IN THE COURT OF

APPEAL AT NAIROBI

(CORAM: W. KARANJA, M'INOTI & ACHODE, JJ.A)

CIVIL APPEAL NO. 218 OF 2019

BETWEEN

FIT- TIGHT FA-STENERS LIMITED.....APPELLANT

AND

AKIBA BANK LIMITED.....RESPONDENT

(*Being an appeal against the judgment of the High Court at Nairobi (Tuiyott J.) dated 10th May 2018*

in

***H.C.C.C No. 466 of 2005*)**

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JUDGMENT OF THE COURT

1. The brief background to this appeal is that **Akiba Bank Limited** the respondent herein, advanced certain financial facilities to Hardware and Tools Limited, (hereinafter referred to as the Borrower), for which Sundev Investment Limited stood as guarantor. To secure the said guarantee, the suit property, L.R No. 209/8194, Nairobi, was charged to the respondent. Upon default by the Borrower, the respondent appointed a Receiver Manager over both the Borrower and the Guarantor's property.

2. In exercise of the Receiver Manager's powers, the suit property was offered for sale. By a letter dated 30th June 2004, the Receiver Manager accepted an offer from **Fit-**

Tight Fasteners Limited the appellant herein, to purchase the property

together with associated assets, namely trading stock, furniture, fixtures, and a forklift, at total consideration of Kshs. 45,000,000. The appellant remitted a 10% deposit amounting to Kshs. 4,500,000 on 11th August 2004.

3. In the ensuing transaction, the firm of M/s Kipkorir, Titoo & Kiara Advocates represented the respondent, while the firm of M/s Jones & Jones Advocates acted for the appellant. Correspondence exchanged between the two firms revealed a dispute concerning the issue of vacant possession. The appellant was desirous of purchasing the property with vacant possession, while the respondent was unable to guarantee the same. Following negotiations the appellant agreed to execute the Sale Agreement without the vacant possession clauses.

4. Subsequently, on 26th May 2005, the respondent's advocates forwarded a draft Sale Agreement to the appellant's advocates for execution. On 27th May 2005, the appellant executed the Agreement and on 30th May 2005, returned it to the Receiver Manager for execution by the respondent. On 21st July 2005, the appellant's advocates formally forwarded three copies of the executed Sale Agreement to the respondent's advocates for counter-execution and return. However, the respondent neither executed, nor returned the Agreement.

5. As a result, the appellant filed this suit *vide* a plaint dated 12th August 2005 and amended on 9th November 2006

seeking:

1) *An order that the respondent do execute the agreement of sale;*

2) *An order for specific performance;*

3) *An order for an injunction restraining the respondent by themselves and/or their servants and agents from alienating, charging, letting, renting, selling and/or disposing or in any manner or way dealing with the property being L.R. Number 209/8194 Nairobi, the stock and forklift belonging to Sundev Investments Limited pending the hearing and determination of this suit.*

4) *An order that the respondent do hand over all Title Deeds pertaining to the property being L.R. Number 209/8194.*

5) *An order that the respondent do execute the Transfer pertaining to the said property in their favour free of encumbrances.*

6) *An order that the respondent do give vacant possession of the said property.*

7) *Damages for breach of contract in lieu or in addition to specific performance.*

8) *Costs of the suit*

6. The respondent filed a statement of defence dated 21st September 2005 denying the contents and allegations in the plaint.

7. On 13th September 2005, after this suit was filed, the respondent refunded the deposit to the appellant, and sold the suit property to a third party, (Ital Products Limited). The respondent transferred the suit property in favour of the third party on 28th October 2005, precipitating the filing of the

application by the appellant to join the third party and the

Receiver Manager to the suit. In a ruling dated 31st January 2007, Ochieng J. (as he then was), struck out the application and limited the unresolved issues in the trial court to damages, costs, and interest.

8. During the hearing, Kanyaiyalal Mansukhlal Goradia, the Managing Director of the appellant, testified and reiterated what was averred in the amended plaint. In addition, he stated that the respondent refunded the deposit on 13th September 2005 after they issued summons to them.

9. Tuiyott J. (as he then was), considered the issue before him and found them to have no merit in them. In a judgment dated 10th May 2018, the learned Judge dismissed the suit in its entirety.

10. That judgment aggrieved the appellant provoking this appeal. In the memorandum dated 22nd May 2019 the appellant raised the following grounds:

    a) *The learned judge erred in not finding that the receiver manager of Hardware and Tools Limited having accepted the appellant's bid to purchase land, trading stock, furniture, fixtures and forklift belonging to Hardware and Tools Limited (in receivership) and Sundev Investments Limited, such acceptance constitutes a contract, which bound the respondent when it accepted a deposit from the appellant.*

    b) *The learned judge erred in applying section 3(3) of the Law of Contract Act, while the agreement was that the appellant, the respondent, the Receiver*

and Manager of Hardware and Tools Limited (in receivership), and

Sundev Investment Limited would enter into separate sale agreements for the land and the other movable properties.

c) *The learned judge erred in not finding that the respondent breached the said contract when it failed to execute the agreement of sale, and it sold the properties to another party.*

d) *The learned judge failed to find that the respondent exercised its statutory power of sale improperly and irregularly and that the appellant was entitled to damages under section 69 B (2) of the Transfer of Property Act, 1882.*

e) *The learned judge erred in not finding that the appellant is seeking, "simply damages" for breach of contract and that neither did the appellant claim special damages for breach of contract, nor did it claim general damages for breach of contract.*

11. The appellant filed submissions dated 22nd November 2019 through the firm of M/s A.B. Shar Advocates, while the respondent's submissions dated 6th February 2020 were filed through the firm of M/s Donald B. Kipkorir KTK Advocates. The appellant filed further undated submissions in response to the respondent's submission.

12. The appellant has raised three issues in its submissions to wit: that there was a binding contract between the appellant and the respondent; that the respondent breached the contract; and, that the appellant is entitled to damages.

13. The appellant relies on two letters, one dated 11th August 2004 being the letter of offer and the other dated 30th

June 2005

being an unconditional acceptance of the offer. The appellant argues that the subject of the contract was an assortment of movable assets including trading stock, fixtures, furniture, and a forklift, and asserts that there was an enforceable contract for the sale of those assets, pursuant to **section 6(1)** of the **Sale of Goods Act**.

14. It is urged that the appellant and the respondent had a further contract which involved the transfer of the suit land. There was difficulty in ensuring transfer of the land with vacant possession and this caused delay in execution. The parties later settled all the terms of the sale agreement and agreed to execute the formal sale agreement. The respondent accepted and kept the deposit and part-payment amounting to Kshs. 4,500,000 paid by the appellant pursuant to the agreement. It is posited that these facts establish the existence of a contract between them.

15. The appellant relies on the decision in **Mumias Sugar Company Ltd v Freight Forwarders (K) Ltd [2005] eKLR,** where this Court, upon considering the correspondence exchanged between the parties, held that there was a contract to enter a lease or sublease. The appellant argues that **Section 3(3)** of the **Law of Contract Act** did not affect the enforceability of that contract.

16. The appellant urges this Court to find that there was an enforceable contract of sale for the trading stock, furniture, fixtures, and a forklift and that the parties had a contract

to

execute and enter into a formal sale agreement concerning **L.R. No. 209/8194,** under which the transaction would be completed.

17. It is submitted that the appellant performed its obligation under the collateral contracts, while the respondent breached the contract. The appellant asserts that it did not seek special damages, or general damages for breach of contract, but "*simply damages*" for breach of contract which it is entitled to under the law.

18. Relying on **Halsbury's laws of England (vol. 12 (1) Reissue) para. 954** the appellant argues that it is entitled to damages for wasted outlay, including legal fees paid to Jones & Jones Advocates who acted for the appellant in the failed transaction. That it is also entitled to the expenses for investigating the title in **L.R. No. 209/8194**. It also relies on **para. 955** of **Halsbury's laws** *(supra)*, where it is stated that;

> ***"…a contracting party at whose expense another party has been unjustly enriched may be entitled to reverse that unjust enrichment and compel the other party to disgorge the value of benefits gained."***

19. In the appellant's view, the fact that the respondent kept and had benefit of the deposit money from 11th August 2004 to 14th September 2005, deprived the appellant of the use of the money for that entire period. The respondent was unjustly enriched at the expense of the appellant and

therefore, the

appellant is entitled to interest on that amount at commercial rates. The appellant contends that it is entitled to damages from the respondent for breach of contract and under **section 69B (2)** of the **Transfer of Property Act, 1982**.

20. The appellant therefore, urges this Court to allow the appeal and remit the matter back to the High court for assessment of damages.

21. In rebuttal, the respondent cites the decision of this Court in **Kukal Properties Development Ltd v Tafazzal H. Maloo & 3 Others [1993] eKLR,** where it was held that where the agreement between parties is not executed, it is unenforceable. It is submitted that the law regulating specific contracts is **Section 3(3)** of the **Law of Contract Act** which provides a regulatory legal framework for contracts for the disposition of an interest in land. It is posited that it is not bound by the sale of material agreement, as it fell short of the Law of contract and could not be breached. In the respondent's view a suit seeking damages for breach of an unsigned contract for disposition of an interest in land is a nullity *ab initio*.

22. The respondent argues that generally, the law of contract does not provide for general damages as a remedy for breach of contract. To buttress this it relies on **Kenya Power & Lightning Ltd vs Abel Momanyi Birundu [2015] eKLR** and this Court's decision in **National**

Industrial Credit Bank Limited vs Aquinas Francis Wasike & another [2015] eKLR.

23. In a rejoinder, the appellant contends, relying on this Court's decision in **Mumias Sugar Company Ltd v Freight Forwarders (K) Ltd [2005] eKLR**, that a contract where all terms are agreed to enter into a contract, is binding on all parties thereto. It invites the Court to be guided by the decision in **Kenya Commercial Bank Limited v Popatlal Madhavji & another [2019] eKLR,** where it was held that there was a binding lease contract, upon considering *inter alia,* a letter by the appellant in that matter referring to a meeting in which the appellant and the landlord agreed on the lease contract.

24. The appellant asserts that there was an enforceable agreement between the parties to this appeal and emphasizes that it is not claiming general damages. It is claiming damages for breach of contract including damages for failure on the part of the respondent to consummate the contract.

25. This is a first appeal and the mandate bestowed upon us as a first appellate Court was well stated in the case of **Neepu Auto Spares Limited v Narendra Chaganlal Solanki & 3 others [2014] KECA 383 (KLR)** is as follows:

> ***"Being first appeal we must re-evaluate the evidence and come to our own conclusions but always bearing in mind that we did not hear the witnesses nor observe their demeanour. We may only interfere with the findings of the trial judge if the judge failed***

to take into account particular circumstances or based his

impression on demeanour of witnesses which was inconsistent with the evidence – see the judgment of this court in Maimuna s/o Patrick Mutoo v Wilson Njau Nyaki Civil Appeal No. 131 of 1994. In Peters v Sunday Post Limited [1958] EA 424 it was held that while an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of the circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to so decide.

26. Upon considering the grounds of appeal, the record of appeal, the rival submissions and the authorities relied upon, we are of the view that the two issues that will resolve this dispute are:

    i. *Whether there was a binding contract between the parties to the suit; and,*

    ii. *Whether the appellant is entitled to damages.*

27. The appellant asserts that there was a binding contract between it and the respondent on the movable goods and on the land. The contract on the movable goods is not governed by **section 3(3)** of the **Law of Contract Act** but by **section 6**

(1) of the **Sale of Goods Act**. Reliance is placed on correspondence exchanged between the parties. On the

other hand, the respondent’s take is that there was no valid

contract, as there was none signed in accordance with **section 3 (3)** of the **Law of Contract**.

28. In the impugned judgment, the learned Judge limited himself to whether the appellant is entitled to damages. In finding that there was no valid contract between the parties herein, the learned judge had this to say:

> *"15. It would seem logical and just that Fit Tight be compensated for the period when the Bank wrongfully held on to the deposit, but the pleadings by Fit Tight placed a difficulty on its own path. In prayer 7, which survived the striking out Order by Ochieng J., Fit Tight bespeaks, "Damages for breach of Contract in lieu or in addition to specific performance". This prayer rests on the Sale Agreement. But the Sale Agreement was not executed by the Bank, at least none was shown to Court. As the transaction involves disposition of an interest in land, the Sale Agreement cannot be a foundation for the claim as it was not signed by all the parties thereto, (Section 3(3) of The Law of Contract Act). In that event a Claim for Breach of Contract cannot be sustained."*

29. We have considered the two letters referred to in the record. The following are the contents of the letter of the appellant to the respondent, dated 11th August 2004:

> *"We refer to our discussions in respect of sale of business of Hardware & Tools (in receivership) Ltd and please to bid for purchasing the business that includes Land & Building, Furniture & Fixtures, Forklift and stock, except the vehicles. We refer to*

part

of the building given on lease, it must be handed over in vacant possession. Our bid is as follows:-

a) *Land & buildings, Furniture & Fixtures for Kshs – 38 million*

b) *Stock and Forklift (inclusive of VAT) – 7 million*

We will require a NO objection letter to register another company with the name Hardware & Tools 2004 Ltd. We herewith attach Cheque No. 000188 for Kshs. 4.5 Million being 10% deposit for the same."

30. The respondent through PVR Rao (Receiver Manager), responded to the letter set out above by a letter dated 30th June 2005, stating as follows:

"As Receivers of the Company "Hardware & Tools Ltd (In Receivership)" and as Receivers of the property at LR No. 209/8194. I hereby confirm our acceptance to your offer for purchase of the assets at Kshs.45 million.

The assets covered by the transactions are:-

- *LR No.209/8194 measuring 0.5277 ha together with buildings*
- *Trading stock (covering pre-receivership stock as at the date of completion)*
- *Furniture & Fixtures*
- *Fork Lift*

……

I hereby acknowledge the receipt of your Cheque No. 000185 for Kshs. 4.5 million, being 10% deposit and in part payment of the purchase price……."

31. We observe from the contents of the letters set out above that the appellant paid Kshs.4.5 million as deposit for the movable and immovable property. However, there was no evidence on the amount that was paid for either the land, or the movable property independently. Therefore, we cannot allocate a certain amount of the deposit paid, without any proof that a certain deposit amount made was for movable goods, and is thus subject to the **Sales of Good Act**.

32. The question that begs an answer is whether the correspondence between the parties herein constitute a contract as stipulated in **section 3 (3)** of the **Law of Contract Act**. The section provides as follows:

> ***"No suit shall be brought upon a contract for the disposition of an interest in land unless—***
>
> ***(a) the contract upon which the suit is founded—***
>
> ***(i) is in writing;***
>
> ***(ii) is signed by all the parties thereto; and***
>
> ***(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:"***

33. The section requires that any contract for the disposition of an interest in land must be in writing and signed by the parties to it. It must also be attested by a witness. This Court

has consistently adjured adherence to **section 3 (3)** of the **Law of Contract Act**.

34. On the requirements of the section, this Court stated in **Jacob Wekesa Bokoko Balongo v Kincho Olokio Adeya & another [2020] KECA 928 (KLR)** as follows:

> ***"Under the applicable section 3(3) of the Law of Contract Act, no suit can be maintained for disposition of an interest in land unless the contract is in writing and executed by both parties. Oral agreements for the sale of real estate and or land are generally not worth anything and are unenforceable by dint of the applicable section 3(3) of the Law of Contract Act."***

(See also **Willy Kimutai Kitilit v Michael Kibet [2018] KECA 573 (KLR)**.

35. Earlier in **Kukal** *(supra),* the Court discussed the question of an unsigned agreement and stated as follows

> ***"The agreement in question was not signed by the appellant or anyone authorized by the appellant to sign it. The Porbunderwallas could not rely on the proviso because they had not taken possession of the maisonette. It is therefore plain beyond argument that there was no concluded agreement both in fact and in law between the appellant and the Porbunderwallas which could be enforced by a decree for specific performance. And as to the judge's holding that the appellant was estopped from***

denying the validity of the agreement, this is quite clearly

erroneous on the authority of Patterson v Kanji (1956) 23 EACA 106, where the Court of Appeal for Eastern Africa held that there can be no estoppel against an Act of Parliament. The result is that the order for specific performance in favour of this couple should never have been made at all because it clearly had no legal basis. This ground of appeal succeeds."

36. We note that in **Mumias Sugar Company Ltd** *supra,* cited by the appellant, the correspondence relied upon was exchanged by the parties in the period between 7th May 1999 and 26th May 1999, before the amendment of **section 3(3)** of the **Law of Contract** came into effect on 1st June 2003. Therefore, it is distinguishable from our present case in which the letter of offer is dated 11th August 2004 and the acceptance letter is dated 30th June 2005. We therefore, find that there was no binding contract between the appellant and the respondent.

37. Turning to damages, the appellant submits that it is entitled to damages for breach of contract and for failure on the part of the respondent to consummate the contract. The respondent is of a contrary view. It urges that the general law of contract does not provide for general damages as a remedy for breach of contract. In the impugned judgment the learned Judge held that:

> *"...It was not clear whether Fit Tight sought General or Special Damages. If it was the latter, it*

failed to specifically plead as expected. If it was the former, then, it failed to plead and establish that the conduct

of the Bank fell within the exceptions, for example that it was oppressive, insolent, highhanded, outrageous or vindictive. The need to plead this conduct is informed by the need to give the other party an opportunity of confronting that accusation during the hearing."

38. In this appeal, the appellant emphasizes that it sought neither specific nor general damages, but "*simply damages*." From its submissions *"simply damages"* appears to include damages for wasted outlay including legal fees to the firm that acted for it in the failed transaction, expenses for investigating the title and interest at commercial rates of the deposit from 11th August 2004 to 14th September 2005. In the amended Plaint the appellant sought for:

> "*7) damages for breach of contract in lieu or in addition to specific performance."*

39. As observed earlier, there was no binding contract between the parties. Therefore, the claim for specific performance could not be achieved and further, since there was no contract, damages cannot be sought based on the nonexistent contract.

40. That notwithstanding, the damages sought by the appellant can be categorized into either special damages, or general damages. The appellant did not prove special damages as required by law. It has been held time and again by this Court that special damages must be pleaded and of course strictly proved. See -**Mohammed Hassan Musa & Dennis**

Constello

Doyle vs Peter M. Mailanyi & Diamond Trust (K) Limited [2000] KECA 252 (KLR).

41. On the propriety of the award of general damages for breach of contract, we call to mind this Court's decision in **Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited [2015] KECA 822 (KLR)** where it was held as follows:

> ***"The next issue raised by the appellant is the propriety of the award of general damages for breach of contract. As a general rule, there can be no damages for breach of contract. This was the holding of this Court in Provincial Insurance Co East Africa Ltd v Nandwa LLR No. 867 (CAK). In Habib Zurich Finance (K) limited vs. Muthoga & Another. [2002] 1 EA 81 at page 88 cited with approval the decision of the Court of Appeal for Eastern Africa in the Case of Dharamshi vs. Karan (supra) where that court held as follows:***
>
> > ***'This case has been accepted by this court as an authority for the proposition that general damages cannot be awarded for breach of contract and that proposition makes sense because damages arising from a breach of a contract are usually quantifiable and are not at large. Where damages can be quantified they cease to be general…'***
>
> ***(See also- Securicor Courier (K) Ltd vs Benson David Onyango [2008] eKLR)."***

42. In **Total Kenya Limited** (supra) the Court went further to state the following:

> ***"However, where there has been some loss arising from such breach, then damages may be awarded so as to put the claimant in a good position as if there had been no such loss. This was the holding of the Court in Visoi Saw Mills Ltd v The Attorney-General [1997] eKLR (Civil Appeal No. 78 Of 1996):***
>
> > ***'But whether the claim is in contract or tort the only damages to which the appellant is entitled is a pecuniary loss: it is to put the appellant into as good position as if there had been no such breach or interference. Normally this would entitle the appellant to recover damages for the expenses caused by and gains foregone because of the breach or interference."'***

43. Additionally, as correctly noted in the impugned judgment, exceptional circumstances such as:

> *".....when the conduct of the respondent is shown to be oppressive, high handed, outrageous, insolent or vindictive"*

may lead the Court to award general damages. This was the holding of this Court in **Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] eKLR**.

44. We have examined the record and find no basis to fault the learned Judge's finding that the appellant failed to

demonstrate that the respondent's conduct was such that it fell under the exceptional circumstances enumerated in **Capital Fish Kenya Limited** *supra.*

45. Consequently, we find that this appeal has no merit and dismiss this it with costs to the respondent.

It is so ordered.

Dated and delivered at Nairobi this 30th day of January, 2026

W. KARANJA

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JUDGE OF

APPEAL

K. M'INOTI

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JUDGE OF

APPEAL

L. ACHODE

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JUDGE OF

APPEAL

I certify that this is a true copy of the original ***Signed***
DEPUTY REGISTRAR