IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, J. MOHAMMED & KANTAI, JJ. A)

CIVIL APPEAL NO. 29 OF 2017

BETWEEN

GEORGE NJENGA KAGAI.....APPELLANT

AND

SAMUEL KABI NJOROGE.....1ST RESPONDENT

REVEREND PIUS TEMBO MANGOLI

REVEREND PETER NUTHU MWANGI

TRUSTEES OF THE KENYA

ASSEMBLIES OF GOD, NAIROBI.....2ND RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya, at Nairobi (R.E. Ougo, J.) dated 23rd January, 2015

in

HCCC No. 1103 of 2004)

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JUDGMENT OF ASIKE-MAKHANDIA, JA

The appellant, **George Njenga Kagai** sued the 1st respondent, **Samuel Kabi Njoroge** for breach of contract by way of an amended plaint dated 22nd November, 2012. He alleged that he entered into a sale agreement with the 1st respondent on 26th and 27th, July 2003 respectively for the purchase of all that piece or parcel of land known as **Dagoretti/Riruta/4170** (hereinafter, the "**suit land")** measuring 0.25 acres at a consideration of Kshs. 2,100,000/=. A down payment of Kshs. 100, 000/= was agreed upon and paid. The balance of the purchase price was to be paid in instalments. It was further agreed that the 1st respondent was to sign the transfer form in favour of the appellant on receipt of the down payment and also pay all outstanding bills with regard to water, electricity, land rent and rates. As at 30th January, 2004, the appellant had paid the 1st respondent a sum of Kshs.430, 000/= as part payment of the purchase price. In turn the appellant and 1st respondent obtained the necessary consent from the Land Control Board for the area, (hereinafter the "**board").** The agreement had further stipulated the completion period to be between 90 – 120 days from the date of execution of the sale agreement.

However, on 24th August, 2004 the 1st respondent without any probable cause sought to repudiate the agreement and declined any further payments of the balance of the purchase price from the appellant, acts which the appellant deemed malicious breach of contract. The 1st respondent then sold the suit land to the 2nd respondent who immediately took possession and have remained therein to date. The appellant termed the sale of the suit premises to the 2nd respondent void since no consent to the transaction had been obtained from the board. The appellant further contended that the sale agreement between the respondents dated 27th August, 2004 was in any event time barred and that the occupation of the suit land by the 2nd respondent was therefore illegal. The appellant claimed further that he was ready and willing to complete his part of the bargain and sought orders of; specific performance to compel the 1st respondent to complete his part of the sale agreement; an order directing the 2nd respondent to vacate the suit land; general damages and costs of the suit. In the alternative the appellant prayed for a full refund of the purchase price paid to the 1st respondent with interest at the rate of 30% per annum from 29th July, 2003 until

payment in full.

The 1st respondent in answer to the claim, admitted that there was a sale agreement but the same was premised on time being of the essence with the completion date being within 90-120 days as the 1st respondent needed that money urgently to take his son to study overseas. That the outstanding balance was to be paid in instalments of not less than Kshs. 500,000/= per tranche. That repudiation of the contract was inevitable as the appellant paid unreasonable amounts in instalments over time. The 1st respondent denied having refused further payment from the appellant or obtaining consent from the board. He alleged that the appellant was in breach of the sale agreement having failed to pay the agreed purchase price within the completion period. Having repudiated the agreement, the 1st respondent was nonetheless agreeable to refund the appellant whatever he had paid him.

The 2nd respondent on its part denied any knowledge of the alleged breach of the agreement alleged by the appellant since at the time it entered into the sale agreement with the 1st respondent, the appellant was not in the picture. That the agreement between it and the 1st respondent was subject to the 1st respondent giving a clear title without encumbrances and thus any sale agreement between the appellant and the 1st respondent was unknown to it. It asserted that the sale of the suit land to it by the 1st respondent was valid and that consent of the board was not necessary as the suit land did not fall within an agricultural area. That the appellant lodged a caution on the suit land in December 2004 and vanished which made it impossible for the 1st respondent to transfer the suit land to it. The 2nd respondent therefore sought orders; that the appellant's suit be dismissed; an order be directed at the appellant to cease interfering with the 2nd respondent's occupation, use and enjoyment of the suit land; an order of specific performance compelling the 1st respondent to fully effect the sale transaction between it and the 1st respondent; and costs of suit.

The evidence as adduced before the trial Court in a nutshell was that, the appellant upon realization that the 1st respondent was in the process of selling the suit land to the 2nd respondent, registered a caution on the suit land to protect his interests. He stated that he continued paying the purchase price even after the expiry of the completion period which money was received and acknowledged by the 1st respondent. According to him therefore the condition of time being of essence was waived. That in any event, the sale agreement did not specifically provide that time was to be of the essence. He testified further that the 1st respondent had failed to pay the electricity and water bills within the completion period as agreed and that the 2nd respondent entered the suit land sometime in 2004 and was still in occupation thereof. That the 2nd respondent failed to conduct an official search on the suit land before entering into the sale agreement with the 2nd respondent for if it had done so, it would have realized that there was a caution registered on the suit land. That the suit land was situate in a controlled area and as such the respondents ought to have obtained consent from the board. That the outstanding balance of Kshs. 1,670,000/- was being held by his advocate which he was ready and willing to surrender to the 1st respondent.

The 1st respondent on his part, testified that the purchase price was agreed at Kshs. 2, 100,000/= and the appellant was to make a down payment of Kshs. 1,000,000/= and the balance thereof was to be paid in instalments. He denied signing the sale agreement and could not state for a fact that the signature appearing thereon was forged or not. He emphasized that the completion period was 90 days and this period was not extended. He admitted that on diverse dates he received amounts totaling to Kshs.430, 000/- past the completion date from the appellant. He claimed that he issued the appellant with a notice of his intention to rescind the sale but had no proof as the file was stolen when his offices were broken into sometimes in 2008. He asserted that the only time he went before the board was in 1993 when he was selling a different parcel of land to the appellant. He stated that the appellant registered a caution on the suit land on 25th March, 2004 while he was still negotiating with the 2nd respondent.

The 2nd respondent in its defence through **Pastor Pius Tembo Mangoi**, its Secretary and trustee testified that the 2nd respondent had been approached by the 1st respondent between March – May 2004 with regard to the purchase of the suit land. They agreed on purchase price of Kshs. 2,000,000/=. They entered into an agreement dated the 27th August, 2004 and having paid the full purchase price took possession of the suit land and have remained therein since August 2004. He claimed that they were not aware that the suit land had been sold to the appellant but admitted that they had not carried out an official search before entering the sale agreement as they had been assured by the respondent that the title was clean.

Wawire, a pastor of the 2nd respondent in his testimony reiterated what pastor Mangoi aforesaid had testified to and urged the court to find that the purchase was legal and allow the 2nd respondent to continue occupying the suit land.

The learned Judge in her judgment observed; that there was an agreement between the 1st respondent and the appellant for the sale of the suit land. The agreement provided that the purchase price was to be Kshs. 2,100,000/= and the appellant was to pay a deposit of Kshs.100, 000/= on signing the agreement and the balance thereof was to be paid within 90-120 days. It was the Court's view that time was made of the essence by the agreement. That the consent relied upon by the appellant from the board was obtained a month prior to entering into the sale agreement while ordinarily such consent is obtained after a sale agreement has been executed and within 6 months pursuant to section 8 of the Land Control Act. The learned Judge observed further that the appellant admitted to have only paid Kshs. 430,000/= of the purchase price and did not complete payment of the balance thereof. That after the lapse of the completion date, the appellant lodged a caution on the suit land and then vanished. That on 27th August, 2004 the 1st respondent entered into a sale agreement with the 2nd respondent for the sale of the suit land who then paid him the entire purchase price of Kshs. 2,000,000/=. In a bid to have the caution lifted so as to enable the 1st respondent transfer the suit land to the 2nd respondent, the 1st respondent invited the appellant to collect the sum of Kshs. 380,000/= which he had paid by then. However, the appellant stated that he had the whole purchase price and was ready and willing to complete his part of the sale agreement though this turned out to be a ruse. It was the learned Judge's further finding that the appellant was not ready to complete the transaction and had therefore approached the Court with unclean hands and therefore undeserving of the prayers sought. The Court then ordered the 1st respondent to refund the appellant the sum of Kshs. 430,000.00/= paid without interest, the appellant having been the author of his own misfortune. She ordered for the removal of the caution registered by the appellant and the 1st respondent was allowed to sign the relevant forms and make the relevant arrangements to transfer the suit land to the 2nd respondent subject to payment of the balance of the purchase price. On the whole therefore, the appellant's suit was dismissed with costs to the 1st respondent.

With regard to the 2nd respondent, the court took the view that it was an innocent purchaser for value who should be allowed quiet enjoyment of the suit land. She directed the appellant to cease interfering with its occupation, use and enjoyment of the suit land. In the end the suit against the 2nd respondents was dismissed with costs as well.

The appellant was aggrieved by the decision of the trial Court hence the present appeal premised on ten grounds which in summary are that the learned Judge erred in fact and in law by; failing to consider the effect of payments made and received by the 1st respondent outside the completion period; failing to hold that the 1st respondent by accepting the late payment waived his right to insist on completion period; failing to hold that the 1st respondent was obliged to make time of the essence of the contract by issuing notice to that effect; validating the contract entered between the respondents when the same had not received the consent of the board; declaring the 2nd respondent as purchaser for value without notice when there was no evidence on record to support such a finding; ordering the transfer of the suit land in favour of the 2nd respondent when there was no counter-claim filed seeking such orders; ordering the refund of part-payment of the purchase price to the appellant without interest; failing to hold that the appellant was entitled to an order of specific performance; failing to consider and apply correctly the authorities cited by the appellant which authorities were relevant and binding; and dismissing the appellant's suit when evidence on record was in his favour.

During case management, parties agreed to dispose of the appeal by way of written submissions. At the plenary hearing, **Mr. Manyara, Mr. Rutto** and **Ms. Nyakiana,** learned counsel appeared for the appellant and respondents respectively. They all relied on their written submissions which they briefly highlighted.

Mr. Manyara submitted that on the basis of the sale agreement between the appellant and the 1st respondent, time was never made of the essence. There was a completion period, which period was waived when the 1st respondent accepted part payment of the purchase price outside the said period. He faulted the learned Judge for recording evidence on payments outside the completion period but failed to pronounce herself on the same. Counsel contended that a completion notice giving reasons for repudiation ought to have been issued before the rescission of the agreement which was not done in this case. Accordingly, there still existed a contract between the appellant and the 1st respondent capable of being enforced by an order of specific performance.

On whether the 2nd respondent was a purchaser for value and without notice, counsel submitted that the 1st respondent had knowledge of the caution lodged on 25th March, 2004 and still proceeded to enter into a sale agreement of the suit land with the 2nd respondent five months later. That the 2nd respondent failed to exercise due diligence by conducting a search of the suit land before entering into the sale agreement and therefore, the doctrine of purchaser for value without notice would not apply in its favour. Counsel further faulted the learned Judge when she failed to rely on authorities cited to her which were binding and issued orders in favour of the 2nd respondent when there was no counter-claim. The learned Judge was also faulted for failing to make a finding on the legal effect of lack of consent when she decreed the transfer of the suit land to the 2nd respondent contrary to section 9 (2) of the Land Control Act which declared such transactions void.

Opposing the appeal, Mr. Rutto submitted that the appellant was never in a position to conclude the transaction and the learned Judge was right when she observed that the appellant had only paid a minimal amount. Counsel contended that the appellant's prayer for specific performance was unavailable on account of indolence as he only made efforts to pay the balance of the purchase price 12 years later. That the conduct of the appellant left a lot to be desired. He had not come to court with clean hands and therefore an order of specific performance being an equitable remedy could not issue in his favour.

Ms. Nyakiana observed that the 2nd respondent was a purchaser for value and without notice at the time it entered into the agreement with the 1st respondent and that time was of the essence in the agreement between the appellant and the 1st respondent. That the learned Judge did not err in validating the contract between the respondents. That the sale of the suit land to it was not time barred contrary to the submissions of the appellant as the 12 year limitation period had not run its course. That the appellant failed to establish a prima facie case to warrant grant of the orders sought in his plaint.

We have considered the record, the written and oral submissions by respective counsel and the law. The issues that stand out for determination are whether; time was of the essence in the contract between the appellant and the 1st respondent; whether there was breach of contract; whether the sale agreement between the appellant and the 1st respondent was validly rescinded; whether the 2nd respondent was an innocent purchaser for value and without notice and therefore entitled to the orders sought without a counter-claim; and whether the trial Court erred in failing to pronounce itself on specific performance.

This being a first appeal, this Court is, as a matter of law, enjoined to analyze and re-evaluate afresh all the evidence adduced before the trial Court and to draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See the case of **Mwangi v Wambugu [1984] KLR 453**.

With regard to time being of the essence, the principles as set out by this Court in the case of **Sagoo v Dourado (1983) KLR 366** are as follows:

> ***"In contracts of all types, time will not be considered to be of essence unless: -***
>
> ***(i) The parties expressly stipulate that conditions as to time must be strictly complied.***
>
> ***(ii) The nature of the subject matter of the contract or the surrounding circumstances show that time should be considered of the essence, and/or***

(iii) A party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence."

Similarly, in the case of **Njamunya v Nyaga (1983) KLR 282** this Court emphasized that in the case where it is not stipulated in the contract that time is of essence, notice must be given to the defaulting party and that notice is what will make time to be of essence. It is also a requirement that such notice must give a defaulting party a reasonable time within which to rectify the default. Further, in **Elijah Kipkorir Barmalel & Another v John Kiplagat Chemweno & 3 others (2010) eKLR** this Court held that:

> ***"…although the parties to a sale agreement upon which a consent has been obtained may choose to terminate it in the absence of an express agreement on time being of essence, notice must be served on the defaulting party before any assertion can be made that time was of essence".***

In this appeal, we have carefully looked at the sale agreement between the appellant and the 1st respondent, and note that there was no express stipulation that time was of the essence save for the completion period of between 90-120 days. The nature and surrounding circumstances of this case did not show that time was of the essence. Neither was notice given to the respondent in writing about the alleged default. In **Halbury's Laws of England, 4th Edition, Volume 9 at paragraph 485** it is stated that:

> ***"In case where time is not originally of essence of the contract or where a stipulation making time of the essence has been waived, time may be made of essence where there is unreasonable delay by a notice from the party who is not in default fixing a reasonable time for performance…".***

It is not in dispute that the appellant failed to pay the balance of the purchase price within the completion period, however that did not void the contract as there was no express condition in the sale agreement that late payment would lead the contract being voided. In any case, when the appellant fell behind in payment of the balance of the purchase price, the 1st respondent took no steps to enforce the agreement. The appellant continued making payments which the 1st respondent gladly acknowledged long after the completion period of 90-120 days had expired. The conduct of the 1st respondent in accepting late payment from the appellant after the completion period had lapsed showed that the 1st respondent condoned the delay and in the premises waived the condition of time being of essence if at all. We note also that when the delay became prolonged, the 1st respondent failed to give notice in writing to the appellant making time of the essence. Instead he wrote a letter to the 1st respondent whose sole intention was to cause the appellant to lift the caution to enable him transfer the suit land to the 2nd respondent and nothing more.

As regards repudiation, Chitty **on Contracts 27th Edition Volume 1 General Principles, Sweet & Maxwell 1994 at page 102** the author states that:

> ***"At law, time is always of the essence of the contract when any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will be for breach of it----stipulations as to time were generally of the essence of the contract, so that a party could treat the contract as repudiated if the other party's performance was not completed on the date stipulated by the contract".***

In **William Kazungu Karisa v Cosmas Angore Chanzera [2006] eKLR** this Court held that**:**

> ***"The basic rule of the law of contract is that the parties must perform their respective obligation in accordance with the terms of the contract executed by them".***

The appellant contends that the 1st respondent rescinded the agreement for sale without issuing notice and reasons for the repudiation and therefore the said action was not valid. The 1st respondent alleged to have informed the appellant that he wanted to use the money to send his son overseas for further studies but there is no proof of that at all. It was not in the agreement. In **Chitty on Contract 29th Edition Vol. – General Principles 12.096** describes the principle that:

> ***"It is often said to be a rule of law that if there be a contract which has been reduced to writing, verbal evidence is not allowed to be given ... so as to add to or subtract from, or in any manner to vary or qualify the written contract ... The rule is usually known as the "parol evidence" rule. Its operation is not confined to oral evidence: it has been taken to exclude extrinsic matter in writing such as drafts, preliminary agreements and letters of negotiation. The rule has been justified on the ground that it upholds the value of written proof the finality intended by the parties in recording their contract in written form and eliminates great inconvenience and troublesome litigation in many instances."***

It follows that the 1st respondent could not purport to rescind the contract on the grounds that the appellant failed to pay the balance of the purchase price, to enable him take his child overseas for further studies. We note that no other steps, save for the consent of the Land Control Board were taken to transfer the suit land to the appellant. Guided by the case of **Cassam v Sachania [1982] KLR 191** where Law JA held that:

> ***"Time was not of essence of the contract in respect of payment of the balance of the purchase price so as to justify the repudiation of the agreement of sale by the appellants. The obligation as to payment of the balance of the purchase price was to pay the balance upon the execution of the transfer. The appellants have never executed the transfer and it was not open to them to declare the agreement null and void on the ground that payment of the balance of the purchase price was not made".***

In **Sisto Wambugu v Kamau Njuguna [1983] eKLR** the Court held 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 essence or if it is not after a party who is in default has given reasonable notice to the defaulting party making time of essence".***

Thus, it was incumbent upon the 1st respondent to serve the appellant with notice before he could validly rescind the sale agreement. In a nutshell, the agreement for sale was not legally rescinded.

On whether the 2nd respondent was an innocent purchaser for value and whether it was entitled to the orders sought without a counter-claim, **Black's Law Dictionary 9th Edition** defines a bona fide purchaser as:

> ***"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."***

Similarly, in **Katende v Haridar & Company Limited [2008] 2 E.A.173** the Court of Appeal in Uganda held that:

> ***"For the purposes of this appeal, it suffices to describe a* bona fide *purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fid* e *doctrine, … (he) must prove that:***
>
> ***(a) he holds a certificate of title;***
>
> ***(b) he purchased the property in good faith;***
>
> ***(c) he had no knowledge of the fraud;***
>
> ***(d) he purchased for valuable consideration;***
>
> ***(e) the vendors had apparent valid title;***
>
> ***(f) he purchased without notice of any fraud;***
>
> ***(g) he was not party to any fraud."***

In this appeal, though the 1st respondent held title to the suit land, he had knowledge that a caution had been lodged on the same. He proceeded to sell the suit land to the 2nd respondent knowing very well that he could not pass a good title to it by virtue of the caution. However, he never disclosed this fact to the 2nd respondent. We note that the transfer had not been effected to the appellant. Similarly, the 2nd respondent has been in occupation of the suit land having paid the full purchase price. It has been in occupation since 2004. It was admitted in evidence that no search was conducted by the 2nd respondent before entering into the sale agreement with the 1st respondent as they relied on the word of mouth of the 1st respondent to a clean title. This is not strange given that the 2nd respondent is a church. No consent was obtained from the board though according to the respondents, the suit land was not situate in a controlled area. This evidence was not seriously challenged by example tendering in evidence a gazette notice indicating that the area was a controlled area. In any event if the consent was necessary, it would not have been possible since the appellant had lodged a caution on the suit land. The appellant took no steps to assert its interest in the suit land once the 2nd respondent took possession of the same. In the premises we are in agreement with the holding by the trial court that the 2nd respondent was an innocent purchaser for value without notice, On specific performance, the appellant sought the said order against the 1st respondent. Specific performance, like any other equitable remedy, is discretionary and the Court will only grant it on well settled principles. The order of specific performance can only issue based on the existence of a valid and enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. **Halsburys Laws of England (4th Edition) at paragraph 487 vol. 44** states that:

> **"A plaintiff seeking specific performance must show that he has performed all the terms of the contract which he has undertaken to perform whether expressly or by implication and which ought to have been performed at the date of the writ in the action. However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance or is in default in some non-essential or unimportant term although in such cases it may grant compensation"**

In **Gurdev Singh Birdi and Marinder Singh Ghatora and Abubakar Madhbuti, Civil Appeal No. 165 of 1996** this Court stated thus:

> "Gicheru, JA (as he then was): ***When the appellants sought the relief of specific performance of sale of the respondent's property...they must have been prepared to demonstrate that they had performed or were ready and willing to perform all the***

terms of the agreement...which ought to have been performed by them and indeed that they had not acted in contravention of the essential terms of the said agreement… It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed...a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action. However, this rule only applies to terms which are essential and considerable. Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim…The moment the plaintiff went into equity, and asked for specific performance, and it was proved that he himself was guilty of the breach of contract.....the court of equity would refuse to grant specific performance and would leave the parties to their other rights…When the appellants came to court seeking the relief of specific performance of the agreement, they had not performed their one essential part of the agreement. Namely: payment of the balance of the purchase price of the suit property. Indeed, right up to the conclusion of the proceedings in the superior court, they had not done so. In these circumstances, no court of equity properly directing its mind to the same would have considered it just and equitable to grant them the equitable relief of specific performance of the agreement with a view to doing more perfect and complete justice".

On his part Tunoi, JA (as he then was) said:

"However, the appellants' conduct has been such as to render it inequitable for specific performance to be granted...There was no evidence that prior to the filing of the suit the applicants tendered the balance of the purchase price to the respondent. This only confirms that they were never ready, able and willing to carry out their part of the contract. Secondly, the appellants simply could not raise the balance of the purchase price on or before the specified time and were in fact in breach of the agreement. Thirdly, the nature of the property and the surrounding circumstances make it inequitable to grant the relief of specific performance. The contract not having been completed within the period fixed for completion, it would be oppressive, unjust and financially injurious to require the respondent, who has not been guilty of laches nor inordinate delay, to part with his property, more than four years after the event when its current value has materially appreciated".

The above observations by Gicheru and Tunoi, JJA, above are on all fours with the circumstances obtaining in this case. The appellant as is quite apparent was not in a position to pay the balance of the purchase price or indeed conclude the transaction. Instead he registered a caution on the suit land and vanished from the scene. It had been 12 years since the agreement but the balance of the purchase price had not been paid. The appellant though he indicated that he was ready and willing to complete the transaction, he did not show how he would do so. As stated earlier on in this judgment, the appellant had not even shown that he attempted to pay the 1st respondent the purchase price and was rejected. It was not enough for the appellant merely to state that he was ready and willing to complete the transaction by a letter as was the case in **Nabro Properties Limited v Sky Structures Limited & 2 others (2002) 2 KLR 300** where the Court held that:

"A party seeking specific performance must show and satisfy court that it can comply and be ready and able a mere statement that the appellant was ready to pay is not sufficient evidence to discharge the burden cast upon the appellant".

Clearly therefore, the appellant was not entitled to an order of specific performance considering that he breached the essential terms of the agreement on account of want of payment of the purchase price. The alternative to refund the appellant the purchase price so far paid to the first remedy was the best option as correctly decreed by the trial court.

The 1st respondent having unlawfully rescinded the contract, he was not entitled to retain the deposit nor the amounts deposited by the appellant with him. The trial court was therefore right in ordering the 1st respondent to refund the appellant the sum of Kshs. 430,000/= and without interest. This was because the Judge felt and rightly so in our view that the appellant was the author of his own misfortune or mischief. In **Syedna & Others v Jamil's Engineering Co. Limited [1973] 244** this Court held that:

"The general principles would appear to be that where a buyer had paid but is unable to complete a contract, the seller upon rescinding it may sue for damages but must return any money that may have been paid. The general principle however must yield to the intention of the parties…..if the payment was part payment on default and reasons the seller must return the money."

With regard to the complaint that the trial court ordered the transfer of the suit land in favour of the 2nd respondent when there was no counterclaim. This is not entirely correct. The defence filed by the 2nd respondent ended-up with the following prayers.

1.The Plaintiff's suit be dismissed with costs.

2. An order directed at the plaintiff to cease interfering with the Interested Parties occupation, use and enjoyment of the Suitland.

3. An order directed at the defendant to cause the title of the suit property be transferred in favour of the Interested Parties.

4. An order of specific performance compelling the defendant to fully effect the sale transaction between the interested Parties and the defendant.

5. Costs of this suit to the Interested Parties.

It should be noted that the interested parties were the 2nd respondent. Further evidence was led by the 2nd respondent in support of the above

prayers. Though in the body of the defence, the 2nd respondent did not specifically raise a counterclaim, nonetheless by implication and going by its prayers aforesaid, the counterclaim was in contemplation. Accordingly, we cannot fault the trial court for acceding to the 2nd respondent's prayer.

Though the appellant has partially succeeded in this appeal on the grounds of time being of essence, and repudiation of the agreement by the respondent, nonetheless they are not sufficient to overturn the decision of the trial court. Because of his own breach of the agreement he was not entitled to the order of specific performance. The only remedy available to him and which he had prayed for in the alternative is to be refunded the amount he had paid to the 1st respondent in part payment of the purchase price. The trial court duly granted him the prayer and justified why the amount would not attract an interest because of the appellant's own misconduct of not paying the whole purchase price and placing a caution on the suit land and then vanishing from the neighbourhood. We have no reason or grounds to interfere with that determination. Ultimately therefore the appeal fails and is dismissed with no order as to costs.

Dated and delivered at Nairobi this 8th day of November,2019.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR

JUDGMENT OF J. MOHAMMED, JA.

I have had the advantage of reading in draft the Judgment of **Asike-Makhandia, JA.** I am in full agreement with his reasoning and conclusions and, therefore, have nothing useful to add.

Dated and delivered at Nairobi this 8th day of November, 2019.

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

JUDGMENT OF KANTAI, JA

I have had the advantage of reading in draft the judgment of my learned brother, Makhandia, JA, and I agree with the conclusion reached that the appeal be dismissed.

The appellant contracted with the 1st respondent to purchase the suit property known as L.R. No. Dagoretti/Riruta/4170 for **Kshs.2,100,000** and completion was stated to be 90-120 days. At the end of that period he had paid a paltry sum of money and he was not able to raise the balance even at the hearing of the suit at the High Court, many years from when the contract was made. He instead disappeared from the neighbourhood and re-appeared years later, still without ability to pay for the land. At no time was he ready or able to complete the transaction. The findings made by the trial judge were supported by the evidence presented and the judge was right to dismiss the suit.

The appeal fails and is dismissed as ordered by Makhandia, JA.

Dated and delivered at Nairobi this 8th Day of November, 2019.

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR