Dhanjal Investments Limited v Shabaha Investments Limited (Civil Appeal 80 of 2019) [2022] KECA 366 (KLR) (18 February 2022) (Judgment)

Neutral citation: [2022] KECA 366 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 80 OF 2019

SG KAIRU, P NYAMWEYA & A MBOGHOLI-MSAGHA, JJA

FEBRUARY 18, 2022

BETWEEN

DHANJAL INVESTMENTS LIMITED ..... APPELLANT

AND

SHABAHA INVESTMENTS LIMITED ..... RESPONDENT

(Being an Appeal against the Judgment and Order of the High Court of Kenya at Mombasa (P.J. Otieno, J.) delivered on 31st May 2019 in High Court Civil Case No. 38 of 1997)

JUDGMENT

1. Shabaha Investments Limited, the Respondent herein, entered into an Agreement of Sale dated and executed on 5th April 1995 (hereinafter "the sale agreement") with the Appellant, Dhanjal Investment Limited, in respect of the property known as Picolo Beach Hotel, situated on L. R. No. 1549/ Section 1 Mainland North Mombasa (CR 13445) (hereinafter "the suit property"). It is not in dispute that the Appellant took physical possession of the suit property on 27th January 1996 after payment of a deposit of 10% of the purchase price, and that a transfer of the suit property to the Appellant was effected on 15th February 1996.

2. When payment of the balance of the purchase price was not forthcoming, the Respondent filed a suit in the High Court from which this appeal arises, namely Mombasa HCCC 38 of 1997. The Respondent in its Amended Plaint dated 15th May 2008 claimed that the Appellant, being in possession of the suit property, was under an obligation to complete performance of the sale agreement. The Respondent accordingly sought a declaration that the agreement for sale in respect of the suit property was valid; for payment of Kshs.38,700,000/-, being the balance of the purchase price; interest at 30% per annum as agreed payable from the date the Defendant took possession of the suit property on 26th January 1996; general damages; mesne profits from 26th January 1996; and costs.

3. In response, the Appellant, in an amended Defence and Counterclaim dated 29th May 2008, claimed that the Respondent was in breach of the Special Conditions of the sale agreement by misrepresenting and misleading that there was no pending litigation in respect of the suit property, whereas Mombasa HCCC 289 of 1994 was pending prior to the agreement of sale. Further, the Appellant states that it was also subsequently sued as a defendant in Mombasa HCCC 85 of 1996 in relation to the suit property.

4. According to the Appellant, third parties had filed the suit in Mombasa HCCC 289 of 1994 on 10th May 1994 against the Respondent and its shareholders, seeking specific performance of an agreement to sell to them the Respondent's shares, and the third parties further lodged a caveat on the title of the suit property on 28th October 1993 to protect their interests. In addition, that on 20th February 1996 the said third parties subsequently filed the suit in Mombasa HCCC 85 of 1996, seeking inter alia an order of injunction against the Respondent and Appellant with respect to the suit property.

5. The Appellant claimed that as a result, it could not carry out requisite repairs and renovations which were necessary to put the suit property in a suitable habitable condition and for business, except for replacing the dilapidated roof and therefore suffered loss that it would have otherwise earned. The Appellant particularized the loss as an average of 50% occupancy over the period from 1st February 1996 to 1st December 2007, and thereafter at an average of Kshs 5 million per month. The Appellant therefore sought to recover Kshs.407,244,087/56 from the Respondent, and that an equivalent amount that may be awarded to the Respondent be set off.

6. While the main suit in Mombasa HCCC 38 of 1997 was pending hearing, the Respondent had also filed an application therein by way of a Notice of Motion dated 15th April 1997 seeking orders that judgment be entered in its favour. A ruling was given thereon on 17th June 1997, on the terms that the Appellant deposits Kshs.38,700,000/- in an interest earning account with East African Building Society in the joint names of the two Advocates and in the name of the Deputy Registrar of the High Court at Mombasa within 7 days. Upon failure to make the deposit, summary judgment would be entered. A stay pending the hearing of the Counterclaim was declined by the High Court, and leave to defend was granted on condition that the payment of the deposit was made.

7. Dissatisfied with the ruling, the Appellant lodged an appeal and also filed application in the Court of Appeal in Civil Application no. NAI 200 of 1997 seeking stay of execution. The Court of Appeal on 8th August 1997 held that the Appellant satisfied the test required for the granting of stay of execution however as a way of providing security, they were to deposit title documents of the suit property with the Deputy Registrar of the High Court at Mombasa, and they were restrained from dealing with the title documents in any way until further orders. Further to that, the status quo was to be maintained.

8. Upon hearing the main appeal, being Nairobi Civil Appeal No 232 of 1997, the Court of Appeal delivered its judgment on 16th February 1998, in which it set aside the order of the High Court imposing upon the Appellant the condition to deposit Kshs.38 million and gave unconditional leave to defend the suit and prosecute the counterclaim. The Court also ordered that title documents to the suit property remained in the custody of the Court until further orders.

9. Subsequently, the Appellant's and Respondent's Advocates entered into a consent dated 7th September 2012 as follows:

> 1. "The title documents, relating to and in respect of the property known as LR NO. 1549/ Sec. 1 Mainland North- Mombasa, C. R 13445, deposited with the deputy registrar of this Court, as security pursuant by an order made on the 8th Day of August 1997, which title documents are in the name of the Applicant be released to Messrs. Paul O. Buti Advocate for the Applicant immediately upon the payment of the sum of Kshs 38,700,000.00 in terms

of the letter of undertaking from Equatorial Commercial Bank dated 5th September, 2012 to the Respondent's Advocates account Number....

A copy of the said letter of undertaking is attached hereto as part of this consent

2. The title documents of the property known as LR No. 1549/Sec.1/Mainland North Mombasa C..R. No. 13445 shall be released by the Court to the advocate for the Applicant, Messrs. Paul O. Buti

3. Upon release of the said title documents to the Applicant as stated in (b) above, the said Dhanjal Investments Limited be at liberty to deal with the same without any restrictions whatsoever.

4. The issue of interest payable on the Kshs 38,700,000.00 and the costs in the superior (sic) shall be agreed by the parties and if not shall be settled by the superior court".

10. Therefore, at the time of hearing of the substantive suit in Mombasa HCCC 38 of 1997, the sum of Kshs.38,700,000/ claimed in the Amended Plaint had been fully paid to the Respondent by the Appellant. On the outstanding claim for interest, the High Court found that the Appellant was estopped from relying on Special Condition 1 in the agreement for sale which provided that time was of the essence, since it failed to issue a completion notice to the Respondent and waived its right to rescind the sale agreement through its conduct of signing a deed of indemnity. Further, that even though the Respondent was in breach of Special Conditions 7 of the said agreement by failing to disclose the existence of HCCC. 289 of 1994 which was material to the Appellant's interests, the Appellant instead of rescinding the contract opted to affirm the contract and filed a counterclaim in which it claimed for loss of income, business and damages.

11. The High Court while applying the doctrine of lis pendens, also found that in the circumstances, the balance of the purchase price was only payable after the final determination in Mombasa HCCC 85 of 1996 which was on the 13th July 2006 when the suit was dismissed for want of prosecution, and therefore interest was payable at the rate of 30% to the Respondent from the 13th July 2006 to the 7th September 2012 when the balance of the purchase price was paid in full. The trial Judge stressed that Courts will not interfere with a contract entered into between two consenting parties and the interest agreed upon unless the same is illegal, unconscionable or fraudulent. The total amount of interest payable to the respondent was therefore calculated as 38,700,000 x 30/100 x 6 amounting to Kshs.69,660,000/=.

12. In dismissing the Appellant's counterclaim, the High Court found that the Appellant was expected to mitigate its losses by continuing to trade and keeping the hotel as they found it pursuant to Condition 6(2)(a) of the Law Society Conditions of Sale 1989 Edition, (hereinafter "the LSK Condition of Sale of 1989"), had failed to particularize it's loss of income and damages claim from 1st May 2008 at monthly rate of Kshs. 5 million and availed no material as proof of damages.

13. The Appellant being dissatisfied with the decision of the High Court proffered this Appeal, and raised twenty grounds of appeal in three parts in its Memorandum of Appeal dated 17th June 2019. The said grounds revolve around 5 broad areas in which the Appellant claims the High Court erred. The first was on the findings on the completion of the sale agreement, which the Appellant alleges precluded a fair trial, and whose time was of the essence and was not capable of extension by the indemnity deed executed by the Appellant. The second was the invoking of the doctrine of estoppel against the Appellant in relation to the pending litigation over the suit property. The third was the application and effect of the doctrine of lis pendens on the payment of the purchase price and interest, and on the Appellant's business. Fourth, was the award and calculation of interest vis-à-vis the prayers sought

in the Amended Plaint. The last was the evaluation of evidence on damage and loss incurred by the Appellant.

14. The Respondent in turn filed a Notice of Cross of Appeal dated 15th February 2021, seeking reversal and setting aside of the findings that it was in breach of the agreement for sale more specifically Clause 7 of the Special Conditions of the agreement for sale , that the sa le of the subject property was subject to the doctrine of lis pendens, and that the interest due from the Appellant should be calculated from l3th July 2006 and substituted with an order that the interest due should be pa id from 31st January 1996.

15. When the appeal and cross appeal came up for hearing on 20th September 2021, the Appellant's learned counsel, Mr. Paul Buti, and the Respondent's learned counsel, Ms. Virginia Shaw appeared and urged their clients respective cases. Mr. Buti in this respect relied on two sets of written submissions dated 15th September 2020 and 4th March 2021, while Ms. Shaw's written submissions were dated 1st March 2021. Mr. Buti had initially urged in his submissions that the cross appeal was incompetent and incapable of consideration by the Court, and cited Rule 45 (1) and Rule 93 (2) of this *Court of Appeal Rules* that require that a Notice and a Cross Appeal to be lodged in the appropriate registry. However, this Court did confirm that the Notice of Cross of Appeal was lodged with the Court's registry on 15th February 2021, and was therefore properly on record.

15. As this is a first appeal from the decision of the High Court, we reiterate this Court's role as expressed in *Selle & Another vs Associated Motor Boat Co. Ltd.& others (1968) EA 123* where it was stated that;

> " ..... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if theimpression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

17. We shall therefore proceed to consider the issues raised in the appeal and cross appeal by re-evaluating the evidence adduced in the High Court and arrive at our own conclusions of fact and law. In this regard we will only depart from the findings by the High Court if they are not based on the evidence on record; or where the said court is shown to have acted on wrong principles of law, as held in *Jabane vs Olenja [1986] KLR 661*; or if its discretion was exercised injudiciously as held in *Mbogo & Another vs Shah (1968) E.A*.

18. It is notable that at the time of the hearing of the suit in the High Court, the Appellant had taken possession of the suit property and paid the purchase price, and a number of prayers in the Amended Plaint had been overtaken by events. We will accordingly commence our decision with a consideration of the claim by Mr. Buti that a constitutional issue of a fair trial was thus raised by the fact the suit had a sojourn in Court for a period of 24 years, which he termed as "nearly a quarter a century" The learned counsel in this regard detailed the advocates who have handled the matter for both parties, and the Judges who heard the suit over the years, and also pointed out that by the time of its substantive hearing, the directors of the two companies who executed the sale agreement were all deceased and the suit was concluded by their sons. Mr. Buti submitted that althoughthis issue was urged in the High

Court, no determination was made of it, and he reiterated the position that no fair hearing could be afforded to either party in this litigation.

19. Ms. Shaw on her part detailed the applications and appeals filed by both parties after this suit commenced, and submitted that the submission by the Appellant that there can be no fairness due to the lapse of time in the final determination of this matter is as a result totally misplaced, as all parties were during the period represented by advocates. Further, that the Respondent was also denied of the fruits of its agreement for the said 24 years.

20. We are of the view that the High Court cannot be faulted for considering the issue of a fair trial or lack of it a non-issue for three reasons. First, the cause of action before the High Court was a contract and the performance thereof, and the Appellant did not raise the constitutionality or otherwise of the trial in his counterclaim or as a preliminary issue for determination in a separate suit. In addition, the Appellant submits that the Respondent was to blame, and also appears to lay blame on the Courts for the delay, but did not provide any particulars or evidence of how the Respondent and Court breached its right to a fair trial.

21. It is notable that the law on the threshold for a claim of a constitutional violation has remains unchanged since the case of *Anarita Karimi Njeru vs The Republic (1979) eKLR*, which principle was later restated by this Court in thecase of *Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR*. The applicable principle is that such a claim should set out with a degree of precision the complaint, the provisions infringed and sufficient particulars of the manner in which they are alleged to be infringed, to which a respondents is to able reply. No such claim was made in any pleadings filed by the Appellant in the High Court, and was only raised for the first time in its submissions. This Court, just like the High Court therefore has no basis for making any findings as regards the alleged violation of the rights of the parties herein to a fair trial in the hearing of this suit.

22. Coming back to the claim that was before the High Court, the consent entered into by the parties on 7th September 2012 effectively rendered the prayers in the Respondent's Amended Plaint as regards payment of the purchase price moot. It is also notable that the Respondent abandoned their claim to mesne profits in their submissions filed and urged in the High Court dated 21st November 2017 (at page 11 thereof).

23. The four issues that are therefore still live and that arise in the appeal and cross appeal are firstly, whether there was any breach of the sale agreement by the Appellant or Respondent, and if so the effect thereof, including on the validity of the sale agreement. Secondly, whether the doctrine of lis pendens applied to the sale agreement, and if so, the effect thereof. Thirdly, whether the Respondent was entitled to payment of interest and if so at what rate and for what period. Lastly, whether the Appellant was entitled to payment of damages, and if so, the quantum.

24. The Appellant's case as regards breach of the sale agreement is that the Respondent breached the provisions of the agreement on the completion and that there was no pending litigation. That Condition 5 of the sale agreement made specific provisions that time was of the essence, and the trial Judge erred in his conclusion that time was not of the essence, and that the Deed of Indemnity executed in February 1996 had the effect of extending the completion date.

25. On the finding that they failed to issue a completion notice to the Respondent once the Respondent failed to complete the transaction within time, it was submitted that in arriving at this conclusion, the trial Judge failed to take into account that the provisions of Condition 4(7) of the LSK Conditions of Sale of 1989 only applies where there is no specific condition that time is of essence in respect of the completion date, and that issuance of a Completion Notice is optional.

26. The Appellant further submitted that the Deed of Indemnity was entered into after the Respondent was already in breach of the condition on the completion date, and as a result of the Respondent's breach of Special Condition 7 of the agreement of sale that there was no pending litigation against the property, and the Respondent offered to indemnify the Appellant against any loss as a result of any action, proceedings or claims made by the caveators, and did not absolve the Respondent from its obligations under the agreement for sale. In addition, that while the trial Court correctly found that the Respondent was in breach of Clause 7 of the agreement for sale, it fell into error in failing to evaluate the effects of the doctrine of lis pendens and its application to the facts in the case then before him. The Appellant in this regard submitted that it did not know of the existence of Mombasa HCCC No. 289 of 1994 until after Mombasa HCCC No. 85 of 1996 was filed against it on 20th February 1996 .

27. Further, that the doctrine of lis pendens to which this transaction was made subservient was provided for in Section 52 of the Transfer of Property Act, which then governed the suit property, before it was repealed by the Land Act 2012. The Appellant placed reliance on the cases of *Naftal Ruthi Kinyua vs Patrick Gachure & Others [2015] eKLR*, *Mawji vs US International University & Another [1976] KLR 185*, and *Wangere Muriu v NSSF (2012) eKLR* to urgethat it was wrong for the trial Judge to have resorted to the application of equitable principles, to the exclusion of codified statutory law, and that the doctrine of lis pendens cannot be waived or defeated by the application of the equitable doctrine of estoppel.

28. The Respondent on its part submitted that it complied with the terms of the agreement for sale to the letter, and on Condition 5, submitted that the Appellant admitted not issuing a completion notice or a rescission notice, and could therefore not claim the existence of breach for which it did not call the attention of the Respondent. The Respondent also contended that the Appellant failed to pay the balance of the purchase price on time thereby breaching the agreement.

29. In response to the claim that it breached Condition 7 of the agreement, the Respondent answered that the agreement between it and the third parties was for purchase of shares in Shabaha Investment Limited and was not equivalent to the purchase of the suit property as held in Mombasa HCCC 85 of 1996. They further stated that in the Deed of Indemnity, they disclosed the existence of the claim for shares and therefore the High Court rightly found that the Appellant waived its right to claim breach as it had knowledge of existence of the suit. Accordingly, having ascertained that the claim in Mombasa HCCC 289 of 1994 was a claim for shares, there was no suit relating to the property. Reliance was placed on the case of *Cooperative Bank of Kenya vs Patrick Kangethe Njuguna & others [2017] eKLR* in this regard.

30. Although the Appellant's counsel in his submissions to this Court did not lay the basis for its claim that there was breach of the Condition 5 of the sale agreement on the time of completion, the Appellant, during the hearing and submissions in the High Court, referred to the admission by the Respondent that it failed to obtain all the necessary consents to transfer the property by the date of completion on 15th April 1995. It is in this respect not in dispute that Condition 5 of the sale agreement entered into by the Appellant and Respondent provided that the completion date would be 15th April 1995, and Special Condition 1 stated that time was of the essence in respect of the completion date in the agreement. Condition 4 of the sale agreement also applied the LSK Conditions of Sale of 1989, of which a number of conditions were relevant, including No. 4 on completion.

31. The findings by the High Court on the issue of breach of the condition as regards completion were as follows:

> " 29. The Plaintiff entered into an agreement for sale with the Defendant dated 3rd April 1995, a deposit of KShs.4,300,000/= being 10% was paid and the balance was to be paid on completion of the transaction which was be on the 15th April 1995. The said agreement under Special Condition 1 provided that "time was of the essence'. However, by November 1995, the Plaintiff had not obtained relevant consents and a caveat registered on the 28th October 1993 against the suit property had not yet been withdrawn.
>
> 30. This meant that the Plaintiff was already in breach of Clause 1 of the Special Conditions of the agreement which provided that time was in essence in relation to the transaction."

32. From a reading of condition 4 of the LSK Conditions of Sale of 1989 and the definition of completion therein, our view as to what completion entailed was firstly, that the vendor completed its part of the agreement by delivering to the purchaser all the registrable documents and consents, while the purchaser completed by paying the vendor the balance of the purchase price upon such delivery.

33. Condition 4(2) (a) of the LSK Conditions of Sale of 1989 specifically stated as follows:

> " Completion shall take place-in manner set out hereunder namely:
>
> a. Upon completion, the purchaser shall pay the purchase money to the vendor's advocate who shall hold the same as stakeholder until registration of the conveyance. If registration of the conveyance shall not be effected within thirty (30) days of completion, the vendor may without prejudice and in addition to any other right or remedy, give notice to the purchaser requiring him to effect the registration of the conveyance within such period (not being less than thirty (30) days from the date of the notice) as may be specified in the notice. If the conveyance shall not have been registered on or before the expiry of the notice, the purchaser shall, within seven (7) days after such expiry:
>
> 1. Pay and release to the vendor unconditionally the whole of the purchase price and all other sums payable under the contract; or
>
> 2. treat the contract as rescinded whereupon the purchaser shall return all-documents delivered to him by the vendor against repayment of any sums paid-by way of deposit or otherwise-and the purchaser shall at his own expense, procure the cancellation of any entry relating to the contract in any register;"

34. The requirement that consents, among other documents would be provided by the Respondent at the date of completion was specifically stated in condition4(2)(d) of the LSK Conditions of Sale of 1989 as follows:

> " Against payment or delivery (as the case may be) in accordance with paragraph (a) or (b) above, the vendor shall deliver, or, where paragraph (c) applies, produce for inspection to the purchaser's advocate and, if so required by the purchaser, the advocate for the purchaser's mortgagee, the duly executed conveyance and all necessary discharge of encumbrances, consents and clearance certificates together with, if required by the purchaser, a duly completed, Stamp Duty Valuation Form.."

35. The High Court therefore did not err by finding that as at the date of competition on 15th April 1995, the Respondent had not procured the necessary consents, since this fact was admitted by the Respondent's witness during the trial, and it was the Respondent's obligation to procure the said consents under Special Condition 2 of the sale agreement. In addition, it is also notable that it is not in dispute that the Appellant had also not fulfilled its obligation to pay the purchase price by the completion date as was required by Condition 4(2) (a) and (d)of the LSK Conditions of Sale of 1989, and was also in breach of the condition as regards time of completion.

36. The legal significance of a term in a contract that time is of the essence is that it elevates the time period in which one party must complete its contractual obligations to the other party to a condition in the agreement, and failure to perform obligations within the stipulated deadline will amount to a fundamental breach of the agreement. The consequences that will flow from such a breach are identified in Chitty on Contracts - Volume I at paragraph 21-016, namely, that the innocent party will be entitled to terminate performance of the contract, and thereby put an end to all the primary obligations of both parties that remain unperformed, and to claim damages from the contract breaker on the basis that the breach of the contract has deprived the innocent party of the benefit of the contract.

37. This was the position that obtained in *Kukal Properties Development Ltd vs Tafazzal H. Maloo & 3 others* [1993] eKLR, where this Court set out the courseof action required to be followed upon breach of the condition that time is of the essence as follows:

> " The respondents by accepting the refunds of the deposits paid by them, thereby accepted the breach with the result that they could only sue for damages for the alleged breach. Alternatively, they could refuse to accept the breach, treat the contracts as alive, and sue for specific performance. In that event, the respondents would have been obliged to perform their part of the contracts. In this case, the respondents did not keep the contract alive. In his speech in the House of Lords in the case of *Johnson v Agnew* [1979] 1 All ER 883, Lord Wimberforce set out the law on this point admirably at p 889 C:
>
> "In this situation it is possible to state at least some uncontroversial propositions of law. First, a contract for the sale of land, after time has been made, or has become, of the essence of the contract, if the purchaser fails to complete, the vendor can either treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the contract; or he may seek from the Court an order for specific performance with damages for any loss arising from delay in performance. (Similar remedies are of course available to purchasers against vendors). This is simply the ordinary law of contract applied to contracts capable of specific performance. Secondly, the vendor may proceed by action for the above remedies (viz specific performance or damages) in the alternative. At the trial he will however have to elect which remedy to pursue. Thirdly, if the vendor treats the purchaser as having repudiated the contract and accepts the repudiation, he cannot thereafter seek specific performance. This follows from the fact that, the purchaser having repudiated the contract and his repudiation having been accepted, both parties are discharged from further performance."

38. To this extent, the finding by the High Court that the Appellant was required to give a notice of completion was erroneous, and for the reason as also noted by this Court in *Fremar Construction Co. Ltd vs Minakshi Navin Shah [2005] eKLR*, that no such completion notice is required under condition 4(7) of theLSK Conditions of Sale where the agreement has made time of the essence.

39. On the breach of the Special Condition 7 as regards pending litigation, evidence of the fact of the existence of the suit filed in Mombasa HCCC 289 of 1994 was adduced by the Appellant, who provided copies of its pleadings, particularly the Plaint filed therein at the High Court in Mombasa on 10th May 1994, which were not disputed. In addition, the claim in Mombasa HCCC 289 of 1994 arose from an agreement by the directors of the Respondent to sell the Respondent's shares to the Plaintiffs therein, and since the Respondent was the registered owner of the suit property, it was a material litigation for purposes of Special Condition 7. Lastly, the Respondent did not dispute the Appellant's averments and evidence that it only became aware of the suit in Mombasa HCCC 289 of 1994 upon being sued in Mombasa HCCC 85 of 1996.

40. We are of the view that the Respondent, by agreeing to Special Condition 7, was deemed to have made a positive representation that there was no litigation pending against the property. Therefore, after the discovery of the existence of Mombasa HCCC 289 of 1994, this representation turned out to be a false representation, and a breach of the sale agreement. The arguments by the Respondent as regards the rulings on the nature of, and the merits of the suit in Mombasa HCCC 289 of 1994 were of no consequence in this regard, and did not change the fact that the said suit was in existence and was not disclosed at the material time, which was at the time of entering into the sale agreement on 5th April 1995. The High Court therefore rightly found the Respondent to be in breach of special condition 7 of the sale agreement.

41. As indicated earlier, the effect of the said breach is that it entitled the Appellant, as the innocent party in the circumstances, the option of treating itself as discharged from further performance of the contract, and to also claim damages for any loss it had suffered. However, neither the Appellant or Respondent repudiated or rescinded the contract either on 15th April 1995 when the respective obligations were not performed, or on 22nd February 1996 when they were sued by third parties over the suit property in Mombasa HCCC 85 of 1996. On the contrary, it is not in dispute that the Appellant took physical possession of the suit property on 27th January 1996 after payment of a deposit of 10% of the purchase price, and that a transfer of the suit property to the Appellant was effected on 15th February 1996. The Respondent thereafter provided the Appellant with a signed Deed of Indemnity in February 1996, and later on entered into the consent dated 7th September 2012, when the balance of the purchase price was paid by the Appellant.

42. It is in this regard explained in paragraph 21-016 of Chitty on Contracts - Volume I, that the right to terminate the contract when there is a fundamental breach may be lost where the innocent party affirms the contract, is held to have waived it, or is estopped from exercising the right to terminate. Affirmance is defined in Black's Law Dictionary, Ninth Edition as "a ratification, reacceptance or confirmation", and in relation to contracts, it is explained therein that "a party who has the power of avoidance may lose it by action that manifests a willingness to go on with the contract. Such action is known as affirmance and has the effect of ratifying the contract". However, a party will not be held to have elected to affirm to contract unless it has knowledge of the facts giving rise to the breach, and of its legal right to choose between the alternatives open to it. In addition, where a party having this knowledge elects to affirm the continued existence of the contract, it does not necessarily relinquish its claim for damages for any loss sustained as a result of the breach.

43. Waiver on the other hand is defined in Black's Law Dictionary, Ninth Edition as "the voluntary relinquishing or abandonment- express or implied - of a legal right or advantage", while estoppel is defined as "a bar that prevents one from asserting a claim or right that contradicts what one has said or done before, or what has been legally established as true". The doctrine of equitable estoppel is a defense that is raised when such conduct or representation has been relied on by another party, with

the result that the other party has suffered a detriment or injury. See in this regard the decisions by this Court in *John Mburu vs Consolidated Bank of Kenya (2018) eKLR* and *Kenya National Assurance Company vs Kimani Another (1987) eKLR*.

44. There is an intertwined connection between the application of the concepts of affirmation, estoppel and waiver in the law that applies to performance and discharge of contracts. Affirmation and estoppel both arise from clear and unequivocal representations or conduct by a party that they will not exercise their right to treat a contract as repudiated, which if proven, then leads the other party to rely on waiver as a defence to any purported termination of a contract. Affirmation will lead to the application of the defence of waiver by election, while waiver by estoppel is also raised as an application of the principle of equitable estoppel. The only difference between the two waivers is that unlike in a waiver by election, no knowledge of the facts giving rise to the exercise of the right to waiver and of its effects is required in a waiver by estoppel. See in this regard *Chitty on Contracts* - Volume I, paragraphs 24-003 to 24-008.

45. Arising from the above principles of law, we find that the legal effect of the breaches of the conditions in the sale agreement in the present appeal was that the Appellant and Respondent, who were both aware of the conditions, having signed the sale agreement and having legal representation at the time, were entitled to treat the agreement as discharged. However, they both elected to continue with the performance of their obligations by their conduct and representations, which culminated in the consent dated 7th September 2012. They were therefore deemed to have affirmed the contract, waived their rights to rescind the contract, and were estopped from terminating the contract or repudiating performance of their obligations under the sale agreement on account of the breaches.

46. In addition, the Appellant's contention that the doctrine of estoppel cannot operate as a defence to the breaches of the sale agreement has no legal basis, and it was specifically found by this Court as follows in John Mburu vs Consolidated Bank of Kenya (supra) that "a person who is entitled to rely on astipulation existing for his benefit in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist."

47. The High Court therefore did not err in finding that the Appellant had affirmed the breach of the sale agreement and waived its right to rescind the contract, and was also estopped from doing so. The subject sale agreement as a result continued to subsist and was valid, having initially met all the formal and essential requirements of a valid contract.

48. We shall now briefly address the findings on the application of the doctrine of lis pendens to the sale agreement. Lis pendens literally means 'litigation pending' or 'pending suit' and is drawn from the maxim "Pendente lite nihil innovature", which means that nothing new must be introduced while a litigation or suit is pending. Therefore, what the doctrine entails is that the property which is subject matter of a suit shall not be transferred during pendency of the suit, and it prevents transfer of the title of any disputed property without the Court's consent. This doctrine was embodied in Section 52 of the Transfer of Property Act of 1882 which has since been repealed in Kenya, but was applicable at the time the Appellant and Respondent entered into the sale agreement.

49. The purpose of the doctrine was explained by this Court in the case of *Mawji vs US International University & another* [1976] KLR 185 by Madan, J.A. asfollows:-

> "The doctrine of lis pendens under Section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, Section 23 of the RTA

and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other..."

50. Under Section 52 of the *Transfer of Property Act of 1882*, the doctrine of lis pendens applied to the parties in a contentious suit before a court, in respect of the property which was subject matter of the suit, and the dealings that were prohibited by the doctrine was any transfer or other dealing with the property which may affect or prejudice the rights of any other party to the suit under any decree or order which may be made therein. This position was emphasised by the Indian Supreme Court in a recently delivered judgment in the case of G.T Girish vs Y. Subba Raju, Civil Appeal No. 380 of 2022, in which itexpounded on the doctrine of lis pendens and stated as follows with respect to Section 52 of the Transfer of Property Act.

> " 94. The cardinal and indispensable requirement, which flows both from Section 52 and the principle, it purports to uphold, is that the transfer or dealing of the property, which is the subject matter of the proceeding, is carried out by a party to the proceeding. Section 52 uses the word 'party' twice. It refers to the disability of a party to transfer or otherwise deal with the property, pending adjudication. This embargo is intertwined with the beneficiary of the veto against such transfer, being any other party thereto... Thus, the sine qua non for the Doctrine of Lis Pendens to apply is that the transfer is made or the property is otherwise disposed of by a person, who is a party to the litigation. The Doctrine of Lis Pendens, only subject, however, the transfer or other disposition of property to the final decision that is rendered. The person/party, who finally succeeds in the litigation, can ask the court to ignore any transfer or other disposition of property by any party to the proceeding. This is subject to the condition that transfer or other disposition is made during the pendency of the lis."

51. In the present appeal, the High Court, while noting that there were orders of status quo given in Mombasa HCCC 85 of 1996 as regards the suit property, applied the doctrine of lis pendens to find that the balance of the purchase price was only payable after the final determination of Mombasa HCCC 85 of 1996 on 13th July 2006. We have difficulty agreeing that this is a proper and correct application of the lis pendens doctrine, in light of the purpose and effect thereof as explained in the foregoing. It has been held severally by this Court that the doctrine of lis pendens only applies to prevent the transfer and disposition of the suit property, or other dealing that may take the property out of the reach of the other parties in a suit, and cannot be extended to apply to any or all other dealings with the suit property. Such an interpretation and application is likely to result in impractical and adverse effects on the parties to a suit.

52. Coming back to the present appeal, by the time of the filing of Mombasa HCCC 85 of 1996 on 22nd February 1996, the suit property had already been transferred to the Appellant, and therefore all that the lis pendens doctrine required was that the Appellant should not in any way dispose of the suit property, and had no bearing at all on payment of the purchase price. The only relevance of the various orders made as regards the payment and deposit of the balance of the purchase price was with respect to securing the Respondent's position after the said transfer, but did not in any way affect the status of the property or result in its disposition. The doctrine of lis pendens cannot therefore be legally applied to justify non-payment of the purchase price, or for other dealings which did not result in disposition of the property.

53. We shall therefore proceed to consider the third issue before us, which is whether interest was in the circumstances payable to the Respondent. The Appellant faulted the trial Judge for awarding the Respondent Kshs.69,990,000.00/= as interest, on the grounds that firstly, the Court overlooked Condition 8 (1) of the LSK Conditions of Sale of 1989 which provided that no interest was payable

where the delay beyond completion date was as a result of the vendor's default. Secondly, that the aspect of depositing the balance as framed by Condition 8 (2) (a) was specifically prohibited by this Court in Civil Application Nai 200 of 1997 (86/97 UR) and confirmed in Nairobi Civil Appeal 232 of 1997, and instead the title documents of the suit property were deposited with the Deputy Registrar. Thirdly, the Appellant pleaded that the requiring them to pay interest while the title documents were being held by this Court would amount to punishing them twice, and there existed no rational basis to award the Respondents Kshs. 69,660,000.00/- in interest.

54. The Respondent on its part submitted that the Appellant took possession of the suit property on 26th January 1996 and that there was no order barring them from trading as a hotel. Therefore, that it was the Appellant's decision to cease operations and refused to pay the balance of the purchase price, and interest was the only penalty that would suffice. The Respondent was of the view that the Appellant was the author of its own misfortune for reasons that they failed to pay the balance of the purchase price necessitating the suit against it; after the ruling of 17th June 1997 they lodged an appeal that ordered the substituting of the purchase price payment with depositing the title documents; the parties entered into a consent in 2012 to pay the purchase price balance and the issue of interest was never dealt with; and the price and cost of litigation was payment of interest and costs. The Respondent therefore claimed for interest at 30% from the 31st January 1996 being the date the Appellant took possession of the property.

55. The main considerations in the payment of interest are the legal basis thereof, the rates to be applied, whether simple or compound interest is envisaged, and the period to which the interest will apply. Where the interest is specifically provided for in a contract, then it is due as of right as construed from the contract, and it need not be pleaded and proved. At common law the principle was also settled in *International Ry vs Niagara Parks Commission (1941) AC 328* and in Re Preistley's Contract (1947) Ch 469 that a vendor of land is entitled to require the purchaser to pay interest on his unpaid purchase money from the date when he takes or might safely take possession of the land.

56. In this regard, Special Condition 4 of the sale agreement between the Appellant and Respondent provided that Condition 2(1) (g) of the LSK Conditions of Sale of 1989 which provided for the rate of interest was amended to read 30%. In addition, the LSK Conditions of Sale of 1989 in Condition 8 (1) and 2() provided for interest payable on the purchase money, and where completion was delayed as a result of default on the part of the vendor, no interest was payable provided the purchaser deposited the balance in any bank and gave the purchaser notice thereof, in which case the purchaser would accept the interest payable by the bank on the deposit. Under Condition 8(3) if the delay was caused by some other reason other than default on the part of the vendor, then interest was payable on the balance of the purchase price and was computed from the completion date until the date of payment in full. Lastly, compound interest is only paid either by agreement or custom and not otherwise. In the present case, it was not provided for in the agreement for sale or the LSK Conditions of Sale of 1989, and the presumption is that simple interest was to be paid.

57. We have in this regard already found that by affirming the contract, the Appellant was estopped from, and waived its right of repudiating the provisions of the agreements for sale on account of the delay in completion by the Respondent, and its only remedy was damages for any loss it may have incurred as a result of the delay. In any event, the Appellant did not bring any evidence that it deposited the balance of the purchase price after the date of completion lapsed on 15th April 1996, or gave notice of the fact to the Respondent as required by Condition 8(1) and (2) of the LSK Conditions of Sale of 1989. On the contrary, it is only upon intervention by the Respondent that the Court ordered the Appellant to deposit the sums on 17th June 1997. It is thus our finding that interest was payable by the Appellant on the balance of the purchase price under the sale agreement.

58. We have also found that the High Court erred in applying the doctrine of lis pendens to the date when payment of the balance of the purchase price was due. Although the Respondent claims that it completed the performance of its obligations under the agreement for sale on 15th February 1997 when it transferred the suit property to the Appellant, we hold the view that completion was not complete as long as there was a continuing breach of Special Condition 7 in terms of the pending litigation in Mombasa HCCC 85 of 1996. It would also be unconscionable to allow the Respondent claim interest during the period of breach. Lastly, we are alive to the fact that there were orders given by the Court of Appeal during this period requiring the Appellant to deposit the title documents to the suit property, as opposed to depositing the balance of the purchase price. However, it is notable that the implications and effect of the orders on the issue of interest payable was not raised nor canvassed in the applications and appeal before the Court of Appeal, and no orders were made thereon.

59. In the end we came to same result as the High Court, albeit by a different route, that the interest on the balance of the purchase price could only be legally and properly claimed by the Respondent upon discharge of its breach with the dismissal of the pending suit in in Mombasa HCCC 85 of 1996 on 13th July 2006. is thus our finding for the foregoing reasons that the interest payable on the balance of the purchase price was payable from 13th July 200 until the payment in full on 7th September 2012 at the contract rate of 30%, and the amount of interest thus awarded to the Respondent by the High Court of 38,700,000 x 30/100 x 6 amounting to Kshs. 69,660,000/= was not in error.

60. The last issue for determination is that of payment of damages to the Appellant. Counsel for the Appellant submitted that it was not prudent to continue trading without knowing the outcome of the earlier suit mainly Mombasa HCCC 289 of 1994 being fully aware of the doctrine of lis pendens. Secondly, that the property was registered in the Appellants name on 16th February 1997 and on 20th February 1997, the suit in Mombasa HCCC No. 85 of 1996 was filed which disclosed the existence of Mombasa HCCC No. 289 of 1994. In such circumstances, no audited accounts, or bed occupancy could be rendered to Court, covering a period of only 3 days when the Appellant was perceived owner of the suit property.

61. The Respondent on its part submitted that the Appellant was given a running business which it was not prevented from continuing with, and did not show how it mitigated its loss but instead run down the suit property. Reliance was in this regard placed on the decision in *Gulthamed Mohamedali vs Sanyo Electrical Company [2003] eKLR*. Furthermore, that the Appellant failed todischarge its evidentiary burden.

62. In light of our findings on the nature of application of the lis pendens doctrine, the Appellant's arguments as to the effect of the doctrine on its business cannot hold. The Appellant was not in any way prevented by the doctrine or by any court orders from dealing with the suit property in any other manner other than disposition. On the contrary, under Condition 6 of the LSK Conditions of Sale of 1989, the Appellant was under a duty upon taking possession and until the date of completion, to keep the property in a good state of repair and condition. Further, the Appellant was also entitled to all rents and profits therefrom under the said condition.

63. Therefore, the damages if any, that the Appellant is entitled to are those that can reasonably be found to flow from the Respondent's breach of the conditions in the sale agreement, so as to compensate the Appellant for any loss or injury that he shows to have suffered as a result of the breach. In this respect, it is the position as stated in Chitty on Contracts - Volume I, paragraph 26-166, that if the vendor delays in completion, the normal measure of damages is the value of the use of land for the period of delay, usually in terms of its rental value. In the present case, the Appellant took possession of the suit property in January 1996, and the transfer of ownership to it was made on 15th February 1996. The

Appellant annexed evidence of income earned by a comparable hotel for the period February 1996 to 31st December 2007, which was the basis for its claim for damages of Kshs.407,244,087/56 and thereafter at a monthly rate of Kshs. 5 million.

64. However, as noted in the foregoing there was no legal impediment that prevented the Appellant from doing business and earning the income during this period. In addition, having affirmed the breach of the contract by taking possession of the suit property, the Appellant was also under a duty to mitigate its damages, and cannot therefore recover losses it could have avoided. We are therefore persuaded that the only period that the Appellant can validly and legally claim for damages for loss of income is the period from the date of completion of the agreement for sale on 15th April 1995 to the date of transfer of the property to it on 15th February 1996, which is a period of 8 (eight) months, however, there was no claim made by the Appellant for the loss of income for this period in its counterclaim.

65. The Appellant did not in addition provide any evidence of the income that was earned by the suit property as at the time of entering the sale agreement to guide this Court on the income it may have lost during the eight months, and for the same reason we do not find the evidence it availed persuasive, for reasons that no comparable basis was laid by the Appellant. In the end we are constrained to award nominal damages for the Respondent's breach of condition 5 and special condition 7 of the agreement of sale. In deciding on the amount of nominal damages to award, we agree with the holding of this Court in *Jogoo Kimakia Bus Services Ltd vs Electrocom International Ltd [1992) e KLR* as follows:

> " Although the respondent did not quantify the loss to be entitled to an award of special damages, they in fact proved the breach of the contract but failed to prove the actual amount of the loss or any loss flowing from the breach of the contract. The award of general damages was not available to them. The loss suffered was therefore capable of compensation by an award of nominal damages.
>
> In '*Medina' and the 'Mediana*' [1900] AC 113, 116 Earl of Halsbury LC as he then was defined nominal damages:-
>
> > "My Lords, here I wish, with reference to what has been suggested at the bar, to remark upon the difference between damages and nominal damages. 'Nominal damages' is a technical phrase which means that you have negatived anything like real damages, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term nominal damages does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages, but may be also represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages."

66. Having regard to the fact that the Appellant have not claimed nor demonstrated the loss of income for the period between 15th April 1995 and 15th February 1996, and given that it was not prevented from doing business for the remaining period of the breach, we are of the view that an award of Kshs.30,000/= nominal damages would be sufficient. This sum shall be offset from the interest payable to the Respondent.

67. The appeal and cross appeal therefore both partially succeed only to the extent of the following orders:

1. The orders by the High Court in Mombasa HCCC 38 of 1997 awarding interest to the Respondent of Kshs 38,700,000 x 30/100 x 6 amounting to Kshs.69,660,000/=, and costs of the suit and counterclaim in Mombasa HCCC 38 of 1997 are hereby affirmed.

2. The orders of the High Court in Mombasa HCCC 38 of 1997 dismissing the Appellant's Counterclaim are hereby set aside and substituted by an award of nominal damages of Kshs.30,000/= to the Appellant, which shall be offset against the interest payable to the Respondent.

3. Each party shall bear its respective costs of the appeal and cross appeal herein.

68. Orders accordingly.

DELIVERED AND DATED AT MOMBASA THIS 18TH DAY OF FEBRUARY 2022.

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR