IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: E. M. GITHINJI, ASIKE-MAKHANDIA & P. KIAGE, JJ.A)

CIVIL APPEAL NO. 61 OF 2016

BETWEEN

SAMUEL NGIGE KIARIE ....APPELLANT

AND

NJOWAMU CONSTRUCTION

COMPANY LIMITED... 1ST RESPONDENT

STEPHEN NJOROGE MUHINJA............................. 2ND RESPONDENT

(An appeal from the Judgment of the Environment and Land Court of Kenya at Nairobi (Gacheru, J), dated 30th September, 2014

in

ELC No. 382 of 2008)

****

JUDGMENT OF THE COURT

The appellant herein is the registered proprietor of LR No. 76/784 situated within Thindigua in Kiambu District (the suit land). An agreement dated 8th June 2007 was entered into between the appellant and the respondents for the sale of the suit land together with all developments thereon at the purchase price of Kshs. 9,000,000. The 2nd respondent is the Managing Director of the 1st respondent and was residing in a house erected on the suit land. The agreement stipulated that the 1st respondent had paid a deposit of Kshs. 4,000,000, taken possession of the suit land as a tenant at a monthly rent of Kshs. 20,000. Further that the balance of the purchase price was to be paid in two equal instalments of 2,500,000 each; the first one was payable on or before 30th June 2007 and the final one on or before 30th August 2007.

Clause 3 of the sale agreement stated that late payments of the purchase price would attract a penalty of Kshs. 25,000 per month until full payment. Pursuant to the said agreement, the 1st respondent paid a total of Kshs. 4,500,000 towards the purchase price whilst continuing to pay the monthly rent when the appellant, through a letter dated 28th September 2007, reviewed the monthly rent to Kshs. 50,000 and expressed his intention to sale the suit land to another buyer since the respondents had allegedly breached the agreement. The respondents responded through a letter dated 17th October 2007 protesting that as the 1st respondent was a purchaser in possession, having paid half of the purchase price the question of review of rent did not arise. They also declared that they would not be cooperating to allow access by 3rd parties to the premises.

The payment of Kshs. 180,000 for rent between the period of September 2007 to December 2007 and the penalty thereon was paid on 17th March 2008. By a letter dated the 7th April 2008, the appellant wrote to the respondents requiring them to vacate the suit land on the grounds that the respondent had purportedly terminated the agreement for sale. Previously on 3rd April 2008, the appellant instructed M/s Recovery Concept, to levy distress for rent. They attached a motor vehicle registration No. KAZ 745B, a Mitsubishi pickup which was valued at Kshs.1,550,650 together with the 2nd respondent’s household goods. The distress was for purported rent arrears of Kshs. 225,000.

The 1st respondent on 17th July 2008 forwarded a cheque for Kshs. 225,000 on account of the purported arears of rent but the appellant flatly refused to accept the same. This provoked the suit that was filed in the High Court with the respondents contenting that they were ready, able and willing to complete the sale and had on several occasions offered the balance of the purchase price to the appellant who however had failed, refused and/or neglected to facilitate the completion by way of proffering the requisite statutory completion documents to the 1st respondent to allow completion. They prayed for the following orders:

a) Specific performance of the agreement for sale dated the 8th June, 2007.

b) In the alternative and without prejudice to (a) above, the sum for Kshs.4.5 million paid to the Defendant under the said agreement for sale together with interest thereon at Court rates from the said 8th June, 2007 until payment in full.

c) General damages for breach of contract of sale dated the 8th June, 2007.

d) Kshs.2,015,904/= being the value of motor vehicle Registration No. KAZ 745 B together with interest thereon from the 11th June, 2008 until payment in full.

e) General damages for loss of use of motor vehicle KAZ 745 B.

f) General damages for coercion.

g) Exemplary and or aggravated damages.

h) Costs of this suit and interest thereon

The appellant filed a defence and counterclaim, which was later amended, stating that the parties had entered into an initial agreement on 1st September 2006 which the 1st respondent breached. The parties thereafter entered into the agreement of 8th June 2007, referred to herein, which the 1st respondent similarly breached by failing to pay the full purchase price.

It was the appellant's contention that the tenancy agreement was part and parcel of the sale agreement and was hinged on the condition that the 1st respondent would perform its part of the sale agreement. Further, that the 1st respondent refused, failed and or neglected to pay the balance of the purchase price as stipulated in the agreement and after the said breach, the rent was enhanced to Kshs. 45, 000 per month which both parties assented to.

The appellant complained that long after the completion period had elapsed, the 1st respondent still made no effort at all to perform its obligations as per the sale agreement. As a result, on the 4th March 2008, the appellant through his advocate wrote to the 1st respondent and issued it with a 21 days' notice, within which to complete the payment of the purchase price, failing which the agreement would be terminated. The 1st respondent ignored, failed, and or refused to respond or to honour the notice and therefore, the agreement was duly terminated upon expiry thereof. The appellant explained that he had to instruct auctioneers to levy distress for rent since the 1st respondent had failed, neglected and /or refused to pay Kshs. 225, 000 rent arrears despite demand. The distress was legally carried out by the auctioneers after 1st respondent was issued with the due notice. The said motor vehicle was sold for Kshs. 430,000 through a public auction and an account of the same was rendered to the 1st respondent through a letter dated 6th August 2008. The cheque for Kshs. 225,000 forwarded by the 1st respondent which purported to settle the rent arrears was returned as it had already been overtaken by events.

In his Counterclaim, the appellant reiterated that since the 1st respondent breached the agreement despite notice, the sale agreement was legally terminated. He expressed his willingness to refund the money paid by the 1st respondent less 10% of the purchase price as was stipulated in the sale agreement. The appellant had taken the necessary steps and deposited the said money into an interest-earning account held by the respective advocates to the parties herein. The appellant contended that the breach by the 1st respondent had lost him the opportunity to invest the sale proceeds and he thus suffered damage. The appellant also lost the market rate of his investment. Additionally, the respondents lodged an illegal caveat against the suit land. The appellant prayed for;

a) Vacant possession of all that property known as LR NO. 76/784 Thindigua Kiambu District failure to which eviction will issue.

b) General damages for breach of contract

c) General damages for lodging of illegal caveat thus encumbering the Defendant's property.

d) Mesne profits at the market rate from 1st September, 2006 up to the date of the Plaintiffs shall accord the Defendant the vacant possession or for such other period as the court may decide.

e) Caveat registered against the suit property be removed.

f) Costs of this suit

It is worth noting that during the pendency of the suit, Kihara, J ordered the respondents to deposit the balance of the purchase price into an account operated jointly by the parties' advocates and to continue to pay the rent of Kshs. 20,000 per month into the said account.

The matter proceeded to full hearing with both sides tendering oral testimonies. The learned Gacheru, J considered the matters before her, the submissions and authorities cited and delivered a judgment on 30th September 2014 in which she granted prayer (a) of the respondent's Plaint and dismissed the appellant's Counterclaim.

Being aggrieved by that judgment of the court, the appellant filed the instant appeal on 7 grounds which contained complaints that the learned Judge erred in law and fact by;

(a) Holding that clause 3 acted as a saving clause.

(b) Holding that the sale agreement was not legally terminated despite the appellant having served a 21 days' notice and as a result the 1st respondent was entitled to lodge a caveat.

(c) Finding that the appellant was not entitled to vacant possession because he allowed the respondents to remain on the suit land after the completion date and continued receiving the monthly rent thereafter.

(d) Failing to award the appellant damages since he failed adhere to the full terms of the agreement.

(e) Ordering for specific performance and dismissing the appellant's counterclaim. When the appeal came up for hearing, learned counsel **Mr Macharia** appeared for the appellant while **Mr Mola** his learned counterpart appeared for the respondents. All the parties filed written submissions and authorities in support of their cases.

Mr Macharia submitted that the 1st respondent was not entitled to the equitable remedy of specific performance against the appellant since it failed to honour its obligation under the sale agreement. That failure to perform part of the contract constituted a failure to perform the whole contract. On this, he relied on the decision made by this Court in **SISTO WAMBUGU V KAMAU NJUGUNA [1983] eKLR**.

Counsel further submitted that the 21 days' notice and the notice to vacate issued by the appellant both served as reasonable notice considering that the same was given at least 6 months after the completion date which was 30th August 2007. Thus time was of the essence and the appellant was entitled to terminate the contract notwithstanding the provision of clause 2. Counsel cited **GURDEV SINGH BIRDI & ANOTHER AS TRUSTEES OF RAMGHARIA INSTITUTE OF MOMBASA V ABUBAKAR MADHBUTI [1997] eKLR** for the proposition.

The learned counsel concluded by asserting that it would be unlawful and unreasonable to interpret a penalty clause as a saving clause which granted the 1st respondent unlimited time to pay the purchase price. The correct position is that once a purchaser breaches the payment clause and inordinately fails to pay the purchase price over a considerable period of time, the vendor reserved the right to terminate the contract upon service of a notice thereof. The appellant having served upon the 1st respondent two notices, he had the right to legally terminate the contract. He urged the Court to allow this appeal.

Mr Mola for the respondents concurred with the learned judges finding of the existence of the saving clause in the agreement whose effect was that in the event of late payment, a penalty of Kshs. 25,000 per month was payable until the full purchase price was paid. Thus the late payment did not lead to the termination of the contract and the judge was correct in giving effect to that clause.

It was argued that time was not of the essence since the subject was non-perishable. Further that as a general rule, time becomes of the essence when parties or the subject matter stipulates it and that the agreement did not make such a stipulation. On the contrary clause 3 demonstrates that time was not of the essence. That the said 21 days' notice had no legal effect as it was received after the expiry of the said 21 days. It therefore, did not constitute as sufficient notice.

It was further submitted that the contract did not terminate after the completion date since the contract did not have a fixed life term. The completion notice dated 7th April 2008 did not amount to a termination of contract. Moreover, since the respondents did not vacate and the appellant continued receiving rent, that conduct negated the cause and effect of the letter. He sought the Court to be persuaded by the holding in **DAVIS MOSE GEKARA V HEZRON NYACHAE [2012] eKLR**.

Additionally, clause 3 was an indication that the parties had no intention for the agreement to terminate on the completion date of 30th August 2007. The appellant by his conduct also evinced that the contract did not terminate on the completion date as he never refunded the 1st respondent the purchase price less 10% as per the provision in clause 5. On the contrary, he continued to receive rent and the penalties as stipulated in the contract until the 4th March 2008 when he demanded the full purchase price. In light of the foregoing and given the 1st respondent's willingness to complete the payment of the purchase it was entitled to the order of specific performance as awarded by the court.

Having considered the appeal and the rival submissions in light of the entire record we have distilled the following as the issues for determination; whether the lack of payment of the full purchase price by 30th August 2007 terminated the contract and the effect of clause 3 thereof; whether the appellant was entitled to vacant possession; whether the respondents were entitled to an order of specific performance; and whether the appellant was entitled to damages.

It is not disputed that the parties herein entered into two contracts over the suit land. The subsequent agreement which is subject of this appeal clearly stipulated in clause 2 that the balance of the purchase price was to be paid in two equal instalments, and the latter being payable on or before 30th August 2007. In the same agreement, the contested clause 3 provided that;

> ***"Should the Purchaser be late in paying the balance of the Purchase Price as set out in Clause 2 hereinabove, the same shall attract a penalty equivalent to Kshs. 25,000/- per month until full payment."***

The learned judge stated that the foregoing clause was open-ended as it had no indication of when the payment in full would be achieved. She further found that although the 1st respondent did not pay the purchase price on time and defaulted on its obligations, clause 2 served as a saving clause that allowed it to pay the penalty per month. That since the appellant accepted that penalty, he could not turn around and allege that the sale agreement had been breached. The appellant disputed this finding and stated that the said clause was a penalty clause and was not intended to give the 1st respondent unlimited time to pay the purchase price.

The Court must then satisfy itself on what the disputed clause 3 meant in order to determine whether the learned judge erred in her interpretation of the same. This Court is persuaded by the finding by this Court in Malindi in **SUN SAND DUNES LIMITED V RAIYA**

CONSTRUCTION LIMITED [2018] eKLR;

> ***"The object of construction of terms of a contract is to ascertain its meaning or in other words, the common intention of the parties thereto. Such construction must be objective, that is, the question is not what one or the other parties meant or understood by the words used. Rather, what a reasonable person in the position of the parties would have understood the words to mean."***

It is trite law that parties to a contract are bound by the terms and conditions stipulated therein. That is the case in the instant appeal since the facts confirm that the parties acknowledged having entered into the agreement for the sale of the suit land. None complained of fraud or coercion and they are accordingly bound by its terms. This what this Court had in mind in **NATIONAL BANK OF KENYA V PIPEPLASTIC SAMKOLIT (K) LTD & ANOTHER [2001] eKLR**;

> ***"The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved."***

We thus proceed on the basis that the agreement was lawfully entered into by the parties and therefore legally binding on all of them. This leaves us with the burden of its interpretation. We must reiterate that the general rule of interpretation is to ascertain and give effect to the intention of the parties as it is that intention that was crystallized in writing in the agreement.

Looking at the literal interpretation of clause 3 it is clear that the parties had intent to impose a penalty of Kshs. 25,000 on the 1st respondent in the event of a delay in the payment of the two instalments of the balance of the purchase price. Like many other contracts that foresee certain contingencies that may come up during the pendency of the agreement that may force a purchaser to delay in remitting the funds on time, such a clause is put in order to safeguard the vendor from losses incurred as a result of the delay. It also serves as a deterrent to the purchaser not to inordinately delay in remitting the required payments.

It is our considered view that a penalty clause cannot be considered as a saving clause since the non-payment of the full purchase price as stipulated in a contract automatically renders the agreement immediately voidable and accordingly terminable at the instance of the innocent party. It cannot be said to remain valid on the strength of payment of penalties because penalties are not part of the purchase price. Moreover, that clause cannot be read in isolation, because, in order to give the full effect of the agreement, we must look at it as whole. Clause 5 provides that;

> ***"Should there be frustration of this Agreement by either party, the party in default shall pay the affected party a penalty equivalent to 10% of the purchase price. For avoidance of doubt, should the purchaser fail to conclude the transaction he shall be refunded his money less 10%...."***

Similarly, clause 9 provides;

> ***"There shall be no variations of the terms of this Agreement and should the Purchaser fail to comply with clause 3 herein the Vendor may enforce eviction after 30th August without any notice whatsoever."***

From the above, it can be deduced that the intent of the parties was that failure to pay the purchase price would lead to the termination of the agreement. Such termination was not affected by continuity of payment of penalties or the lack of payment of the monthly rent. The termination of the agreement was tied to the default of payment of the full purchase price. We therefore take the respectful view that the learned judge misconstrued the meaning and intent of the parties by concluding that clause 2 was a saving clause. It cannot be the case that as long as the 1st respondent continued to pay the rent and the penalties accruing, the agreement survived automatic termination and remained perpetually open, free of timelines. The intent of the parties is paramount in the interpretation of provisions of an agreement as courts must be faithful to give them effect. It was held in **SAVINGS AND LOAN KENYA LIMITED V MAYFAIR HOLDINGS LIMITED [2012] eKLR**;

> ***"….Therefore, 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."***

We think the learned judge erred in not giving effect to the parties' intentions.

The learned judge further held that the sale agreement did not expressly stipulate that time was of the essence and neither was it subject to the Law Society of Kenya conditions of sale section 4 (2)

(a). While the respondents affirmed the finding of the learned judge, the appellant was of a contrary view that once it issued the 21 days completion notice and the vacation notice, time became of the essence. He contended further that irrespective of the provisions of the agreement, those notices expressly invoked timelines as to when the purchase price should be paid in full thereby injecting time with essence.

Halbury's Laws of England 4th Edition Volume 9 paragraph 481 explains the circumstances within which time which was previously not of essence, will be considered as of essence unless:

> ***"(1) the parties expressly stipulate that condition as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of essence; or (3) a party who has***

been subjected to unreasonable delay gives notice to the party in default making time of the essence."

The issue is further elucidated in Halbury's Laws of England, 3rd Edition volume 8 on page 165 that;

> ***"In cases where time is not originally of the essence of the contract; or where a stipulation making time of the essence has been waived, time may be made of the essence where there is unreasonable delay, by notice from the party who is not in default fixing a reasonable time for completion and stating that in the event of non-completion within the time so fixed he intends to enforce or abandon the contract. But the time fixed must be reasonable having regard to the position of things at the time when the notice was given, and to all circumstances of the case."***

The foregoing well explains that the issuance of notice by the aggrieved party serves to make time of the essence in circumstances where a contract did not expressly provide for it.

In **DAVID MOSES GEKARA V HEZRON NYACHAE [2012] eKLR**, for instance the Court was persuaded with the holding in **NJAMUYA V NYAGA [1983] KLR 282** which stated;

> ***"….where it was emphasized that in case where it is not stipulated in the contract that time is of the essence, the notice must be given to the defaulting party and that notice is what will make time to be of essence. It is also clearly stated there that the notice must also give a defaulting party a reasonable time within which to rectify the default."***

From the record herein we note that the date stipulated within which the final instalment of Kshs. 2,500,000 was to be made on 30th of August 2007. The first notice sent by the appellant to the respondents issuing a 21 days' notice was dated 4th March 2008, six months after the lapse of the completion date. From the proceedings of the High Court, the 2nd respondent testified that he did not see the said letter on time as he received it on 9th April 2008. There is however a letter dated 7th April 2008 in which the appellant refers to the respondents' lack of response to the previous letter. He then proceeds to give yet another 21 days' notice of the termination of the contract and to demand that the respondents vacate the suit land within 30 days.

We are of the considered view that the 6 months lapse after the completion date constituted an unreasonable delay and the two letters served on the respondents were sufficient notice. They rendered time of the essence in this instance and the learned judge erred in finding the contrary. It is safe to state that the said agreement was legally terminated after the lapse of the 21 days' notice and therefore the appellant was entitled to vacant possession.

The learned judge erred in finding that a constructive trust was created in favor of the respondents. She expressed herself as relying on this Court's decision in **MACHARIA MWANGI MAINA & 87 OTHERS V DAVIDSON MWANGI KAGIRI [2014] eKLR**. This case is easily distinguishable as the facts on which it was grounded were totally different attracting different legal consequences.

The learned judge further erred in finding that the agreement did not legally terminate and that the respondents were always willing and able to meet their end of the bargain. We find that respondents were not able and not willing to pay the purchase price prior to coming to court because they were equally unable to meet the timelines set by the court for the deposit of the balance of the purchase price hence sought time extension for compliance of the same. Therefore the respondents were playing hide and seek with the appellant and were hoping to buy more time by filing suit so that they could get payment from some alleged construction work done for the Judiciary whose payment they claimed had delayed.

The law and its process cannot be used to circumvent express agreements between parties nor can it be used as a delaying tactic. The 1st respondent had no right to register the caveat as his rights over the suit land had ceased at the point of termination of the contract. The respondents did not sufficiently demonstrate that they were deserving of an order of specific performance as they had not satisfied their obligation as per the agreement, which was full payment of the purchase price. We endorse what was held in **SISTO WAMBUGU V KAMAU NJUGUNA [1983] eKLR**;

> ***"In my judgment the respondent cannot come to the court and obtain an order of specific performance of the agreement, unless he had performed his part of the bargain or can show that he was at all times ready and willing to do so."***

Ultimately this appeal succeeds. We set aside the judgment of the High Court in entirety. The caveat registered against the land is also hereby lifted. The appellant shall have costs of this appeal and of the court below.

Dated and delivered at Nairobi this 21st day of June, 2019

E. M. GITHINJI

....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

....

JUDGE OF APPEAL

P. O. KIAGE

....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR