IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, KIAGE & GATEMBU JJ.A)

CIVIL APPEAL NO. 98 OF 2018

BETWEEN

KAKAMEGA PAPER CONVERTERS LIMITED.....APPELLANT

AND

MOHANLAL ARORA.....1ST RESPONDENT

SUSHILA MOHANLAL ARORA.....2ND RESPONDENT

BANK OF BARODA (KENYA) LIMITED.....3RD RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi, Milimani Commercial Courts, Commercial and Admiralty Division, (Tuiyott, J.) delivered on 20th December, 2017

in

Commercial Case No. 91 of 2011)

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JUDGEMENT OF THE COURT

1. The appellant, Kakamega Paper Converters Limited, is a company incorporated in Kenya with its registered office at Kakamega from where it has carried on the business of manufacturing and sale of exercise books for many years. Intending to sell that business as a going concern alongside the premises where its factory is located, namely land parcel numbers Kakamega Town/Block 1/ 242, 243 and 244 (the land), it entered into an agreement for sale dated 26th July 2010 (the first agreement) with Mohanlal Arora, his wife Sushila Mohanlal Arora (hereafter "the 1st and 2nd respondents" or "the Arora's") and one Paspulati Jayasurvya Sunil Raj, who was the 3rd defendant in the lower court (hereafter *"Raj").*

2. Under that agreement, the Arora's and Raj agreed to purchase the appellant's business, its factory together with the three parcels of land on which it is located, as well as the buildings, plant and machinery, the raw material, stock and finished products for a price of Kshs.160,000,000.00 made up of Kshs.120,000,000.00 as the price for the land and Kshs.40,000.000.00 for the raw materials, stock and finished products.

3. On 26th August 2010, a month after entering into the first agreement with the appellant, the Arora's and Raj incorporated a limited liability company, East African Paper Converters Limited (EAPC) (the 4th defendant in the lower court).

4. By an agreement for sale dated 29th October 2010 (the second agreement) the appellant agreed to sell, and EAPC agreed to purchase the land, plant and machinery, raw materials, stock and finished products and vehicles for the price of Kshs.174,462,434.00 of which Kshs.51,000,000.00 was for the land; Kshs.69,000,000.00 for plant and machinery; and Kshs.54,462,434.00 in respect of raw materials, stock and finished products and vehicles.

5. Clause 3.3 of the second agreement provided that the appellant, as vendor, understood that EAPC was being financed for the purchase by a bank and that "*the proceeds of the said finance will be paid by the Purchasers' Bank to the Vendor's Bank and in the event of shortfall in the purchase price the parties shall settle the shortfall as between themselves*." In that regard, EAPC's bankers, Bank of Baroda (Kenya) Ltd, the

3rd respondent, (hereafter "the Bank" or "the 3rd respondent") agreed to extend a facility to EAPC for that purpose to be secured by a first legal charge over the land, among other securities to be provided by EAPC.

6. At the time, the land was charged to Kenya Commercial Bank Kenya Limited (KCB) to secure facilities extended to the appellant. By a letter dated 25th October 2010, the Bank irrevocably and unequivocally undertook to pay to KCB the sum of Kshs.120,000,000.00 to the account of the appellant within 14 days "from *the date of registration of the requisite transfers as aforesaid and subsequent registration of the Kenya Commercial Bank security in… favour*" of the Bank. To further give effect to that arrangement, the advocates for the two banks exchanged professional undertakings on the basis of which the title documents relating to the land were released to the advocates for the Bank. More on that later.

7. EAPC took over possession of the factory, the land, raw materials and stock from the appellant on 29th October 2010 in accordance with the second agreement and confirmed having done so by a letter of the same date addressed to the appellant.

8. Having taken possession, EAPC operated and run the factory for some time, until it discovered, according to the 1st respondent, that the appellant had misrepresented to it that the business was producing over 50,000 cartons of paper per year and was a profitable business. On 17th January 2011, the advocates for EAPC wrote a letter to the appellant's advocates thus:

> "*Our express instructions are to formally inform you that our client hereby rescind the agreement for sale. Our clients' shall be available to hand back the premises on the 26/1/2011 at 11.00 am. Please inform your client to avail a representative on the said date and time*."

9. The appellant protested. In a prompt response dated 19th January 2011, the advocates for the appellant informed the advocates for EAPC that:

> "*Our instructions are that the sale agreement has been performed by all parties who have executed all necessary documents and your clients have not only taken possession of the properties and control of the business which they are now running but they (your clients) have also made arrangements for the payment of the purchase price by issuing post-dated cheques and procuring Bank of Baroda Ltd to give an undertaking to pay the balance of the purchase price. All stocks, materials and vehicles were handed over and your client accepted possession after fully satisfying themselves as businessmen*."

They went on to state that the undertaking by Bank of Baroda must be honoured and neither the bank nor EAPC could get out of it.

10. Against that background, on 14th March 2011 the appellant instituted suit against the Arora's, Raj, EAPC and the Bank before the High Court at Nairobi contending that the purported rescission of the agreement for sale was wrongful. In the suit, the appellant sought judgment as against EAPC for: specific performance of the second Agreement; the sum of Ksh.51,462,429.63 and interest thereon being the values of the postdated cheques issued to but subsequently stopped; a declaration that the purported rescission of the second agreement is invalid and of no consequence.

11. As against the Arora's and Raj, the appellant sought an order to compel them to "carry out their promise and assurances" to the appellant and procure EAPC to fulfill its obligations under the second agreement. In the alternative and or in the event of EAPC not paying or being unable to pay for whatever reason the sums claimed against it, an order for the Arora's and Raj to pay the same to the appellant.

12. As against the Bank, the appellant sought an order to compel it to honour its undertaking by paying the sum of Kshs.120,000,000.00 plus interest thereon in accordance with the undertaking dated 25th October 2010.

13. In defence the Arora's denied the appellant's claim asserting that they were improperly joined in the suit as they were not privy to the second agreement. On its part, EAPC averred that it was induced by the appellant's fraudulent misrepresentations to enter into the second agreement; that the appellant misrepresented that its business was profit making when in fact it was loss making; and that the appellant purported it could transfer a property in the name of Kabras Millers Limited when that company was not privy to the agreement. EAPC counterclaimed against the appellant and sought a declaration that its rescission of the agreement was in those circumstances lawful.

14. The Bank in its defence also denied the appellant's claim. It averred that it could not disburse the funds it agreed to lend to EAPC unless and until the transfer of the assets the subject of the agreement for sale were fully effected; and that as the transfer of the immoveable properties did not take place, conditions precedent to the maturity of its undertaking to pay were not realized and consequently liability could not attach to it.

15. At the trial Pipat Panachot Shah, a director of the appellant testified on behalf of the appellant. Mohanlal Arora testified on his own behalf and on behalf of his wife the 2nd respondent as well as on behalf of EAPC. Dennis Onyoti testified on behalf of the Bank. After considering the evidence and submissions the learned trial Judge identified five issues for resolution: whether the contract forming the subject of the dispute is the first or second agreement; whether the appellant breached the contract; whether EAPC was entitled to rescind the contract; whether the Arora's, Raj, EAPC and the Bank or any of them are liable to the appellant; and whether the Bank is liable under the terms of its undertaking.

16. Addressing those issues, the Judge held that the second, as opposed to the first agreement was the operative one; that there was no evidence that the appellant breached the agreement and EAPC was therefore not entitled to rescind the contract; that the Arora's were not privy to the second agreement and therefore not liable; and that as the land was never transferred to EAPC, the Bank was not liable for breach of undertaking. Consequently, the Judge entered judgment in favour of the appellant against EAPC; ordered EAPC to specifically

perform its obligations under the second agreement; and dismissed the appellant's suit as against the Arora's, Raj and the Bank.

17. The appellant is dissatisfied with that part of the judgment that dismissed its claims as against the Arora's, Raj and the Bank. EAPC has cross appealed contending that the holding by the trial Judge that the rescission of the agreement was wrongful is erroneous. During the hearing of the appeal, the parties were represented by learned counsel. ***Mr. A.B. Shah*** and ***Mr. L. Kimondo*** appeared for the appellant. ***Mr. W.A. Amoko*** and ***G. Dar*** appeared for the Arora's and EAPC. ***Ms. Kamunya*** appeared for Bank of Baroda.

18. For the appellant, it was submitted that the Judge erred in dismissing its suit against Arora's, Raj and the Bank; that the first agreement was between the appellant as vendor and the Arora's and Raj as purchasers; that Arora's and Raj informed the appellant that their bank, the Bank, was not comfortable in extending loan facilities to individuals whereupon EAPC was incorporated to take over the obligations of the Arora's and Raj under the transaction; that based on assurances and promises made by the Arora's and Raj to the appellant that they would ensure EAPC would perform and fulfil its obligations, the appellant agreed to forego the first agreement and entered into the second and executed a deed of substitution and discharge.

19. It was submitted that the first agreement was novated for the second agreement in consideration of the Arora's and Raj repeatedly promising and assuring the appellant that they would ensure EAPC would perform its obligations under the second agreement.

20. The appellant urged that having fulfilled its obligations under the second agreement by handing over possession of the plant to EAPC; having forwarded the completion documents including executing discharges of charge over the land, the learned trial Judge correctly held that EAPC wrongly attempted to rescind the agreement but erred in dismissing its claim against the Arora's and Raj; that EAPC has no attachable assets and the decree against it is *"in vain"* unless the Arora's are ordered to ensure that EAPC obeys the decree; and that the Judge was wrong in concluding that the Arora's and Raj could not be held liable without lifting the veil of incorporation considering that they were parties in the suit and *"were parties to novation of the first agreement for the second agreement."*; that the Arora's and Raj instigated the substitution of the second agreement for the first one and all the appellant requests is for the Court to direct the Arora's and Raj to honour the terms of the novation and carry out their promise and assurance to the appellant to procure EAPC to fulfil its obligations.

21. According to counsel, the Judge erred in holding that the first agreement was discharged absolutely; that breach of the terms of the novation restores the parties to their previous position whereby the first agreement of 26th July 2010 is reinstated; that the Judge erred in failing to find that the pleadings and the evidence tendered by the Arora's did not in any way answer or rebut the appellant's case against them; that while on the one hand the Arora's claimed to have rescinded the agreement on account of alleged misrepresentations, it emerged at the trial that the real reason for purporting to do so was because of lack of experience in manufacturing business and had to cease the business after Raj ran away.

22. As regards the Bank, it was submitted that as EAPC was ordered to specifically perform the second agreement, the Bank is contractually liable to finance EAPC; that a binding contract was formed when the Bank made an offer for a loan which EAPC accepted; that the Bank never cancelled the loan contract but was merely prevented from performing by EAPC; that the Bank is estopped from not financing EAPC in the purchase; that the Bank led the appellant to believe that it would finance the transaction and the appellant relied on and acted on the Bank's assurance and undertaking and changed its circumstances; that it would be unjust and inequitable for the Bank to deny that it contracted and undertook to finance EAPC and is estopped from going back on its undertaking.

23. In opposition to the appeal it was urged for the Arora's and for EAPC that the holding by the Judge that the second substituted the first agreement is well founded; that simultaneously with the second agreement, a deed of substitution and discharge was executed with the result that the first agreement stood extinguished; that the contention by the appellant that the Arora's gave assurances regarding performance of the second agreement by EAPC is baseless and an attempt to subvert the established company law principle of corporate legal personality, a principle that cannot be gotten rid of, it was urged, for convenience of execution. It was urged that whereas lifting the corporate veil may be justified in certain cases, the appellant did not establish in the court below that the Arora's used the veil of incorporation to abuse corporate legal personality or that EAPC was incorporated in order to evade enforcement of a legal obligation.

24. It was submitted that the argument by the appellant that the second agreement came about by novation of the first agreement is not supported by the facts; that the first agreement was discharged by express agreement after fulfilling its role to *"secure the deal"* in anticipation of incorporation of EAPC; that the argument based on novation is an attempt to impose obligations on the Arora's from which they were discharged by reason of the deed of substitution and release; and that no evidence was led to support the claim that the second agreement was entered into on the basis of any assurances by the Arora's. Furthermore, it was submitted, novation was not pleaded and was not an issue for determination before the trial court; and that parties are bound by their pleadings "*which in turn limits the issues upon which a trial court may pronounce*" as held by the Court in ***Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others [2014] eKLR***.

25. As regards the complaint that the evidence tendered by the Arora's did not in any way answer or rebut the appellant's case against them, it was submitted, on the authority of the decision of this Court in ***Charterhouse Bank Limited (Under Statutory Management) vs. Frank N. Kamau [2016] eKLR***, that evidentiary burden remained with the appellant to establish its case; that the failure by the 2nd respondent to testify did not lessen the appellant's evidentiary burden to adduce credible and believable evidence to prove the alleged assurances by the Arora's as inducement for the second agreement dated 29th October 2010.

26. Regarding the appellant's complaint that the Judge erred in failing to hold the Bank liable, it was submitted that the undertaking by the Bank was given to the appellant's bankers, KCB, and the appellant was not privy to it; that under the doctrine of privity of contract as applied in the case of ***Waruhiu K'Owade & Ng'ang'a Advocates vs. Mutune Investment Limited [2016] eKLR***, that undertaking could not be enforced against the Bank at the instance of the appellant.

27. In support of the cross appeal by EAPC that the Judge erred in holding that the rescission of the second agreement was wrongful and in ordering it to specifically perform the same, it was submitted, based on the decision of this Court in ***Gharib Suleman Gharib vs. Abdulrahman Mohamed Agil LLR No. 750 (CAK) Civil Appeal No. 112 of 1998***, that the jurisdiction to order specific performance is based

on the existence of a valid and enforceable contract; that in this case there was no longer a valid and enforceable contract that would form the basis of an order of specific performance following the withdrawal of financing by the Bank.

28. It was argued that under Clause 3.3 of the second agreement, the transaction was subject to financing as a pre-condition and the withdrawal of financing by the Bank resulted in failure of that precondition with the result that there was no longer a valid and enforceable contract which would form the basis of an order of specific performance. It was submitted that the rescission by EAPC on 17th January 2011 was preceded by the withdrawal of the financing by the Bank on 8th January 2011 and the Judge was wrong in finding that the Bank pulled out of the transaction because EAPC called off the transaction. Citing the case of ***Billey Oluoch Okun Orinda vs. Ayub Muthee M'Igweta & 2 others [2017] eKLR*** where the Court stated that specific performance may be refused where it will cause severe hardship, it was also urged that an order for specific performance in this case, in the absence of financing, would cause severe hardship to EAPC.

29. It was submitted further that in light of clause 3.3 of the second agreement, the Judge should have held that there was an implied condition precedent for the appellant to supply EAPC with financial statements; that the evidence by the 1st respondent that the appellant refused to provide him with financial statements was uncontroverted and the Judge should therefore have found the agreement was conditional and unenforceable at the election of the innocent party. The case of ***Wagichengo vs. Gerald [1988]] eKLR*** was cited.

30. Counsel also faulted the Judge for admitting parol evidence from the Bank's witness which, according to counsel, contradicted the terms under which the Bank offered the loan facility to EAPC; and that it was therefore not open to the Judge to find that the facility was granted on preliminary assurances that were at variance with the terms in the letter of offer.

31. On behalf of the Bank, the 3rd respondent, it was submitted that the trial Judge correctly held that the undertakings in question are not enforceable by the appellant; that in its undertaking dated 25th October 2010, it undertook to release the amount of Kshs.120,000,000.00 to KCB upon registration of the discharges, transfers and fresh charges in its favour; and that the intention behind the requirement for successful registration of the discharges, transfers and fresh charges in its favour was to secure its interests as well as those of KCB. The case of ***Arthur K. Igeria t/a Igeria & Co Advocates vs. Michael Ndaiga [2017] eKLR*** was cited.

32. It was urged that the conditions that required to be fulfilled before the Bank could be called upon to release the said amount were not fulfilled; that the Bank would only have released the said amount once the charges in its favour were effected; and that once the sale was rescinded, the need for security to be perfected in favour of the Bank was negated and registration was automatically frustrated; that KCB's interests remained protected upon reinstatement of the earlier charges over the land in its favour. It was urged that the claim by the appellant that the Bank colluded with EAPC to rescind the agreement was wholly baseless and no evidence in support of that allegation was tendered.

33. In opposition to the cross petition by EAPC counsel for the appellant submitted that the finding by the trial court that EAPC unlawfully attempted to rescind the agreement with the appellant is well founded; that as a result of that wrongful rescission, the Bank was prevented from financing the purchase; that the claim that the appellant failed to supply financial statements causing the Bank to withdraw financing is baseless as the requirement to supply financial statements was contained in the Banks letter of offer to EAPC; it was EAPC therefore, not the appellant, that was required to furnish statements to the Bank, it was urged. Moreover, it was argued, the agreement for sale expressly provided that EAPC entered into the agreement with the appellant out of its own independent enquiry and market survey and not out of any representations made by the appellant. It was submitted that contrary to the claim by EAPC that the Bank withdrew financing, the truth is that EAPC directed the Bank not to pay.

34. As regards clause 3.3 of the agreement, it was submitted that the same merely reiterated the appellant's understanding that the Bank had agreed and undertaken to finance EAPC in the purchase. The clause did not impose any condition on the appellant to furnish its financial statements to the Bank as contended by EAPC.

35. In submissions in reply, counsel for the appellant reiterated that what the appellant seeks from the Court is an order to compel the Arora's, as directors and shareholders of EAPC, to honour their promises and assurances they gave the appellant that they would ensure that EAPC would perform its obligations under the agreement with the appellant; that no hardship or prejudice would be occasioned if the Arora's are compelled to do that which they promised to do; and that the appellant does not thereby seek a lifting of the veil of incorporation as misapprehended by the 1st to 3rd respondents.

36. In relation to the Bank, it was submitted for the appellant that the Bank represented to the appellant that it would finance the purchase of its business; that relying on that representation, the appellant entered into the agreement with EAPC; that the appellant is not, as misapprehended by the Bank, seeking to enforce the Bank's advocates undertaking; that in relation to the Bank's undertaking of 25th October 2010 to KCB, no evidence was produced to show that any of the documents presented for registration were rejected; that the appellant acted fully upon that undertaking, transferred its business and sent all security documents to the Bank's advocates; that the Bank took advantage of a wrongful rescission by the EAPC and is bound to release the amount of Kshs.120,000,000.00 to the appellant.

37. We have considered the appeal, the cross appeal and the submissions. The issues arising for determination are: whether the Judge erred in concluding that the rescission of the second agreement was wrongful and in ordering EAPC to specifically perform the same; whether the Judge erred in dismissing the appellants claim against the Arora's and Raj; and whether the Judge erred in holding that the Bank is not liable to the appellant and that its obligations to complete the registration of its securities and to release the loan proceeds ceased upon rescission of the agreement. In addressing those issues, we are cognizant of our duty as a first appellate court. We are at liberty to part company with the conclusions reached by the trial court and to draw our own conclusions should our review and analysis of the evidence lead us to do. (See ***Selle vs Associated Boat Co [1968] E.A. 123***).

38. We begin with the question whether the Judge erred in concluding that the rescission of the agreement between the appellant and EAPC was wrongful and in ordering EAPC to specifically perform the same. In that regard, the trial Judge expressed: ***"This Court is unable to see any breach on the part of Kakamega Paper and holds that EAPC was not entitled to rescind the contract."***

39. As is clear from the foregoing narration, the appellant entered into the first agreement for sale with the Arora's and Raj under which it agreed to sell, and the Arora's and Raj agreed to purchase the land *"together with all the buildings, plant, machinery, raw materials, stock and finished products"* for a price of Kshs.160,000,000.00 made up of Kshs.120,000,000.00 as the price for the land and Kshs.40,000.000.00 for the raw materials, stock and finished products. The completion date under that agreement was 30th September 2010.

40. Under clause 3.2 of that agreement it was agreed that on completion the appellant would transfer the property sold into the name of EAPC (In formation) and that such transfer would constitute a complete discharge of the appellant's obligations to the Arora's and Raj. Clauses 3.3 and 3.4 of that agreement stipulated that the purchasers, Arora's and Raj, *"are in the process of incorporating EAPC in which they will be shareholders and directors"* and that the appellant *"understands that the Purchasers are being financed for this purchase by a Bank. The proceeds of the said finance will be paid by the Purchasers' Bank to the Vendor's Bank and in the event of shortfall in the purchase price the parties will settle such shortfall as between themselves."*

41. Clause 15.1 provided that *"this agreement and conditions constitute the entire agreement between the parties"* and may only be varied or modified in writing and that save as to such written statements of the appellant in answer to preliminary enquiries prior to the making of the agreement, the purchasers had not entered into the agreement in reliance wholly or partly on any other statement or representation made to it.

42. It is evident from that agreement therefore that the parties thereto intended, as early as July 2010, that the business and property of the appellant would be transferred and taken over by EAPC once it was incorporated. Just over a month after entering into that agreement, EAPC was duly incorporated and a certificate of incorporation to that effect was issued by the Registrar of Companies on 26th August 2010.

43. Approximately two months later, the appellant entered into the second agreement with EAPC on 29th October 2010 for the sale of the land, plant and machinery, raw materials, stock and finished products and vehicles with a different price structure from the first agreement. Of the total price of Kshs.174,462,434.00, the amount of Kshs.51,000,000.00 was for the land; Kshs.69,000,000.00 was for plant and machinery; and Kshs.54,462,434.00 was in respect of raw materials, stock and finished products and vehicles.

44. On the same date, i.e. 29th October 2010, the appellant and EAPC executed a deed of Substitution and Discharge in which they "*mutually agreed to substitute*" the agreement for sale made on 26th July 2010 "*with a new one thereby discharging themselves from the terms of the said agreement of 26th July 2010*". That Deed provided further:

> "a) *The Vendor and the purchaser hereby agree and declare that the agreement of 26th July 2010 has been brought to an end.*
>
> *b) The vendor and purchaser substitute and /or replace the agreement of 26th July 2010 with the agreement for sale dated 29th October 2010*."

45. It is however noteworthy that Arora's and Raj as the purchasers under the first agreement were not privy to that Deed which might perhaps explain why the trial Judge did not give the Deed much weight.

46. It is hardly surprising that the completion date under the second agreement was set to be 30th October 2010, the day following the execution of thereof. Evidence shows that by that time, all that required to have been done under the agreement had been done except for the payment of the purchase price.

47. Evidence shows that: by a letter of offer dated 16th September 2010, the Bank offered EAPC banking facilities including a term loan for Kshs.120,000,000.00 to be secured by a first charge over the land EAPC was purchasing from the appellant; on 27th September 2010, the advocates for the Bank wrote a letter to the advocates for KCB to which the land was charged for facilities extended to the appellant with a view to redeeming the same; that upon confirmation that the redemption amount due to KCB was Kshs.120,000,000.00, the advocates for the Bank requested for the title documents in respect of the land from the advocates for KCB on the basis of a professional undertaking given on 4th October 2010; on 21st October 2010, the appellant confirmed to EAPC that the payment for the raw materials and finished product stock would be paid for by equal instalments commencing January 2011 to June 2011 and EAPC was to issue postdated cheques to the appellant on takeover; that on 25th October 2010 the Bank wrote a letter directly to KCB undertaking to pay to it the said amount of Kshs.120,000,000.00 within 14 days from the date of registration of transfers in favour of EAPC and charge in its favour; and that by a letter dated 29th October 2010 addressed to the appellant, EAPC confirmed *"having received possession of all land, building, plant and machinery, raw material stock and finished good and vehicles*" as per the agreement of sale dated 29th October 2010.

48. Subsequently, KCB executed Discharges of Charge over the land and the same were forwarded to the advocates for the Bank in order to perfect the Bank's securities in respect of the facilities it was extending to EAPC.

49. The first sign of trouble with the transaction was when the advocates for EAPC wrote a letter to the advocates for the appellant on 21st December 2010. That was a couple of months after EAPC had taken over the operations of the appellant. In that letter, EAPC complained that the prices of the raw materials it purchased from the appellant were *"far in excess of the market price"* and that it was unable to sell the finished products at any reasonable price or margin. EAPC therefore required a rescheduling of the payments in respect of which it had issued postdated cheques to the appellant.

50. Less than a month later the advocates for EAPC wrote a letter to the advocates for the appellant on 17th January 2011 purporting to rescind the agreement for sale and requesting for the return of all cheques EAPC had issued to the appellant. The letter read in relevant part:

> "*Our express instructions are to formally inform you that our clients' hereby rescind the agreement of sale.*

Oue clients' shall be available to hand back the premises on the 26/1/2011 at 11.00am. Please inform your client to avail a representative on the said date and time.

Further for purposes of avoiding acrimony we suggest that our respective clients do not communicate with each other. All communications should be between the advocates."

Of note, no reasons were stated in that letter for the rescission.

51. In a quick rejoinder two days later, in a letter dated 19th January 2011, the advocates for the appellant stated that it was rather late in the day for EAPC to purport to rescind the agreement. The relevant part of the letter was that:

"Our instructions are that the sale agreement has been performed by all parties who have executed all necessary documents and your clients have not only taken possession of the properties and control of the business which they are now running but they (your clients) have also made arrangements for payment of the purchase price by issuing post-dated cheques and procuring Bank of Baroda Ltd to give an undertaking to pay the balance of the purchase price. All stocks, materials and vehicles were handed over and your client accepted possession after fully satisfying themselves as businessmen.

Similarly land, buildings, plant (all machinery and equipment) were duly assessed by your clients who were satisfied prior to accepting full possession thereof.

Accordingly rescission is no longer available to your client and our clients will not attend any handing over "ceremony" on the 26th instant or at all.

As your clients have decided not to honour the cheques, our clients will forthwith take action in respect thereof."

52. Shortly thereafter the advocates for the Bank who had already registered the Discharges of Charges executed by KCB in respect of the land requested the land registry to reverse the entries and reinstate KCB's securities. This was done, and on 20th January 2011, the advocates for the Bank returned the title documents in respect of the land to the advocates for KCB and later requested the appellants to retake possession of its business.

53. The question is whether, in those circumstances, EAPC was entitled to rescind the agreement as it sought to do. Many years gone, Bowen L. J observed in ***Mercy Steel and Iron Co. vs. Naylor Benzon & Co (1882) 9 Q. B. D. 648, 671*** that "***a fallacy may possibly lurk in the use of the word 'rescission'***".

In **Black's Law Dictionary**, 8th edition rescission is defined as ***"a party's unilateral unmaking of a contract for a legally sufficient reason, such as the other party's material breach, or a judgment rescinding the contract."***

54. As already noted, EAPC did not in its advocates letter of rescission dated 17th January 2011 give any reason at all for its purported action. The appellant had practically performed all its obligations under the agreement for sale, handed over its operations and surrendered the title documents in respect of the immoveable properties with a view to transferring them to EAPC and charging them to the Bank.

55. EAPC belatedly attempted to justify its action in its advocate's letter dated 21st January 2011 by asserting that the appellant's director misrepresented that sales of the business *"topped 50,000 cartons"*. In its statement of defence, EAPC averred that the appellant had through Raj, who acted as its agent, orally and fraudulently represented that the business of the appellant was profit making business when in truth the business was making losses; and that the misrepresentations were made fraudulently. The particulars of fraud pleaded were that the appellant was purporting to transfer a property in the name of Kabras Millers Limited to EAPC when it was not privy to the agreement; that it was purporting to sell plant and machinery that did not belong to it; that the agreement would be completed in a day; and that the appellant would be able to perform its obligations.

56. EAPC did not present any evidence at all to support those claims. In any case the claims could not stand in light of the express stipulation in clause 15.1 of the agreement that:

"This Agreement and the conditions constitute the entire agreement between the parties and may only be varied or modified whether by collateral contract or otherwise in writing under the hands of the parties or their advocates. The Purchasers acknowledge that save as to such (if any) of the written statements of the Vendor in answer to preliminary enquiries prior to the making of this Agreement as were not susceptible of independent verification by inspection and survey of the Property search and enquiring of the local and other public authorities or inspection of the documents disclosed to the Purchasers (and whether or not such inspection survey search and inquiry have been made) and have been relied on by the Purchasers they have not entered into this Agreement in reliance wholly or partly on any other statement or representation made to it."

57. Therefore, we are fully in agreement with the conclusion reached by the trial Judge that the purported rescission of the agreement was invalid and wrongful.

58. We turn to the question whether the Judge erred in dismissing the appellants claim against the Arora's and Raj. As already indicated, the first agreement was between the appellant as vendor and the Arora's and Raj as the purchasers. At the time, EAPC was in formation. As noted, that agreement provided that on completion, the business and assets of the appellant would be transferred to EAPC. After incorporation of EAPC, the second agreement was entered into between the appellant and EAPC on the clear terms that it was in substitution of the first agreement.

59. The Arora's and Raj were not privy to the second agreement in respect of which the appellant sought an order for specific performance. As the editors of **Chitty on Contracts**, Volume 1 state at paragraph 18-133, under the doctrine of privity of contract and as a general rule, a contract binds only the parties to it. The appellant states that the Arora's and Raj gave assurances that they would ensure EAPC would discharge its obligations under the second agreement. That assertion is however negated by the express terms of the second agreement, the disclaimer, to the effect that the *"agreement and the conditions constitute the entire agreement between the parties"*. Consequently, we agree with the conclusion reached by the trial Judge that liability against the Arora's and Raj was not established.

60. The last issue is whether the Judge erred in holding that the Bank is not liable to the appellant. From the onset it was clear to the appellant that the purchase was being financed by a bank. The appellant's acknowledgment of that fact is contained in clause 3.3 of the agreement to which we have already made reference. As indicated, the Bank offered to extend banking facilities to EAPC for that purpose by a letter dated 16th September 2010 on condition that the same would be secured by a first charge over the land that EAPC was purchasing from the appellant and a floating debenture over the entire moveable assets.

61. To give effect to that arrangement, the Bank's lawyers got in touch with the lawyers for the appellant who were also acting for KCB to whom the land was then charged. Two separate, but linked undertakings were then issued in order to facilitate the process. The first undertaking was by the Bank's lawyers in relation to the handling of the documents. It was given on 4th October 2010 to the lawyers for KCB. In that undertaking, L.G. Menezes Advocates requested Wasuna & Company Advocates to facilitate the release of the security documents held by KCB in order for the transfers to EAPC to be undertaken alongside the registration of securities in favour of the Bank to secure the banking facilities being extended to EAPC. L.G. Menezes Advocates undertook to hold the documents to the order of Wasuna & Company Advocates returnable on demand and that immediately upon the registration of the Discharge of Charge discharging the KCB securities and the Charge in favour of the Bank securing facilities to EAPC, they would notify KCB of such registration. In the same letter, L.G. Menezes Advocates informed Wasuna & Company Advocates that, "*we are arranging to forward to your client Bank an undertaking from our client Bank in relation to the sums of monies owing*."

62. The second undertaking was by the Bank given directly to KCB.

It was contained in a letter dated 25th October 2010. The relevant part of that letter was as follows:

> *"We propose to take over the Deeds of Title, the Original Charge and other related documents (hereinafter collectively referred to as "the Title Documents") created in your favour over title numbers Kakamega Town/Block 1/242 and 243 registered in the name of M/s Kakamega Paper Converters Limited and Kakamega Town/Block 1/244 registered in the name of M/s Kabras Millers Limited (hereinafter referred to as "the Kenya Commercial Bank Security") and request that you agree to execute the relevant discharge documents with respect to the Kenya Commercial Bank Security.*
>
> *In consideration of you executing the relevant discharge documents discharging the Kenya Commercial Bank Security, we hereby irrevocably and unequivocally undertake to you that we shall within 14 [fourteen] days from the date of registration of the requisite transfers as aforesaid and subsequent registration of the Kenya Commercial Bank Security in our favour pay to you the sum of 120,000,000/= [Kenya Shillings One Hundred and Twenty Million] being the agreed settlement sum outstanding with respect to the Borrower's credit facilities with you through Real Time Gross Settlement (RTGS)…*
>
> *In the event that the aforementioned amount is not paid as stipulated above, we agree to indemnify you and hold you harmless for any loss or expense including payment of the aforementioned amount being the total agreed settlement sum outstanding in the Borrower's credit facilities."*

63. Thereafter the title documents held by KCB alongside the Discharge of Charge duly executed by KCB were released to the Bank's lawyers. However, by the time the appellant handed over possession its property to EAPC on 29th October 2010, the process of registration had yet to be done. The witness for the Bank, Dennis Onyoti stated in his evidence that the Bank was informed by the advocates that the agreement for sale had been rescinded after which the Bank, with instructions from its customer EAPC, made the decision to cancel the loan facility and the registration of the Dicharge of KCB Bank's security cancelled and KCB Bank's security reinstated.

64. The question is whether, in those circumstances, the Bank be compelled to pay to the appellant the amount of Kshs.120,000,000.00? We do not think so. For a start, the undertaking was given to KCB. It was not given to the appellant. We doubt that it could be enforced at the instance of the appellant. Secondly, as far as the Bank is concern, the transaction the subject of the finance fell through and as the trial Judge correctly stated once the Bank was informed that the sale was rescinded, whether rightly or wrongly is immaterial for this purpose, the Bank was under no further obligation to complete the registration of its securities and to disburse the loan proceeds. Thirdly, the conditions precedent to the Banks obligation to pay as stipulated in the letter of undertaking, namely the transfer of the land and registration of securities in the Bank's favour had not been fulfilled.

65. All in all, we have no basis for interfering with the decision of the trial court. The learned Judge was right in holding that the purported rescission of the agreement for sale by East Africa Paper Converters Limited was wrongful and in ordering it to specifically perform the agreement. He was also right in holding that Mohanlal Arora, Sushila Mohanlal Arora and Bank of Baroda are not liable to the appellant. The appeal and the cross appeal are devoid of merit and are hereby dismissed. The appellant shall pay costs of the appeal to the Arora's and to the Bank, the 1st, 2nd and 3rd respondents. We make no orders as to costs of the cross appeal.

Orders accordingly

Dated and delivered at Nairobi this 5th day of June, 2020.

M. WARSAME

……..……

JUDGE OF APPEAL

P.O. KIAGE

……

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

……

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR