It follows therefore, with respect, that Mwangi was not, and is still not, in breach of the contract on that score but he is because he has not paid the balance of the agreed sale price. He does not have to perform any further obligations under the oral agreement if Kiiru treats his default as a discharge of it which he has done by filing his plaint on October 15 1970 asking for the suit land to be transferred back to him, but, instead, Mwangi must pay damages as compensation to Kiiru which will be based on the balance of the purchase price together with interest on it which is what Kiiru claimed in the alternative when his plaint was amended by consent on May 26, 1981.

Likewise, because the contract is now discharged, Kiiru has no obligations to fulfill under the same agreement and, indeed, he has kept to his side of the bargain in every respect (including joining with

Mwangi to obtain the consent of the local land control board, transferring the plot to Mwangi and having the register amended to accord with all this) save for giving Mwangi possession of it. In other words, the contract was partly executed.

Now since this parcel is registered land and there is no fraud, misrepresentation or mistake pleaded or revealed in this evidence Mwangi cannot be ordered to transfer it to Kiiru.

He was registered as owner of it on February 15, 1970, Kiiru had a caution registered against the title on August 21 1970 but this was raised on June 3, 1971 which left Mwangi as the registered owner and Kiiru as an unpaid vendor in possession. Kiiru has no lease, charge encumbrance or any right or interest which is an over-riding one. See sections 2, 28, 30 and 143 of the Registered Land Act. Thus although with a discharge of the contract Mwangi would not have to perform any further obligations under the agreement which would include yielding up possession of these acres he will have to do so because of the provision of the Registered Land Act to which I have referred and, instead, accept damages which he asked for in the alternative.

The learned judge did not make a finding on what these damages should be but on the pleadings and evidence before him and now before this court they will have to be the lower figure of Kshs 15,647.50.

The appellant failed to prove on the balance of probabilities that he was entitled to the remedy of recission which would mean that the contract was no contract from the out-set for there was no fraud or mistake or misrepresentation to justify it.

I concur with the orders proposed in the other two judgments.

Simpson CJ. Sometime in the year 1969 the appellant who was the defendant in the court below and the respondent/plaintiff entered into an oral agreement for the sale by the plaintiff to the defendant of a piece of land at Othaya – No Chinga/Gikigie/64 – consisting of 7.3 acres at the rate of Kshs 1,000 per acre together with Kshs 1,095 for development charges, a total of Kshs 8,395. In addition according to the plaintiff the defendant agreed to pay Kshs 15,052.50 for the price of development and Kshs 8,700 as compensation for buildings and trees. According to the defendant he agreed to pay an additional Kshs 12,647.50 only which amount included the amount of Kshs 1,095 already mentioned. On 6th January, 1970, the land was transferred to the defendant. By that date he had paid only Kshs 4,100 (or Kshs 4,300 according to the defendant).The plaintiff remained in possession.

In October, 1970, the plaintiff, alleging that it was a precondition of the agreement that the balance of Kshs 28,047.50 be paid on or before 15th February, 1970, and that it was expressly agreed that time should be of the essence of the agreement, sued for reconveyance to him of the land. The defendant (who drafted his own defence) stated that he was ready, able and willing to pay Kshs 3,000, the balance of the purchase price, and Ksh 12,647.50. He denied that payment was due on or before 15th February, 1970. Although he failed to include a specific denial that Kshs 8,700 was payable as compensation for buildings and trees it is clear that he did not accept that this amount was payable.

In the course of the hearing which, for reasons not ascertainable from the record, did not start until 20th May, 1981, the plaintiff with the consent of the defendant added an alternative claim for damages.

The learned judge having considered the conflicting evidence with respect to the agreed date of payment made a finding that it was a term of the contract that it was to be paid on or before the 15th February, 1970. He made no reference to time being of the essence of the contract but held that non-payment by 15th February, 1970, or a reasonable time thereafter, was a breach entitling the plaintiff to rescind the contract. He ordered the re-transfer of the suit land to the plaintiff. It is against this judgment that the defendant now appeals. The grounds of appeal were fully set out in the judgment of Nyarangi Ag JA.

The use of the expression, “or a reasonable time thereafter” suggests that the learned judge did not take the view that time was of the essence of the contract. The following passage appears in *Halsbury’s Laws of England* (4th Edition) Vol 9, para 481, p 338:

> "The modern law, in the case of contracts of all types, may be summarized as follows. Time will not be to be of the essence unless: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence; or (3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence.
> Even if time is not of the essence a party who fails to perform within the stipulated time will be liable in damages."

There is no evidence of an express stipulation making time of the essence nor does the subject matter or the surrounding circumstances show that time should be considered of the essence.

No notice was given by the plaintiff making time of the essence. I agree with Nyarangi, Ag JA, that time was not of the essence of the contract and for the reasons given by him that the innocent party, the respondent, was entitled neither to treat the contract as rescinded *ab initio* nor to an order of rescission *ab initio*. Rescission or discharge for non-payment of the agreed consideration concerns only future performance. For the primary obligations under the contract there is substituted a secondary obligation to pay damages.

The learned judge in the High Court held that section 143 of the Registered Land Act (cap 300) relating to rectification had no application since rescission for non-payment of the outstanding balance was dependent upon the ordinary of contract. I agree with respect however with Nyarangi, Ag JA that in essence this is a matter of rectification and in the absence of fraud or mistake the court has no jurisdiction to order a retransfer to the respondent. Since re-transfer cannot be ordered the respondent must give up possession of the land.

Having said that in my opinion time was not of the essence of the contract it is necessary to consider whether or not there was any breach of contract entitling the respondent to damages. The learned judge of the High Court found that under the contract the balance of the purchase price and the amounts claimed for development and compensation were to be paid on or before 20th February, 1970, or a reasonable time thereafter. By October, 1970, when the plaint was filed a reasonable time had elapsed and the balance had not been paid. It has not yet been paid.

The appellant is accordingly in breach of contract and is liable to pay damages. The respondent has remained in possession. The amount of damages is referable to the purchase price and other amounts agreed to be paid in respect of improvements and compensation. The appellant admits that Kshs 15,647.50 is still due by him. The amount of Kshs 8,700 claimed by the respondent and with regard to which no finding was made by the learned judge in the court below is mainly in respect of buildings of which he has had the benefit for 14 years and which (or the materials of which) he can remove. I agree with Nyarangi, Ag JA, that in all circumstances it is just to take the lower figure.

I agree that the appeal should be allowed and with the orders proposed. As Kneller, JA also agrees the appeal is allowed, the orders of the High Court are set aside, the appellant is ordered to pay Kshs 15,647.50 to the respondent with interest at 12% from the date of this order until payment in full. Upon full payment the respondent will vacate the suit land with leave to remove any temporary buildings and any building material still on the land. The respondent will pay to the appellant the costs of this appeal and the costs in the High Court.

Dated and Deliveredat Nairobi this 9th May, 1984

A.H. SIMPSON

.....

CHIEF JUSTICE

A.A. KNELLER

.....

JUDGE OF APPEAL

J.O NYARANGI

.....

Ag JUDGE OF APPEAL