Ikumbu v Wanjiru (Civil Appeal 157 of 2017)
[2022] KECA 81 (KLR) (4 February 2022) (Judgment)

Neutral citation: [2022] KECA 81 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 157 OF 2017

DK MUSINGA, RN NAMBUYE & AK MURGOR, JJA

FEBRUARY 4, 2022

BETWEEN

SAMUEL IKUMBU ..... APPELLANT

AND

VERONICAH WANJIRU ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya (A. Emukule, J.) dated 7th November, 2014 in Nakuru HCCC No. 90 of 2009)

JUDGMENT

1. This is a first appeal against the judgment of A. Emukule, J. delivered on 7th November, 2014 in Nakuru HCCC No. 90 of 2009.

2. The background to the appeal is that Veronicah Wanjiru (the respondent) filed Nakuru HCCC Case No. 90 of 2009 vide a plaint dated 25th March, 2009 against Samuel Ikumbu (the appellant), subsequently amended on 6th October, 2010 to join Heiwa Auto Spares and Distributors Limited (Heiwa Auto Spares) and Barclays Bank of Kenya Ltd (the bank) as 2nd and 3rd defendants respectively.

3. In it, the respondent averred, inter alia, that vide a tenancy agreement with the appellant effective June, 2005 to June, 2010 she rented Nakuru Municipality Block 4/54 (the suit property) at a monthly rent of Kshs.35,000.00, which subsequently translated into an agreement of sale dated 5th October, 2007. In it, the appellant agreed to sell and the respondent to buy the suit property at an agreed purchase price of Kshs. 18,000,000.00. The respondent paid the appellant Kshs. 3,000,000.00 as the agreed deposit. It was the appellant's obligation under the said agreement of sale to obtain the original title documents from Barclays Bank to which the suit property had been mortgaged, to facilitate the transfer of the suit property to the respondent. The balance of the purchase price was agreed at Kshs. 15,000,000.00 payable within ninety (90) days of the date of the agreement of sale. As part of her fulfilment of her

obligation under the agreement of sale, the respondent approached Equity Bank seeking a financial facility to raise the balance of the purchase price. On 21st November, 2007, Equity Bank agreed to extend to the respondent a loan facility of Kshs 14,000,000.00 to be secured by a charge over the suit property and other securities. In anticipation of the fruitioning of the agreement of sale, the respondent undertook major renovations on the suit property to the total tune of Kshs.2,710,000.00.

4. Contrary to the respondent's legitimate expectation, the appellant failed to meet his obligation to Barclays Bank for him to secure the release of the title documents to facilitate the transfer of the suit property to the respondent. The bank advertised the suit property for sale and did sell the same by public auction, inclusive of all the developments the respondent had carried out thereon. She therefore sought the court's intervention for:

    i. Judgment against the appellant for a sum of Kshs 5.71 million with interest at 14% from the date of payment to the appellant till payment in full to her.

    ii. Liquidated damages equivalent of 20% of the purchase price together with general damages for breach of contract.

    iii. Costs of the suit.

    iv. Interest on the above items at court rates.

5. In rebuttal of the respondent's claim, the appellant filed a defence on 8th May, 2009 subsequently amended on 30th May, 2012 to include a counterclaim. In summary, he conceded execution of the agreement of sale between them and payment of a deposit of Kshs. 3,000,000.00. The balance of Kshs 15,000,000.00 was to be paid within ninety (90) days of the agreement, which did not materialize. He had no knowledge of any major renovations carried out on the suit property by the respondent. In the alternative and without prejudice to the foregoing, he averred that if any renovations were carried out by the respondent on the suit property, which was denied, then the same were carried out without the consent or approval either by him or the Municipal Council of Nakuru and were therefore illegal and no compensation could be made for such renovations. According to him, he had done everything possible to have the documents of ownership of the suit property released to him by the bank to conclude the agreement of sale with the respondent. He denied that the respondent was entitled to a refund of either Kshs.3 Million or Kshs.2,710,000.00 nor to any form of damages.

6. In his counterclaim, the appellant averred, inter alia, that it was the respondent, who was in breach of the agreement of sale, having failed to pay the balance of the purchase price of Kshs.15,000,000.00 within ninety (90) days from the date of the execution of the agreement for sale. She was therefore liable to pay to him damages for breach of the agreement of sale. He therefore prayed for rent arrears up to the time the property was sold in a public auction by Barclays Bank of Kenya, general and liquidated damages for breach of contract, costs and interest of the counterclaim and any other relief the honorable court may deem fit and just to grant.

7. The cause was canvassed through rival pleadings and oral testimony. The respondent gave testimony as PW1, reiterating her averments in the amended plaint and blamed the appellant for want of fruitioning of the agreement of sale as on her part, she was always ready and willing to pay off the balance of the purchase price, having secured a financial facility of Kshs 14,000,000.00 from Equity Bank vide their letter of offer and acceptance dated 21st November, 2007, subject to her depositing with them the original title documents of the suit property, which the appellant failed to avail to her for her to hand over to Equity Bank to release the balance of the purchase price.

8. It was further her testimony that she carried out extensive renovations on the suit property in anticipation of the fruitioning of the agreement of sale of the suit property in her favour. She denied breaching the agreement of sale executed between them and blamed the appellant wholly for the breach, hence her claim was well founded both in law and on facts and prayed for it to be allowed with costs. She called one witness, Mungalla Inoti, PW2, a practicing land valuer and proprietor of Prime Valuers, who testified that he carried out a valuation of the renovations carried out on the suit property by the respondent assessed at Kshs 2,710,000.00.

9. The appellant's testimony in summary was also a reiteration of his averments in the defence and counterclaim. He acknowledged receiving Kshs.3,000,000.00 from the respondent as deposit towards the purchase of the suit property upon execution of the agreement of sale between them. He concedes he did not avail the title documents to the respondent to facilitate her to obtain a loan facility from Equity Bank. His explanation for that default was that it was the balance of the purchase price that he intended to use to redeem the suit property from Barclays Bank. The property was sold by Barclays Bank on 13th October, 2010 after the respondent had failed to release the balance of the purchase price. He blamed the respondent for carrying out renovations to the suit property without his consent and that of the Nakuru Municipality. They were therefore illegal. He was therefore not liable to meet those costs. He acknowledged being indebted to the respondent in the sum of Kshs 3,000,000.00 being the deposit paid towards the purchase price for the aborted agreement of sale but in respect of which he prayed that the same be offset against the amount owed to him by the respondent as rent arrears and the liquidated damages he had prayed for from the court for the respondent's breach of the agreement of sale executed between them.

10. At the conclusion of the trial, the learned Judge assessed the record in its totality and identified issues for determination, namely: which party was liable for failure to complete the contract; whether the respondent was entitled to reimbursement of the costs of renovation; whether the appellant was entitled to payment of the rent arrears and if so, for which period, and, the amount of damages payable to the party against whom the breach was committed.

11. On liability for breach of the agreement of sale executed between the respective parties herein, the Judge pinned this wholly on the appellant firstly, for his failure to settle his indebtedness to the bank and have the property discharged, especially when according to the Judge, the agreement of sale was explicit that the vendor, who was the appellant, was the party who undertook to make a follow up on the issue of the discharge of the title documents by the bank. There was evidence on record that Equity bank vide clause 6 of its letter of offer to the respondent was willing to release Kshs.13,500,000.00 against a first legal charge over the suit property which did not materialize due to the appellant's failure to obtain release of the title documents from the bank and hand these to the respondent to be used as security with Equity Bank.

12. Thirdly, for his advocate's failure to communicate to the respondent's advocate of the revised offer of the balance of the appellant's indebtedness to the bank to the total tune of Kshs.8.5Million and therefore below the balance of the purchase price and which had it materialized would have been beneficial to both parties and which was withdrawn a year later after the offer.

13. The Judge absolved the respondent of any blame for breach of the agreement of sale executed between them because the record was explicit that by 21st November, 2007, within a period of 1½ months of the execution of the agreement of sale dated 5th October, 2007 the respondent had secured a facility from Equity Bank for Kshs.14Million the disbursement of which was dependent upon registration of a charge over the suit property in favour of Equity Bank to secure the repayment of the loan facility. It

was due to the appellant's failure to have the title documents released from his bankers that the offer to the respondent to secure a loan facility from Equity Bank collapsed.

14. On the remedies available to the respondent as the party absolved of any wrong doing with regard to the circumstances that led to the collapse of the agreement of sale, the Judge took into consideration the decision in the case of *Openda vs Peter Martin AHN* [1984] KLR 208 for the holding, *inter alia,* that "...a purchaser is entitled to recover damages at large where a seller refuses to implement an agreement for any reason other than defective title and compensation contemplated by the contract or which could reasonably have been in the contemplation of the parties as likely to be wasted if the contract is broken."

15. Applying the above threshold to the rival positions before him on this issue, the Judge ruled that the consequences for breach of the sale agreement were as spelt out in clause (5) of the agreement namely, payment of a stipulated 20% of the purchase price and a refund of all other expenses incurred pursuant thereto, which in the Judge's opinion would include a refund of the Kshs.3,000,000.00 paid towards the deposit for the purchase price which the Judge allowed. The liquidated damages on the other hand were worked out as Kshs.18,000,000.00 x 20/100 = 3,600,000.00 which the Judge also allowed.

16. On the refund of the amount allegedly spent by the respondent on extensive renovations to the suit property in anticipation of the fruitioning of the sale agreement between them, the Judge held the view that the appellant having allowed the respondent to deal with the suit property as she wished upon execution of the agreement of sale between them, he could not be heard to argue that the alleged renovations were carried out without his consent. Secondly, the appellant by his conduct represented to the respondent that he had granted her all rights over the suit property save for the payment of rent and ownership which was pegged on payment of the balance of the purchase price. The respondent therefore acted on that representation and on the premise that the appellant would be ready to complete the agreement of sale and would ultimately transfer the suit property to her, and on that account allowed the figure of Kshs.2,700,000.00 under this head.

17. Lastly, on the liability of the respondent to pay rent to the appellant pending completion of the sale agreement at the agreed rate of Kshs.35,000.00, the Judge found this was payable monthly until the Kshs.15,000,000.00 balance of the purchase price was paid or until the expiry of the lease if the purchase did not materialize covering the period from October, 2008 when the respondent stopped paying rent to October, 2010 when she parted with possession with the suit property to the total tune of Kshs.840,000.00 which the Judge allowed in favour of the appellant.

18. On the totality of the above assessment and reasoning, the Judge rendered himself as follows:

> " From the foregoing, I find that the Plaintiff and the Defendant were each able to prove their claims in part. The Plaintiff established that the Defendant failed to ensure completion of the sale agreement. She was also able to prove that she carried out substantive renovations with the sanction of the Defendant and for which she was entitled to compensation. Further the Defendant admitted that the deposit of Kshs 3,000,000.00 had not been refunded. On his part, the Defendant proved on a balance of probability that the Plaintiff was in rent arrears which he was entitled to payment.
>
> In summary therefore there shall be judgment for the Plaintiff under the Amended Plaint dated 6.10.2010 as follows -
>
> (a) (1) Refund of Deposit Kshs. 3,000,000.00
>
> (2) Special Damages as per Contract Kshs. 3,600,000.00

(3) Refund for costs of Renovation Kshs. 2,710,000.00

Sub-Total Kshs. 8,710,000.00

(b) Less Judgment on the counterclaim by the Defendant for Rent arrears October 2008 to October 2010 Kshs. 840,000.00

Net Balance Kshs 7,870,000.00

(c) the net balance shall attract interest at court rates from the date hereof until payment in full.

(d) Having succeeded in part the Plaintiff in the main suit is awarded half the costs of the suit.

19. The appellant was aggrieved by the above findings of the trial Judge and filed a memorandum of appeal dated 1st November, 2017 raising 11 grounds of appeal subsequently condensed into three (3) thematic issues in his written submissions dated 3rd May, 2021, namely, whether the learned Judge of the Superior Court erred in law and facts and misdirected himself when:

a. He found that the respondent had proved her case on the required standard despite having made a finding that both parties had breached the contract and subsequently shifting the blame to the appellant herein thus contradicting himself.

b. He attempted to draw the agreement between the parties herein by imputing that the respondent intended to use the suit property as security for banking facility.

c. He made a finding that the appellant had given the respondent right over the suit property thus awarding the respondent a sum of Kshs.2,700,000.00 being monies for renovations.

20.. The appeal came before us for plenary hearing on 26th May, 2021, via the Go-To-Meeting platform, canvassed through the respective parties' written submissions and legal authorities relied upon in support of their opposing positions. Learned Counsel, Ms. Barbara Wangari who appeared for the appellant wholly adopted the appellant's written submissions without oral highlighting while learned counsel, Mr. Ndubi, who appeared for the respondent, also adopted wholly the respondent's written submissions with partial oral highlighting.

21. Supporting ground (a) of the appeal, the appellant has faulted the trial Judge for erroneously blaming the appellant wholly for want of the fruitioning of the agreement of sale executed between the respective parties herein after the Judge had explicitly made a finding that both parties were to blame for the collapse of the agreement of sale. In his opinion, it was the respondent who was at fault for the collapse of the agreement of sale for the failure to pay the balance of the purchase price of Kshs.15,000,000.00 within the stipulated time of 90 days from the execution of the agreement of sale. The Judge is also faulted for misdirecting himself on his appreciation of the facts on the record, hence erroneously holding that the appellant was to blame for the collapse of the sale transaction between parties for the alleged failure to obtain the release of the title documents from the bank when there was no timeline within which the said title documents were to be obtained from the bank, and which according to the appellant could not have been done without the respondent paying the balance of the purchase price for him to apply part of it to. The appellant also contends that it is also not correct, as erroneously held by the trial Judge, that the respondent was a stranger to the appellant's indebtedness

to his bankers as this was factored in the sale agreement indisputably drawn by the respondent's advocate. Lastly, on this issue, that the appellant had a genuine expectation that once the balance of the purchase price was paid by the respondent, he would be able to clear his indebtedness to the bank. That is why he negotiated the revision of the outstanding balance to Kshs.8.5Million.

22. It is also the appellant's position that he acted in good faith. Had the respondent met her obligations under the agreement of sale by paying the balance of the purchase price within the stipulated completion timeline, the agreement of sale would have fruitioned. She is therefore the one who was in breach of the agreement of sale for which the appellant was entitled to damages in the sum of Kshs.3,600,000.00.

23. To buttress the above position, the appellant relies on the case of *Sisto Wambugu vs. Kamau Njuguna* [1983] KLR 172 at 174 for theholding/proposition, inter alia, that "contracts for the sale of land commonly give the vendor the right to rescind the sale if the purchaser does not pay on the appointed day; the law is that this right can only be exercised where time is of the essence or if not after the party who is not at fault has given reasonable notice to the defaulting party making time of the essence", and the case of *Mwangi vs. Kiiru* [1987] eKLR also for the holding/proposition, inter alia, that "the rule is usually stated that any breach of contract gives rise to a cause of action as not every breach of contract gives rise to a discharge from liability".

24. Supporting ground (b), the appellant relies on the case of *National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR for the holding, inter alia, that "a court of law cannot purport to rewrite a contract between the parties, and that the parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded"; and the case of *Jiwaji vs. Jiwaji* [1968] E. A. 547 also for the holding, inter alia, that "where there is no ambiguity in an agreement it must be construed according to the clear words used by the parties", both in support of their submissions that the court having found that both parties had breached the contract of sale executed between them, contradicted itself when it subsequently absolved the respondent of any blame and instead pinned blame wholly onto the appellant in utter disregard of the explicit terms in the content of the agreement of sale that there was no provision that provided that completion of the agreement of sale was conditional on the respondent obtaining a loan using the title documents to the suit property, hence the necessity for the appellant to obtain its release as a condition precedent for the performance of her part of the contract.

25. Secondly, that since the agreement of sale was drawn by the respondent's advocate, nothing prevented her from including a term in the said agreement to the effect that the balance of the purchase price was going to be financed by a financial institution of her choice using the title to the suit property. Thirdly, the finding went contrary to the Judge's earlier finding that the appellant informed the respondent of the renegotiated balance of the loan for her to pay so that the title to the suit property could be released. She failed to act on the said appellant's offer, with the result that the bank after months of waiting for its indebtedness to be cleared by the appellant caused the suit property to be auctioned, hence his contention that the Judge's holding that the appellant was wholly liable for breach of the contract was unfair and should not be sustained.

26. Supporting ground (c), with regard to the specific amount awarded to the respondent of Kshs.2,700,000.00 for renovations carried out by the respondent on the suit property, the appellant reiterates his averments in the amended defence and oral testimony that if any renovations were carried out on the suit property by the respondent as alleged by her both in her pleadings and evidence which was and still is denied by the appellant, he urges this Court to find that the same were not only illegal but also unlawful for want of sanctioning, firstly, by him as the landlord and secondly, by the relevant

Nakuru Municipality. The court is therefore urged to interfere with the said finding and set it aside. On the amount allowed for rent arrears, the appellant urged this Court to affirm the same.

27. Opposing the appeal, the respondent submits that both the record and the appellant's submission are silent with regard to the terms of the consent order entered into by the parties herein compromising the appellant's notice of motion dated 16th December, 2014 for stay of execution of the impugned judgment vide which the appellant was granted stay on condition that he liquidates the amount of Kshs.3,000,000.00 by specific instalments as more particularly set out in the said consent order. This court is therefore invited to find that the appellant does not contest the trial court's award of a refund by him to the respondent of Kshs. 3,000,000.00 being the deposit paid towards the aborted agreement of sale of the suit property which this Court is invited to affirm.

28. In response to ground (a) of the appeal, the respondent relies on the case of *Ephantus Mwangi and Geoffrey Nguyo Ngatia vs. Duncan Mwangi Wambugu* [1982 – 88] I KAR 278 on the threshold for this Courtinterfering with the trial court's finding of facts namely, "demonstration that the trial court failed to take into account of particular circumstances or probabilities material to an estimate of the evidence or (b) that the trial court's impression of the facts based on the demeanour of a material witness was inconsistent with the evidence of the case generally," and submits that the trial Judge's decision to absolve the respondent from any responsibility for breach of the agreement of sale and pinning that responsibility wholly onto the appellant was well founded both on the facts and the law.

29. In support of the above assertion, the respondent submits that the respondent paid the appellant a deposit of Kshs.3,000,000.00 on execution of the agreement of sale with the balance being indicated as payable within ninety (90) days of the date of the execution of the agreement. The appellant did not controvert her oral testimony on oath that he had informed her that the bank wanted Kshs.5Million to settle his debt with the bank and that since she had raised a deposit of Kshs.3Million, he was going to raise the balance of Kshs.2Million. Neither did he apply the deposit of Kshs.3Million she had paid to him towards the said indebtedness. It is therefore not correct as contended by the appellant that he was not aware that the balance of the purchase price payable by the respondent was to be financed by a financier as in a letter dated 15th May, 2008, the appellant through his lawyer wrote to Muriu Mungai & Company Advocates for Equity Bank stating that there were issues the appellant was still sorting out, which in the respondent's opinion was sufficient demonstration that the appellant was aware that the respondent required the title documents to the suit property to facilitate the release of funds by Equity Bank to enable her clear the balance of the purchase price.

30. The respondent therefore urges this Court to affirm the finding of the trial Judge that the blame for breach of the agreement of sale lies with the appellant, especially when the Judge found sufficient demonstration on the record that she duly paid the deposit of Kshs.3,000,000.00, secured financing with Equity Bank in less than 1½ months after the execution of the agreement of sale, linked the advocate of her financiers with that of the appellant and who engaged them with a view to getting the appellant to obtain the release of the title documents from the bank with a view to releasing these to Equity Bank for them to process the financial facility she had already secured with Equity Bank to enable her pay off the balance of the purchase price.

31. In response to issue number (b), the respondent asserts that it is not correct as asserted by the appellant that the conclusions reached by the trial Judge on pinning responsibility wholly on the appellant for breach of the agreement of sale amounted to the trial Judge rewriting the contract of sale between them. In the respondent's opinion, all that the court did was to give effect and purpose to the meaning and intention of the parties to the agreement of sale borne out by the contents of the said agreement of sale, mutually executed by the parties with the consensus of their respective advocates.

32. The respondent relies on the case of *Samuel Ngige Kiarie vs. Njowamu Construction Company Limited & Another* [2019] eKLR for theholding, inter alia, that: "the intent of the parties is paramount in the interpretation of provisions of an agreement as courts must be faithful to give them effect." In her opinion, this is the reason as to why the Judge took into consideration the decision in the case of *Savings and Loan Kenya Limited vs. Mayfair Holdings Limited* [2012] eKLR; for theholding/proposition, inter alia, that:

> " The intention of the parties should be construed with reference to the object and the terms of the agreement. If the words used in the agreement are clear they should be construed in their ordinary meaning so as to establish the intention of the parties."

33. According to her, clause 2 of the agreement of sale is explicit that the appellant undertook to follow up the issue of the discharge of the title by Barclays Bank, notwithstanding that the agreement talked of both parties taking all relevant steps to obtain necessary consents to the transaction. In the circumstance of the agreement, subject of this appeal, it was the appellant to obtain consent of the bank to release the title documents to facilitate the sale between them since the property was charged to the bank which he failed to do. The trial Judge cannot therefore be faulted on his finding that on the record, the respondent having secured financing from Equity Bank to the tune of Kshs.14Million and demonstrated her readiness/willingness to fulfil her part of the bargain in terms of payment of the balance of the purchase price was not to blame for the collapse of the agreement of sale executed between them.

34. The Court is also invited to reject as unfounded the appellant's allegation that he requested the respondent to clear the revised bank loan as the same is not supported by any evidence on the record. Second, if this were the correct position as asserted by the appellant, there was no basis for his lawyer writing to the lawyer of Equity Bank that there were issues that the appellant was still sorting out with regard to the finalization of the release of the title documents to fruition the agreement of sale. Neither did the trial Judge misdirect himself when he ruled that payment of the balance of the purchase price was conditional to the appellant tendering to the respondent the title documents as this is the normal practice in transactions of this nature. Further, that the conclusions reached by the trial Judge on this issue convey the ordinary meaning in clause 2 of the agreement of sale which stipulated explicitly that it was the appellant who undertook to secure the release of the title documents from Barclays Bank. It is therefore not correct as contended by the appellant that there was no time limit within which to secure the release of the title documents as according to the respondent time was of the essence.

35. In response to ground (c), the respondent submits that the Judge's finding in her favour on this item was well founded on clause 3 of the agreement of sale which provided explicitly that it was the payment of rent by the respondent which was to cease upon payment of the balance of the purchase price of Kshs.15,000,000.00. Secondly, the appellant was "henceforth" to cease having any control on the whole plot with a rider that he would bring that to the attention of the other tenants. Thirdly, the appellant admitted on oath that upon signing of the agreement for sale, the respondent became both an intending purchaser and tenant in possession. Fourthly, that the developments subject of the proceedings were not there before and that the respondent carried out those developments as a purchaser, with the full knowledge of the appellant with the belief that she was doing so in her capacity as the purchaser. Fifthly, the appellant conceded that the developments were carried out by the respondent with his knowledge and approval. Neither did he challenge the value of the renovations as assessed by the valuer who gave evidence as PW2, nor tender his own valuation thereof to controvert hers. The respondent therefore urges this court to dismiss the appellant's appeal in its entirety.

36. The appeal before us is a first appeal. Our mandate as a first appellate court is to re-evaluate and re-analyze the evidence so as to draw out our own inferences of fact and to arrive at our own independent conclusions thereon as explicitly provided for in Rule 29(1) of the Court of Appeal Rules. In so doing, however, we are reminded by the applicable principles that we should be cognizant of the fact that unlike the trial court we did not have the benefit of hearing and seeing the witnesses testify and we should therefore give due consideration and defer to the learned trial Judge's factual findings, only to depart from them where there is demonstration that they are either based on no evidence, or that there is demonstrably on the record evidence of a misapprehension of the evidence or where the findings of the Judge are not supported by the evidence. See *Selle vs. Associated Motor Boat Co Ltd & Others* [1968] E.A. 123.

37. We have considered the record in light of the above mandate and the rival submissions and case law relied upon by the respective parties herein in support of their opposing positions. Only one issue falls for our determination, whether the conclusions reached by the trial Judge giving rise to the reliefs awarded to the respondent against the appellant were well founded both in law and fact and are therefore sustainable.

38. All the reliefs awarded to the respondent against the appellant have their genesis in the agreement of sale of the suit property executed between the respective parties herein on 5th October, 2007. The salient features of the same albeit in a summary form are that the sale was in respect of the suit property at an agreed purchase price of Kshs.18,000,000.00, Kshs.2Million was paid vide two bankers cheques Nos. 000072 and 000073 upon the execution of the said agreement of sale while Kshs.1Million was paid on 30th October, 2007. The balance of Kshs.15,000,000.00 was payable to the vendor within a period of ninety days from the date of the execution of the agreement of sale. The vendor undertook to follow up the issue of discharge of the title to the suit property by Barclays Bank. He was also to ensure that all fees, land rents and all other outgoings were paid to the relevant authorities to enable the transfer and registration to be effected in favour of the respondent as would be necessary.

39. As at the time of the execution of the agreement of sale, the purchaser was already in possession as a tenant paying rent to the vendor. Rent payment by the purchaser to the seller was to cease upon payment of the balance of the purchase price. The vendor was henceforth to cease having any control on the whole plot, a position he was enjoined to bring to the notice of all other tenants in the change of ownership of the suit property following which they would henceforth deal with the purchaser. There was provision that parties were to take all the relevant steps to obtain all the relevant consents to the transaction. There was also explicit provision vide clause (5) thereof that if any party failed to comply with any terms and/or conditions in the agreement of sale he/she would suffer liquidated damages in the sum of 20% of the purchase price and would also refund the other all expenses incurred pursuant thereto.

40. Those are the terms that the trial Judge not only construed but also considered in light of the totality of the record before arriving at the impugned conclusions that the appellant has invited us to vitiate and the respondent to affirm. They are the same terms that we are going to revisit, so as to construe on our own and decide either way, which we have accordingly done and now proceed to express ourselves thereon in so far as these affect the reliefs granted against the appellant and in favour of the respondent.

41. Starting with the relief for a refund of Kshs.3,000,000.00 paid as deposit in furtherance of the agreement of sale, it was correctly submitted by the respondent that the appellant's submissions were silent on this issue, a position the respondent has invited us to hold as a no contest and affirm the trial Judge's findings on this item which we accordingly hereby affirm.

42. Turning to the liquidated damages in the sum of Kshs.3,600,000.00, this was founded on clause 5 of the agreement of sale highlighted above. We appreciate that the trial Judge upon construction of the terms of the agreement on this issue and considering it in light of the rival positions on the record on this issue, indeed remarked that both parties were in breach of the agreement of sale. Our take on the above remark by the Judge is that it was simply based on the failure of either party to comply within the ninety (90) days completion period stipulated in the sale agreement. That finding in itself in our view did not bar the Judge from interrogating the circumstances under which the breach was occasioned in order to determine against which of the two contracting parties was to bear responsibility for that default.

43. On the record as assessed above, we find no basis for faulting the Judge on those conclusions and therefore decline the appellant's invitation for us to overturn those conclusions. Our reasons are, firstly, nowhere in his evidence in chief and submissions before this Court does the appellant state that he met his obligations under clause 2 of the agreement of sale. He is on record as saying that he was unable to meet his part of the bargain after successfully negotiating with the bank to revise the outstanding loan to Kshs.8.0 – 8.5Million. Neither is there any mention of the payment of all fees, rents, rates and all other out goings on the suit property in readiness for the completion of the agreement of sale executed between them. Secondly, we find no serious rebuttal of the respondent's assertion that she was always ready and willing to complete her part of the bargain and that it was the appellant who frustrated those efforts by his conduct of not fulfilling his part of the bargain.

44. As proof of this assertion, the respondent has drawn to our attention two communications forming the record before us. The first of these is a letter from Equity Bank ref WM/9/01/07/CV/EQ/085/07-03 dated 15th May, 2008 emanating from the appellant's advocates to the advocates of Equity Bank. They acknowledged receipt of the bank's communication to them dated 17th April, 2008. The contents are explicit that the subject of communication was the substratum of the agreement of sale executed between the disputing parties herein. It is appreciated that the respondent's advocate's letter of 17th April, 2008 as well as the appellant's advocates letter dated 15th May, 2018 were outside the stipulated ninety (90) days completion period. We however find these relevant to the issues in controversy herein as they go to demonstrate clearly the respondent's willingness to fulfill her part of the bargain under the said contract.

45. The appellant blames the respondent for the alleged failure to take advantage of the window Barclays Bank offered to him to pay off the outstanding loan to Barclays at the revised figure of Kshs.8.5Million. Nowhere, either in his evidence before the trial court, and submissions before this Court has he pointed out any evidence with regard to any communication demonstrating that he brought this to the attention of the respondent who failed to react to the same. What we have on record is communication from the bank to the appellant's advocate ref: WM/9/01/07/B20/044/2004D, B20/201/L/2005-D dated August 5, 2008 in further reference to communication the bank had written to the appellant of 30th May, 2008 giving the appellant a counter offer to repay the outstanding loan at Kshs.8.5Million notwithstanding that, this was outside the stipulated completion period. Nowhere is there proof that the appellant made any effort to salvage the agreement, either by seeking extension of time within which to comply on the one hand, orfacilitating the respondent with a view to enabling her to secure the financial facility from Equity Bank to complete the sale.

46. We also find no efforts made by the appellant to secure the necessary consents from the relevant authorities for the transfer of the suit property from himself to the respondent, notwithstanding that clause 3 in the agreement of sale in the manner framed tends to place an obligation on both parties to obtain the consents for the transaction. Further, proof of the respondent's willingness to complete the transaction of sale is a letter ref IM/GEN/08 dated 8th November, 2008 emanating from the

respondent's advocates to the appellant's advocate notifying them of the respondent's willingness to complete her part of the bargain, even at that point in time long after the 90 days' completion period had long lapsed. In it, the advocate blamed the appellant for the failure to secure the release of the title documents from the bank to facilitate the finalization of the transaction. Nowhere on the record has the appellant pointed out any response to that letter, pinning responsibility on the respondent for the collapse of the agreement of sale. In light of the totality of the above assessment and reasoning, we reiterate our earlier stand that the trial Judge's finding pinning responsibility onto the appellant wholly for the breach of the agreement of sale executed between them was well founded, both in law and in fact and we affirm the same.

47. Turning to the claim of Kshs.2,700,000.00, it is explicit from the record that this was awarded as the value of the renovations carried out on the suit property by the respondent in anticipation of the completion of the sale transaction between them. Besides her oral testimony that those renovations were carried out, the respondent tendered to court the testimony of PW2, a registered valuer who returned the value allowed by the court of Kshs.2,700,000.00 as the value of renovations carried out on the suit property.

48. Our take on the appellant's complaint on this issue is that it is based on his assertion that this claim should have been discounted for want of consent and or approval of the renovations both from him and Nakuru Municipality authorizing the respondent to carry out those works. The respondent's response to the above complaint is that she relies on clause 3 of the agreement of sale which indicated explicitly that from "henceforth" meaning that from the date of the execution of the agreement of sale and payment of the deposit of Kshs.3,000,000.00 which the respondent asserts was fully paid as at the time she commenced those renovations, she was to deal with the suit property as if she were the owner, a position not rebutted by the appellant. Clause 3 is part of the terms of the agreement of sale to which the appellant appended his signature. Nowhere either in his pleadings, testimony at the trial or submissions before this Court has he recanted appending his signature on the said agreement. The trial Judge cannot therefore be faulted for finding clause 3 binding on him, especially when he admitted on oath that indeed renovations were carried out by the respondent and that he raised no objection with her at the time those renovations were being carried out.

49. As for the issue touching on Nakuru Municipality, the appellant tendered no authority to complain on their behalf, nor to rebut the respondent's assertion on oath that she obtained all the relevant consents from Nakuru Municipality before carrying out those renovations. We find the trial Judge rightly discounted that purported complaint on behalf of Nakuru Municipality.

50. Having laid the basis for the claim, we now proceed to address the prerequisites for sustaining a claim of this nature, being a special damages claim. We take it from the decision of this court in *Hahn vs. Singh* [1985] KLR 716 for the holding, inter alia, that special damagesmust not only be claimed specifically but must also be proved strictly, with a caveat that the degree of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves. In this appeal, as we have already alluded to above, the respondent tendered evidence through PW2 a registered valuer. She admitted on oath that she did not have receipts to show the costs of the improvements. There was no further pressure for her to avail them. Neither did the appellant seek the court's authority to have these renovations valued by a valuer of his own choice. The trial Judge cannot therefore be faulted for allowing the same.

51. In the result, we find no merit in the appeal. It is accordingly dismissed with costs to the respondent both on appeal and at the trial.

DATED and DELIVERED at NAIROBI this 4TH of FEBRUARY, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR