**IN THE COURT OF APPEAL AT NAIROBI**

**(CORAM: MUSINGA, (P), TUIYOTT & ODUNGA, JJ.A.)**

**CIVIL APPEAL NO. 550 OF 2019**

**BETWEEN**

**JOHNSON NGARARI MWAURA.....APPELLANT**

**AND**

**ANDREW MURUGU MAINA ..... 1ST RESPONDENT CAROLINE WANGARI MURIUKI ..... 2ND RESPONDENT**

*(Being an appeal from the judgment of the Environment and Land Court at Nairobi (**Okong'o, J**.) delivered on 28th March 2019*

***in***

***ELC Case No. 617 of 2008)***

***************************

## JUDGMENT OF THE COURT

[1] The trial court (**Okong'o, J.**) found that an agreement dated 12th June, 2008 entered between **Andrew Murugu Maina** and **Caroline Wangari Muriuki** (**the respondents**) on the one part and **Johnson Ngarari Mwaura** (**the appellant**) on the other, was valid, enforceable and ordered that it be specifically performed. That holding and outcome is the subject of this appeal.

[2] The respondents are husband and wife and owned property

at Runda Estate next to the LR No. 7785/897 (**the suit property**)

owned by the appellant. The neighbours got talking and entered into negotiations for the sale and purchase of the suit property at a price of Kshs.5,500,000.00 (Kenya Shillings Five Million Five Hundred Thousand). On 9th June, 2008, the couple deposited a sum of Kshs.5,292,710.00 with their advocates, Mboya & Wangong'u, a substantial part of which was the purchase price. At trial, the respondents contended that the purchase price deposited was to be held by the said advocates as stakeholders pending completion.

[3] Again, on 9th June, 2005, the respondents' advocates gave a professional undertaking to the advocates of the appellant for payment of the purchase price and requested them to release, on the strength of the said undertaking, all the completion documents enumerated in clause 7 of the written agreement. A few days later, on 12th June, 2008, the respondents' advocates paid a sum of Kshs.220,010.00 to the appellant's advocates being stamp duty payable on the transfer.

[4] The respondents asserted that they were always ready to complete the transaction but the appellant had failed and/or refused to provide the completion documents. The respondents were unhappy about a letter dated 15th December 2008 in which the appellant's advocates wrote

to their advocates

indicating that the appellant was no longer interested in the transaction and was cancelling it. The respondents' advocates responded on 18th December, 2008, rejecting the proposed cancellation and demanding specific performance of the contract.

[5] Setting out a catalogue of breaches of contract, the respondents sought the following orders against the appellant:

> **"(a) An order of injunction restraining the defendant by himself or through his agents or servants from breaching or committing any further breach of the Agreement for sale to the plaintiffs of L.R. No. 7785/897 Runda, Nairobi or in any way cancelling, purporting to cancel, terminating, retracting or in any way withdrawing from the sale of the said property to the plaintiffs.**
>
> **(b) An order of directing the defendant to specifically perform and complete the sale of the property known L.R. No. 7785/897 to the plaintiffs forthwith.**
>
> **(c) General damages for breach of contract.**
>
> **(d) Special damages for KShs.220,010.00**
>
> **(e) Costs of the suit.**
>
> **(f) Any other or further order that this honourable court may deem just and fit to grant."**

[6] This, in brief, was the case of the respondents encapsulated in the plaint dated 22nd December, 2008 and the evidence of **Mr. Maina** (the 1st respondent).

[7] In an amended statement of defence and counterclaim, the appellant admitted that there were detailed negotiations between the two parties in which it was disclosed to the respondents by him that in any subsequent agreement and/or transaction of sale of the suit property, it would be a fundamental term that time was of absolute essence and the particulars and circumstances of the appellant's financial situation was well within the respondents' knowledge. Further, that the written agreement was null and void in law for lack of consideration and was incapable of specific performance under the law.

[8] The appellant contended that on the strength of the professional undertaking given by the respondents' advocates, his advocates released all completion documents and advised the respondents of outstanding rates of Kshs. 550,000.00 due to the City Council of Nairobi. Simultaneously, he authorised the respondents to utilize a sum of Kshs. 550,000.00 out of the sale proceeds to pay the outstanding rates due to the property and to remit the balance of Kshs. 4,850,000 to him or his advocates upon successful registration of the property in their favour.

[9] Emphasised was that while all completion documents to the respondents and/or their advocates were released, the Rates Clearance Certificate could not be issued due to outstanding rates of Kshs. 550,000.00 which was at all material times known to the purchasers and their advocates. In addition, the letter of 15th December, 2008 was a culmination of various communications between the parties and their lawyers and affirmation of the fact that it was well within the parties' knowledge of non-existence of a legal, valid and enforceable agreement.

[10] In the counterclaim, the appellant contended that he opted to sell his property to the respondents at a price of Kshs. 5,5000,000 on the assurance that he would receive funds within 60 days of 12th June 2008, that is on or before 12th August 2008. Reiterated was that it was a fundamental term of the purported agreement that time was of the essence and non- observance would lead to collapse, "*ipso facto*", of the terms thereof. Further, that it was within the knowledge of the respondents that the suit property had outstanding rates, payment of which was fundamental to the fulfilment of the terms of the agreement. Elaborating, the appellant states that at the time of executing the purported agreement it was within

the knowledge of the respondents and their lawyers that he did not have any funds, making him unable to discharge any financial obligation without applying proceeds of the intended sale.

[11] He asserted that the purported agreement was frustrated and incapable of performance as the respondents failed, refused or neglected to pay the outstanding rates within the 60-day period, notwithstanding express authorisation to do so made prior to the expiry of that period.

[12] The counterclaim by the appellant was for;

> **"a) a declaration be made that the 'agreement' dated 12th June, 2008 lapsed on 11th August, 2008.**
>
> **b) an order that the 'agreement' dated 12th June, 2008 is incapable of specific performance.**
>
> **c) an order that the Plaintiffs are not entitled to recover the sum of Kshs.220,010/= from the Defendant."**

[13] In his testimony before the trial court, the appellant rehashed his pleaded defence and counterclaim.

[14] In the judgment, the subject to this appeal, the trial court carved out two substantive issues for determination: whether the agreement for sale date 12th June 2008 between the parties was valid and enforceable. To this question the learned trial

Judge returned an answer in the affirmative. The second was whether the said agreement was lawfully rescinded by the appellant. To this issue the learned trial Judge found that the respondents fulfilled all their obligations under the agreement dated 12th June 2008 and that it was the appellant who breached it, and the appellant's purported recession of the sale agreement was unlawful. With that the trial court made an order for specific performance of the sale agreement of 12th June 2008 and completion of the sale of the suit property to the respondents. The counterclaim was dismissed. The appellant was, further, condemned to pay costs of the suit and counterclaim.

[15] The appellant sought to impeach the judgment on the basis of 9 (nine) grounds of appeal set out in the memorandum of appeal dated 11th November 2019 filed by his former advocates, Gichuru & Gichuru Advocates. His current advocates condensed all three to one ground with 3 subsets cast around the following issues:

> **"(a) Whether the claim pleaded in the plaint dated 22nd December, 2008 was for an invalid and enforceable oral contract for the sale and purchase of immovable property.**
>
> **(b) Whether the subsequent written sale agreement of 12th June, 2008 was supported by the**

**consideration flowing from the respondents to the appellant or merely relied upon the past consideration given for the oral agreement by the respondents?**

**(c) Can the professional undertaking given by the respondents' lawyers for the oral agreement provide the request consideration for the subsequent written agreement of 12th June, 2008?"**

[16] This is a first appeal in which we re-appraise the evidence at trial and reconsider the issues of law arising with a view to drawing our own conclusions but bearing in mind that unlike the trial court we do not have the benefit of seeing and hearing the witnesses testify and allowance must be given for this.

[17] During plenary, **learned senior counsel, Mr. Ahmednasir,** appeared for the appellant while **learned counsel Mr. Omuganda** appeared for the respondents. Both highlighted the arguments raised in the written submissions filed on behalf of the parties.

[18] Answering the question whether the claim pleaded on 22nd December, 2008 was for an invalid and unenforceable oral contract for the sale and purchase of immovable property, the appellant contends that there was evidence before the trial court that the parties orally negotiated and agreed upon the terms of the sale of the suit property way before they

executed

the written agreement and the said oral agreement was substantially performed well before the written one was executed. Cited is the UK Supreme Court case in **RTS Flexible Systems Limited -v- Molkerei Alois Muller GmbH & Company KG (UK production) [2010] UKSC14** for the argument that a binding contract depends on an objective consideration of the parties' words and conduct, not their subjective state of mind, and even if certain terms are not fully settled initially, performance by the parties can objectively lead to the conclusion that they intended to be bound, thereby validating an agreement. The appellant further relies on the dicta of Lord Justice Steyn in **G. Percy Trentham Ltd -v- Archital Luxfer Ltd and others [1993] 1 Lloyd's Law Report** as cited in ***RTS Flexible Systems Limited*** **(supra)**, which further supports the objective theory of contract formation, that a contract can come into existence and be binding as a result of performance, even if not fully settled at the outset. The appellant however contends that an oral agreement for the sale of immovable property is inherently invalid and unenforceable under section 3 of the Law of Contract Act. There would be no shortage of decisions to support this position, including **Kukal Properties Development Ltd v**

**Tafazzal H. Maloo & 3 others**

**[1993] KECA 65 (KLR)** and **Mohammed Jawayd Iqbal (Personal representative of the Estate of the Late Ghulam Rasool Jammohamed) v George Boniface Mbogua [2019] KECA 209 (KLR)** which adopted the dictum of Muli, JA. in ***Kukal Properties Development Ltd*** and similarly **Daudi Ledama Morintat v Mary Christine Karie & 2 others [2017] KEELC 2998 (KLR)**.

[19] On the second subset question, whether the subsequent written sale agreement of 12th June, 2008 was supported by consideration flowing from the respondents or merely relied upon past consideration given for the oral agreement, the appellant first questions whether the agreement of 12th June, 2008 was a variation of the oral agreement or was a valid agreement that replaced the oral agreement in toto and whether it was supported by any consideration given by the respondents. The appellant submits that the written agreement did not replace the oral agreement and was not performed by either party and no form of consideration was offered by the respondents for the sale agreement. This, the appellant suggests, was common ground between the parties. The appellant argues that only an undertaking was offered by the respondents' advocates in part performance

of the oral

agreement. The appellant's position is that the 12th June, 2008 sale agreement was wholly unsupported by any consideration during the subsistence of the agreement and that on the contrary, the promises made by the respondents to him were in support of the prior oral agreement. In addition, the appellant submits that the court took the wrong view of clauses 3 and 4 of the sale agreement that provided for payment of the purchase price within 7 days after the registration, and argues that no undertaking was given by the respondents' advocates pursuant to the sale agreement of 12th June, 2008. Emphasized is that the only consideration for the said agreement was past consideration. Drawing from **Chitty on Contracts, (12th Edition, 1994)**, the appellant gives an example of what constitutes past consideration. When a thing is guaranteed by a seller after it has been sold, the buyer cannot sue on the guarantee as the consideration for it is past. The appellant contends that the consideration for the 12th June, 2008 agreement was either past or not provided by the respondents and it is trite law that past consideration is not consideration at all, and since the written agreement did not vary or discharge the oral agreement, it was superfluous and of no legal consequence.

[20] Regarding whether the professional undertaking given by the respondents' advocates for the oral agreement provided the requisite consideration for the subsequent written agreement of 12th June, 2008, the appellant points out that the undertaking was given 3 days before the agreement for sale was executed and given pursuant to the oral agreement. The appellant submits that the undertaking given on 9th June, 2008 was invalid and of no legal consequence and does not constitute a valid enforceable consideration principally because on 9th June, 2008, the only agreement between the parties was the oral agreement. The appellant further submits that despite the findings of the court, the same cannot constitute consideration for the subsequent agreement of 12th June, 2008, firstly because no professional undertaking was given for the agreement of 12th June, 2008. Second, consideration in the law of contract must flow from one party to the other and third, an advocate through a professional undertaking to another advocate cannot provide consideration on behalf of his client to a contract between his client and a third party. We are referred to the definition of consideration in **Chitty on Contracts Vol. General Principles 29th Edition,** that traditional consideration concentrates on the requirement

that something of value must

be given and is either some detriment to the promisee or some benefit to the promisor, the same thing looked at from different points of view. The appellant disagrees that the professional undertaking which was given 3 days before the execution of the agreement of 12th June, 2008 was valid and argues that the consideration must pass between the parties during the substance or lifespan of the agreement and consideration that comes via a professional undertaking of a lawyer is not valid consideration. The appellant refers to the definition of a professional undertaking in **Halsbury's Laws of England. Vol 36 Page 195** as a binding promise made by solicitors, but as noted in **Waruhiu K'Owade & Ng'ang'a Advocates v Mutune Investment Limited [2016] eKLR**, must be unequivocal and clear to be enforceable.

[21] In response, the 1st and 2nd respondents contend that the sale agreement dated 12th June, 2008 was duly executed by both parties, with clear terms of performance, and the appellant even signed transfer documents. Referring to clauses 3 and 4 of the agreement, the respondents note that the agreement stipulated the purchase price of Kshs.5,500,000.00 was to be paid within seven days of the registration of the transfer, and this payment was to be

secured by a professional undertaking from the

respondents' advocates, to which they complied by depositing the purchase price with their advocates on 9th June, 2008. They assert that the consideration was the purchase price, secured by an unconditional, unequivocal, and irrevocable professional undertaking from their advocates, promising to pay the sum within seven days of successful registration of the transfer. The respondents refute the appellant's claim that the agreement is void for want of consideration, stating that consideration is defined as "*what one party to an agreement is giving, or promising, in exchange for what is being given or promised from the other side*", citing **The Modern Law of Contract, Eleventh Edition**. They argue that consideration can be executed or executory, and that executory consideration consists of mutual promises (**Chitty on Contracts, Vol. 1, General Principles, 25th Edition at paragraph 3-151)**. The respondents contend that their promise to pay the full purchase price upon registration of transfer was a future promise, constituting valid executory consideration. They rely on **Charles Mwirigi Miriti vs Thanaga Tea Growers Sacco Ltd & another [2014] eKLR** for the proposition that promises for future acts constitute executory consideration, making the contract valid and enforceable.

[22] The respondents highlight that under clause 5, completion would be 60 days from execution and time was of essence in all respects. The respondents contend that despite their readiness and ability to comply with the timelines, the appellant frustrated completion by failing to provide the rates clearance certificate, which was a required completion document under clause 7(h) of the agreement, and this failure by the appellant constituted a breach of contract. They cite **Halsbury's Laws of England (4th Edition) Vol. 9 at paragraph 481** on the conditions under which time is considered of the essence: parties expressly stipulate those conditions as to time must be strictly complied with; or 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 a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence.

[23] The respondents argue that the appellant cannot benefit from his own breach. Their advocates' professional undertaking was issued before completion, and their obligation to pay was contingent upon transfer registration, which was prevented owing to the appellant's failure to provide the rates clearance certificate. That the contractual

date of completion is  the

"*yardstick for establishing whether or not a breach of the contract has occurred*", as per **Tom O. Ojienda's Principles of Conveyancing in Kenya**.

[24] Further, it is pointed out that clause 6 of the agreement incorporated the Law Society Conditions of Sale (1989 edition), save where those conditions are inconsistent with the agreement. The respondents argue that the trial judge thus correctly applied the LSK conditions requiring a 21-days completion notice for a defaulting party, as the agreement did not provide a specific completion notice period. They assert that the judge did not supplant an express provision, but appropriately applied an incorporated condition. They reinforce the principle that courts are bound by the terms of a contract and do not rewrite them, citing **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] KECA 362 (KLR)** and **Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] KECA 152 (KLR)**.

**[25]** The respondents submit, further, that contracts for the sale of land cannot be terminated unilaterally due to delay without a proper notice. They cite **Omweri v Kiptugen (Civil Appeal 5 of 2018) [2022] KECA 413 (KLR)** which made reference to **Simpson v. Connolly (4), [1953] 2**

**All E.R. 474** and **Aida**

**Nunes v John Mbiyo Njonjo and Charles Kigwe [1962] 1 EA 88**, to support the proposition that a party cannot avoid a land sale contract on grounds of unreasonable delay unless a notice has been served making time of the essence. Since the appellant was in breach and no such notice was given, the appellant cannot claim the contract was self-terminating.

[26] The respondents similarly contend they met the conditions for specific performance for the reasons that: there was a valid, enforceable contract; the contract did not suffer from any defect, mistake, or illegality; and damages are an inadequate remedy for breach of a contract for the sale of land, making specific performance the appropriate relief. They rely on cases such as **Benard Nganga Ndirangu v Samuel Wainaina Tiras [2019] KECA 741 (KLR)**, **Nabro Properties Ltd v Sky Structures Ltd & 2 others [2002] eKLR**, **Caltex Oil (Kenya) Limited v Rono Limited [2016] KECA 457 (KLR)** and **Sisto Wambugu v Kamau Njuguna [1983] KECA 69 (KLR),** which collectively affirm that specific performance is a discretionary equitable remedy granted when a valid and enforceable contract exists, damages are insufficient, and the party seeking it demonstrates readiness, willingness, and ability to perform

his/her part. The trial Judge was lauded for ordering specific performance.

[27] Having read the pleadings, given regard to the evidence at trial and the judgment of the trial court, and, further, after considering the arguments put forward by the parties, we have come to the conclusion that the two issues set out by the trial court remain relevant for the determination of this appeal:

a) Was the agreement dated 12th June 2008 a valid agreement and enforceable?

b) If the answer to (a) is in the affirmative, was it lawfully rescinded by the appellant?

[28] The fulcrum of the case argued by learned Senior Counsel Mr.

Ahmednasir for the appellant is that the parties entered into an oral agreement for the sale of the suit property and performed all aspects of the oral agreement, but suffered a setback in that the oral agreement purporting to dispose of the suit property, being land, was contra-statute and unenforceable in view of section 3(3) (a) of the Law of Contract Act. He was emphatic that the written agreement was an afterthought and was defeated by lack of consideration.

[29] The first reaction to those arguments by learned counsel Mr.

Omuganda for the respondents was that the issue of the oral

contract was not raised at the High Court and was being argued for the first time in this Court.

[30] The respective cases pleaded by the parties resolves this preliminary matter in favour of the respondents. In the plaint, the respondents make reference to a series of events involving negotiations in April 2008 and giving of a professional undertaking by their advocates to the advocates of the appellant on 12th June, 2008. In his defence, the appellant expressly admits to the negotiations, calling them "detailed negotiations". In paragraph 3A of his pleadings, the appellant admits signing an agreement, which, however, he asserts to be null and void for lack of consideration. Indeed, in the counterclaim the appellant seeks, amongst other prayers, a declaration that the agreement of 12th June 2008 lapsed on 11th August 2008 and was incapable of specific performance.

[31] In his testimony, the appellant makes no reference to the supposed oral agreement. In addition, and crucially, the appellant in his final submissions unequivocally states:

> ***"The parties entered into a sale agreement on 12th June 2008 which thereafter governed the relationship of the parties in respect of the property."***

[32] In the end the trial court was not called upon to, and could not, hold that the parties entered into an oral contract, which owing to the rigours of section 3 of the Law of Contract Act, was unenforceable.

[33] On the basis of the pleadings and the case set up for the respondents and the defence of the appellant, the dispute came down to simply whether the agreement of sale dated 12th June, 2008 was invalid and unenforceable for lack of consideration. The arguments around an oral contract are an afterthought and can only serve to obfuscate a rather straightforward legal issue, a distraction that is impermissible.

[34] In order to determine the core controversy around the written agreement of 12th June, 2008, the background leading to it is not without importance. Prior to entering the agreement, the parties had discussions culminating in the firm of Maithya Muhochi & Co. Advocates acting for the appellant drawing a draft agreement for sale. In a letter of 8th May, 2008, the law firm of Mboya & Wangongú acting for the respondents returned the agreement for sale with amendments.

[35] There was to be further amendments made by the respondents' advocates and the amended agreement sent

back to Mboya & Wangongú through a letter of 13th May, 2008. There is then the

letter of 6th June, 2008 from the same advocates forwarding a further amended sale agreement to the advocates of the respondents.

[36] Three days later, on 9th June, 2008, Mr. Maina sends to his advocates the duly executed sale agreement and two cheques:

(a) Bankers Cheque No. 042271 for Kshs.4,500,000.00.

(b) Personal Cheque No. 000273 for Kshs.1,292,710.00

[37] Promptly on the same date (9th June, 2008), the said advocates forward the duly executed agreement to the advocates of the appellant for his execution and calls for a copy of the duly executed and engrossed sale agreement. At the same time, the advocates call for the completion documents on the strength of a professional undertaking to pay the purchase price of Kshs.5,500,000 within 7 (seven) days of successful registration of the transfer in favour of his clients (the respondents).

[38] The appellant, it would seem, signed the sale agreement on 12th June, 2008. Again, on that day there was another development. The advocates for the respondents forwarded a bankers cheque no. 922400 in the sum of Kshs.220,100.00 being stamp duty payment for the transfer. This was done, apparently, after various telephone conversations between

the two advocates.

[39] From this sequence of events, the appellant executed the agreement after the respondents' advocates had given the undertaking in respect to payment of the purchase price in terms of clause 7 of the agreement. Further, in his written testimony of 29th October, 2014, the appellant stated:

> ***"The plaintiffs made it clear that they would not pay me or my lawyers any deposit and only offered to pay the full purchase price upon successful registration of the property. While it was within my rights to demand at least 10% deposit in line with the standard terms and conditions of such sale agreements, I conceded to the terms dictated by the plaintiff due to my dire need for funds."***

[40] Against this background, can it be said that the sale agreement dated 12th June 2008 is invalid for lack of consideration? At the heart of the argument by the appellant is that the undertaking to pay having been given before the execution of the agreement amounted to a past consideration that was delivered by the respondents' advocates well before the agreement was executed, and past consideration is no consideration at all. The appellant asserts that a valid undertaking could only have been one given after 12th June 2008.

[41] This argument is not tenable because at the point of executing the sale agreement on 12th June 2008, the appellant acted on the undertaking which he now alleges to

have been given, not

in support of written agreement, but the "oral agreement", a proposition that is at odds with the appellant's own testimony. In his written statement he states:

> ***"Subsequently, I executed the sale agreement and released all completion documents to the plaintiffs' advocate except the Rates Clearance Certificate which could not be issued due to the outstanding rates in the property, which was within the knowledge of the plaintiff and/or his advocates."***

[42] For starters, we have debunked the theory of the oral contract, and so it could not be feasible that the undertaking constituted a consideration for an oral contract which did not exist. Even more important, the conduct of the appellant in acting on the undertaking (including signing the transfer) after executing the sale agreement, was an acknowledgment that the undertaking, although given earlier than the date he executed the sale agreement, was valid consideration in support of the sale agreement. The consideration comprised in the promise given in the undertaking was an executory consideration that is recognised as good consideration under the law of Contract. In this regard is the passage in **Chitty on Contracts Vol. 1, General Principles 25th edition at paragraph 3-151** cited by counsel for the respondents:

> ***"Executed consideration refers to***

***performance of an act of forbearance in return for a promise.***

> ***Executory consideration consists of mutual promises. For example, if a seller promises to deliver goods in six months' time and the buyer to pay them on delivery, there is an immediately binding contract from which neither party can withdraw, though of course performance cannot be claimed till the appointed time."***

[43] It is for this reason that we uphold the learned trial judge's finding that:

> ***"It is common ground that the defendant did not receive any payment from plaintiffs under the agreement for sale dated 12th June 2008. However, from the authorities cited above, that does not mean that there was no consideration flowing from the plaintiffs to the defendant under the said agreement. Under the agreement, the plaintiffs promised to pay to the defendant the full purchase price of Kshs. 5,500,000/- within 7 days of completion of registration of transfer of the suit property in favour of the plaintiffs. This promise which was to be performed in future was sufficient consideration of the defendant's agreement to sell the suit property to the plaintiffs. In the circumstances, it is my finding that the plaintiffs provided consideration for the agreement for sale dated 12th June 2008 between the plaintiffs and the defendant. The agreement was therefore valid and enforceable."***

[44] The next issue is whether the appellant lawfully rescinded the agreement. The appellant's testimony was that there was delay in completing the transaction within the time stipulated in the contract, and that caused him a lot of financial embarrassment. He asserts that the agreement lapsed on 18th August, 2008 and defends his action of

walking away from the sale.  The

respondents on their other hand blame the appellant for the delay because of failing to avail the Rates Clearance Certificate on time.

[45] It is common ground that one of the documents required to complete the transaction was the Rates Clearance Certificate. A reading of Clause 4 is that the payment of the purchase price would be within 7 days of completion of registration in favour of the purchaser. A successful transfer of the title from the appellant to the respondents was predicated upon the appellant's advocates delivering the completion documents enumerated in clause 7 once they received the requisite undertaking from the respondents' advocates. As mentioned earlier, this undertaking was duly given to the appellant's advocates by the respondents' advocates.

[46] It turned out that the pending bill on rates was high, and the appellant asked the respondents to pay it on his behalf and it be deducted from the purchase price. But another issue alluded to in a letter of 17th November, 2008 from the respondents' advocates to the appellant's advocates arose:

> ***"We were also informed that the vendor had applied to the City Council of Nairobi for a waiver of the rates payment and we have still not received any confirmation whether the same has been obtained or not."***

[47] There is no evidence from the appellant that he eventually advised the respondents of the waived amounts so as to enable them pay the outstanding rates on his behalf and to obtain the rates clearance certificate. As the onus of obtaining the rates clearance certificate was on the appellant, he was guilty of defaulting on the terms of the sale agreement. While clause 5 of the agreement provided that the completion date was 60 days from the execution of the agreement and made time of essence in all aspects, the appellant being the defaulting party could not deploy the provision of that clause to rescind or call off the transaction as he had failed to provide a crucial document that would have enabled a timeous completion of the transaction.

[48] We are therefore in agreement with the trial judge, who also, correctly, held that there was a further reason to find the appellant at fault;

> ***"I wish to add that clause 6 of the agreement for sale incorporated the Law Society Conditions of Sale (1989 Edition) ("LSK Conditions of Sale"). Clause 4(7)***
> ***(b) of the LSK Conditions of Sale requires a defaulting party to be issued with a 21 days completion notice. There is no evidence that a completion notice was issued to the plaintiffs prior to the purported rescission of the agreement for sale. In the circumstances, even if the defendant had a right to rescind the agreement for sale, the purported rescission***

***was not carried out in accordance with the terms of the agreement for sale***

***and as such was ineffective to terminate the agreement."***

[49] Ultimately, the entire appeal is without merit and is hereby dismissed with costs to the respondents.

**Dated and delivered at Nairobi this 20th day of February 2026.**

**D. K. MUSINGA (PRESIDENT)**

**.....**
**..... JUDGE OF APPEAL**

**F. TUIYOTT**

**.....**
**JUDGE OF APPEAL**

**G. V. ODUNGA**

**.....**
**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

***DEPUTY REGISTRAR.***