IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), MAKHANDIA & MUSINGA, TJ.A)

CIVIL APPEAL NO. 267 OF 2016

HOUSING COMPANY OF EAST AFRICA LIMITED.....APPELLANT

AND

THE BOARD OF TRUSTEES

NATIONAL SOCIAL SECURITY FUND.....1st RESPONDENT

KISIMA MANAGEMENT COMPANY LIMITED.....2nd RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya

at Nairobi (J. B. Havelock, J.) dated 14th August 2014

in

H.C.C.C. No. 543 of 2007)

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JUDGMENT OF THE COURT

The genesis of the dispute leading to this appeal is an agreement for sale entered into between the appellant and the 1st respondent dated 10th December 2004, "the agreement". The agreement was for the sale of LR. No. 209/11408, State House Road, Nairobi, "the suit premises" by the 1st respondent who was the registered proprietor thereof to the appellant for an agreed purchase price of Kshs.77,250,000/-. The agreement adopted the 1989 Law Society conditions of sale "LSK conditions" and the purchase price was agreed to be paid as follows:

(a) Kshs.7,725,000/- as deposit on or before the execution of the agreement.

(b) Balance of Kshs. 59,525,000/- to be paid within 180 days of the execution of the Agreement.

The appellant made the following payments towards the purchase price; a deposit of Shs. 7,725,000/-; Shs. 5,000,000; Shs. 10,000,000/-; Kshs. 7,300,000/-; Shs. 1,500,000/-; Shs. 1,500,000 all totaling to Kshs. 46,025,000/-.

Pursuant to the above payments, the appellant requested the 1st respondent for partial occupation of an acre of the suit premises. By a letter dated 29th July 2006, the 1st respondent agreed to the proposal and further accepted the request by the appellant for extension of completion period for another 90 days. The 1st respondent then instructed its advocates, Messer's Robson Harris & Co. Advocates to prepare a Deed of Variation to the Agreement which was executed by the appellant and the 1st respondent dated 9th June 2006 by which the completion date was extended to 30th July 2007. However, the appellant was unable to fulfill its obligations under the sale agreement and by a letter dated 9th July 2007, the 1st respondent served a 21 days' notice on it demanding payment of the balance of the purchase price. However, the appellant called the 1st respondent's bluff since the 1st respondent had no foundation in fact or in law as, by mutual agreement, the balance of the purchase price was not due until 30th July 2007. Through a letter dated 26th July 2007, the appellant made a further payment of Shs. 3 million and sought an extension of a further 60 days to enable it pay the balance of the purchase price. The 1st respondent by a letter dated 22nd August 2007 acknowledged receipt of the Shs. 3 million and agreed to allow the appellant a further 60 days for the completion of the Agreement. The extension though reluctantly granted, was on the clear and unequivocal understanding that failure to complete the

transaction within the said period would lead to the 1st respondent repossessing the suit premises without any further reference to the appellant and it would proceed to consider other offers from third parties. The 1st respondent was of the view that as the extension was based on the request by the appellant, time was of the essence and if the appellant failed to pay the balance of the purchase price on or before 30th September 2007, the 1st respondent was at liberty, without further notice to deal with the suit premises as it deemed fit. As it turned out, the appellant was unable to meet its obligations by the said date and the 1st respondent offered the suit premises to the 2nd respondent.

The appellant detailed that it had duly facilitated and secured payment of the balance of the purchase price of Shs. 37,250,000/- as follows:

> A Bank Guarantee of 25th September 2007 by Chase Bank (K) Ltd issued in favour of the 1st defendant for Shs. 22,000,000/-.
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> (II) A professional undertaking dated 25th September, 2997 from Njoroge Regeru & Co. Advocates undertaking to pay the 1st respondent the sum of Shs.6,300,000/- upon conclusion of the sale of (presumably the respondent's) Flat No. B2 on L.R. No. 2/267 Nairobi.
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> (III) A professional undertaking dated 28th September 2007 from Susan Kahoya & Co. Advocates undertaking to pay the sum of Shs. 2,950,000/- to the 1st respondent upon successful registration of the transfer of the suit premises in favour of the appellant.

The appellant maintained that from the above, it was clear that it had at all material times been ready, able and willing to complete the purchase of the suit premises. The appellant accused the 1st respondent of not being keen to complete the sale and transfer of the suit property to the appellant and, as a result, was in clear breach of the agreement; and that the 1st respondent had purported to enter into an agreement for sale of the same suit premises with the 2nd respondent and to rescind the agreement. It had failed to serve a completion notice as required by the LSK Conditions. Further, as a result of the 1st respondent's breach, the appellant had been unable to make use of and to develop the suit premises that would have seen the construction of 66 housing units. The 1st respondent's retort was that even if the appellant had secured payment of the balance of the purchase price, it was in breach of the intention of the parties as expressly or impliedly provided for in the agreement.

The 1st respondent went on to outline the particulars of breach, firstly, that the appellant failed at the date of completion to actually tender the balance of the purchase price. Secondly, the appellant had unilaterally purported to alter the terms of the agreement without consultation or seeking the consent of the 1st respondent. Thirdly, the appellant had purported to adopt a method of completion that was not intended, agreed upon or even contemplated by the parties. Fourthly, the purported method of completion would have further delayed the period in which the 1st respondent would have obtained much needed funds whereas time was of the essence. Finally, contrary to the mandatory provisions of Clause 4(2)(b) of the LSK Conditions, the agreement of the 1st respondent had not been obtained; that the balance of the purchase price would not be paid upon completion but would be secured by undertakings from the appellant's advocates or any other form of security.

On the basis of the foregoing facts, the appellant sued the 1st respondent and subsequently joined by the 2nd respondent seeking special damages in the sum of Kshs. 924,000,000/- being profit on the sale of 66 units it would have put up on the suit premises and sold. The appellant also sought orders of permanent injunction to restrain the respondents from selling, transferring, disposing, pledging, leasing, charging or in any other manner alienating or dealing with the suit premises, as well as changing the ownership and occupation thereof. It also sought an order for specific performance requiring the 1st respondent to complete the Agreement and to deliver to the appellant a Certificate of Title and/or title deeds relating to the suit premises. Finally, the appellant in the alterative sought a full refund of the sum of Shs. 44,525,000/- together with interest thereon at commercial rates until payment in full.

In its defence and counterclaim, the 1st respondent averred that the appellant, without any justifiable cause, had caused a caveat to be registered against title to the suit premises which it requested the court to order its removal. It maintained that the appellant was unable to fulfill its obligations under the agreement, and as a result, it was at liberty to deal with the suit premises without further reference to the appellant. The 1st respondent went on to state that after the expiry of the last extension accorded to the appellant being 30th September 2007, it was at liberty to offer the suit premises for sale to a third party namely the 2nd respondent. The 1st respondent pleaded that under cover of its letter dated 26th November 2007, it had forwarded to the appellant a cheque for Shs. 36,800,000/- being a refund of the purchase price so far remitted less 10% in accordance with the default clause contained in the sale agreement. The 1st respondent prayed for the dismissal of the suit and by way of counterclaim, a declaration that the agreement was lawfully rescinded; that it was entitled to retain the 10% of the aggregate purchase price on account of the appellant's default in completing the sale and the removal of the caveat registered by the appellant along with the costs. It further asked for general damages in the form of loss of bargain or a declaration that the appellant do indemnify it against any consequential loss resulting from the unlawful lodgment of the said caveat.

The 2nd respondent's statement of defence and counterclaim maintained that the 1st respondent had rescinded the agreement in view of the fact that the appellant had breached the same. It averred that the appellant had no legal right to block any sale transaction between the 1st respondent and itself as the former had the right to sell the suit premises to any person of its choice. The 2nd respondent pleaded further that the appellant maliciously caused the caveat to be registered against the title to the suit premises though it had no legal right to do so. The respondents had entered into a sale agreement in which the 2nd respondent had paid Shs. 85,000,000/- to the 1st respondent for the suit premises. That at the time of the negotiations, purchase and transfer of the suit premises, the 2nd respondent was not aware of any prior transaction regarding the suit premises. It only became aware after it had purchased it when the appellant placed a caveat on the title necessitating it to seek legal redress. Later it became aware of the suit betweenthe appellant and 1st respondent regarding the suit premises and applied to be enjoined with a view to having the caveat removed and also sought an order of injunction to restrain the appellant from trespassing, interfering with, intermeddling and/or tampering with the suit premises as well as a declaration that the suit premises rightfully belonged to it and that the appellant had no right to the same.

On this set of facts and in a judgment delivered on 9th September, 2014, Havelock, J. dismissed the appellant's suit against the respondents. The learned judge made a finding that the agreement dated 10th December, 2004 was lawfully rescinded and that the 1st respondent was entitled to retain the amount of Kshs. 7,725,000/- being the 10% deposit of the aggregate purchase price on the basis of the appellant's default to complete the sale.

The learned judge considered the issue of the validity or otherwise of the 21 days' notice in the 1st respondent's letter dated 9th July 2007 and paid credence to the authorities cited by the 2nd respondent, and in particular, the holding in J.T.M. Construction & Equipment Ltd. at paragraphs 70-75, which are reproduced here below:

"Before I leave this judgment (sic) the plaintiff has expressed doubts as to the validity or otherwise of the 21 day notice issued to it by the 1st defendant in its letter dated 9th July 2007. I have already detailed that I did not consider that the notice was a completion notice as contemplated by clause (4) (7) (b) of the Law Society Conditions of Sale. In my research surrounding the point, I was impressed by the authorities cited by the 2nd defendant more particularly the case of J.T.M. Construction & Equipment Ltd (supra). Paragraphs 70 - 75 of that case reads as follows:

> "70. It is settled that 'when time is of the essence there is no leeway for delay'. Completion must be on the date specified. Failure to complete by the date set in the notice is a breach of contract. In such circumstances, the general principle is that the court will not assist the party served with the notice where he fails to complete within the time specified. It follows that all remedies will be available to the aggrieved party, including rescission.
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> 71. This principle was firmly established by the House of Lords in Stickney v Keeble (supra), where .... the House of Lords, having examined what was left to be done by the respondent as vendor, concluded that the time given (being fourteen days) was sufficient. . The headnote, which is accepted as being reflective of their Lordship's decision, read:
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> 'Where in a contract for the sale of land, the time for completion is not made the essence of the contract but the vendor has been guilty of unnecessary delay, the purchaser may serve upon the vendor a notice limiting time at the expiration of which he will treat the contract as at an end. And in determining the reasonableness of the time so limited, the Court will consider not merely what remains to be done at the date of the notice but all the circumstances of the case including the previous delay of the vendor and the attitude of the purchaser in relation thereof'

The learned judge in the present dispute concluded thus on this point;

> "73. One only needs to substitute the word 'purchaser' for 'vendor' and 'vendor' for 'purchaser' where the words appear and the principle would be applicable with equal force to a situation, as obtain in this case, where the purchaser is the party being accused of delay and the vendor has served a notice to complete.
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> 74. In relation to the instant case, there is no question that the parties were behind time in the completion of the transaction.
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> It is also evident that there had been previous delays on the part of the claimant to do what it was supposed to have done to complete. Lord Loreborn in Stickney v Keeble made the attractive point, which I would endorse, that "people who are behind time in the transaction of business must expect such pressure". So, I would say that the claimant, in all the circumstances, should have expected that some pressure would be brought to bear on it to complete after so many years and after so many opportunities given to it to make good its previous defaults.
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> 75. On a totality of the circumstances, including the lapse of time, the history of delay on the part of the claimant and the several efforts made by the defendant to remind the claimant of the things it needed to do to move towards completion, I find nothing wrong with the course taken by the defendant to serve a notice to complete, making time of the essence of the contract. I conclude that the defendant acted properly and reasonably in all the circumstances and as such time had become of essence of the contract which means there was no room for further delay by either side. The failure of the claimant to complete within the time stipulated was, as Ms.
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> Reid has submitted, a fundamental breach of the agreement. This means that the defendant would be entitled to exercise its rights to rescind. This is what the defendant opted to do.'
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> "I consider that it is good law that where a purchaser has dragged his feet and has been guilty of unnecessary delay, the vendor is perfectly entitled to serve upon the purchaser a notice limiting time, at the expiration of which the vendor will treat the contract as having come to an end. ..."

Upon dismissing the appellant's suit as aforesaid, the judge ordered that the 1st respondent will reimburse the monies paid to it less the deposited amount, in the sum of Kshs.36,780,000/-. The said amount was to bear interest at court rates from the date of payment of each instalment as follows:

(i) Kshs. 5,000,000/- 19th April 2005;

(ii) Kshs. 10,000,000/- 20 th June 2005;

(iii) Kshs. 3,000,000/- 13th July 2006;and

(iv) 1,500,000/- 18th August 2007

The learned judge further ordered the removal of the caveat registered by the appellant and issued a declaration that the appellant indemnifies the respondents for any consequential loss resulting from the lodgment of the caveat.

Dissatisfied with the judgment and decree aforesaid, the appellant lodged the instant appeal on 10 grounds. However, in its written submissions, they were condensed into 3 broad grounds to wit; failure by the trial court to apply the express provisions of the agreement to the parties thereby arriving at a decision that was inconsistent with the evidence led, which was in contravention of the established legal principles; the trial court erred in fact and in law by arriving at the conclusion that it did and making the orders complained of; and finally, the trial court erred in fact and in law by finding that the 2nd respondent was a bona fide purchaser for value without notice.

The appeal was disposed of by way of written submissions with limited oral highlights. However, only the appellant and the 1st respondent filed their respective written submissions.

The appellant submitted that the agreement expressly and specifically incorporated LSK conditions. The relevant clauses of the said conditions were; that sub conditions would apply unless a special condition provided that time would be of essence in respect of the completion date; completion notice meant a notice served in accordance clause 4(7)(a), that if the sale was not completed on the completion date, either party may after that date serve on the other party, notice to complete the transaction; that upon service of the completion notice it would become a term of the contract; that the transaction be completed within 21 days of service and time shall become of essence of the contract, and where, after service of a completion notice, the time for completion shall have been extended by agreement or implication, either party could again invoke the provisions of this condition which shall take effect with the substitution of 10 days for 21 days.

It was submitted that there was no dispute that the agreement did not have a special condition stipulating that time was of essence. Accordingly, the LSK conditions came into play, with the end result being that the agreement could not be lawfully rescinded without first giving 21 days' completion notice which notice could only be given after the completion date had lapsed. The appellant submitted that the LSK conditions were not complied with. Instead, the respondents relied on the 1st respondent's letter dated 9th July 2007 which was issued when the completion date was about 21 days away. It was submitted that in so far as it was issued within the completion period and not after the completion date, then the said letter could not amount to a proper or valid completion notice within the meaning of clause 4(7) (a) of the LSK conditions aforesaid. It was submitted that though the trial court found that the said letter did not comply with the LSK conditions, at that point, the only logical conclusion it could have reached was that the letter was of no effect for the simple reason that it was contrary to the agreement. However, the trial court proceeded to uphold the letter despite its aforesaid finding and in effect modified the agreement on behalf of the parties, thereby seriously misdirecting itself. It was further canvassed that in doing so, the court relied on the authority of J.E.M. Construction Equipment Ltd. vs. Circle B. Farms Limited, claim Number 2007 Hcr 05110, a decision of the Supreme Court of Jamaica which was of doubtful persuasive authority according to the appellant. In contrast, the trial court failed to apply the legal position in Kenya as demonstrated in Kent Libiso & Anor v Cirkon Trust Co. Limited & Anor [2008] eKLR, Fremar Construction Company Limited v Minakshi Narin Shah [2005] eKLR and Francis Mwanzia Mulwa v Lucia Mwebi & Anor [1998] eKLR; all of which held that a completion notice issued before the completion date was of no legal effect and the necessity of completion notice where time was not expressly made of essence to the contract. The appellant went on to submit that it was common ground that the completion date was extended from 30th July 2007 to 30th September, 2007. That even assuming that there was no further extension of time, the appellant, in accordance with clause 4(7) (g) of the LSK conditions, would have been entitled to a fresh completion notice post 30th September 2007. No such notice was given, hence the subsequent purported recession was obviously illegal, unlawful, null and void. To the appellant, by the respondent's letter dated 22nd August 2007, the completion date was by mutual agreement extended to 21st October, 2007. It was not, as urged by the respondent, merely buttressing the earlier extension granted vide a letter dated 2nd August, 2007.

The appellant also faults the trial court for not applying contra-proferentem rule and reiterated that any ambiguity introduced by the letter dated 22nd August, 2007 had to be construed against the 1st respondent, the author of the letter. It was according to the appellant extremely unjust for the 1st respondent to introduce an ambiguity on the issue of extension and seek to take advantage of it to the detriment of the appellant.

Lastly, on this ground of appeal, the appellant submitted that in accordance with the lease agreement made sometime in 2006, the appellant assigned the agreement in material aspect to its sister company, Housing Group Limited, and pursuant thereto, the appellant became entitled, even in the extent of breach of agreement, to one acre comprised in the title to the suit premises.

With regard to the 2nd ground, the appellant submitted that since time was not of essence and the 1st respondent did not issue the requisite notice, it followed that it was the respondent and not the appellant who breached the agreement. Consequently, the rescission of the agreement by the 1st respondent was plainly unlawful.

Regarding the order that the appellant do indemnify the respondents for any consequential loss resulting from the lodgment of the caveat, it was submitted that the consequential loss could only be in the realm of special damages. The same were not pleaded with specificity or at all as the law requires nor were they proved. There was therefore no lawful basis for awarding the same. The appellant relied on the case of Provincial Insurance Co. East Africa Limited v Nandwa [1995-1998] 2 EA 228 for the proposition that special damages must be specifically pleaded before they can be awarded. Similarly, the appellant submitted that the award of interest was erroneous in that the same did not specify the period over which the said interest should be computed.

The appellant further questioned the judge's holding that the appellant could not claim both damages and specific performance. The appellant had not sought both damages and specific performance but only specific performance, damages being claimed in the alternative. Accordingly, once the court confirmed that the appellant was not in breach, it could either have proceeded to order specific performance or in

the alternative awarded the unchallenged damages in the sum of Kshs. 924,000,000/-.

On the third ground, the appellant submitted that by failing to find that the respondents were acting in concert in a scheme and conspiracy designed to defeat the appellant's contractual and legal right and that in the circumstances, the 2nd respondent was not a bona fide purchaser of the suit premises for value without notice of the appellant's entitlement thereto, the court erred. In particular and bearing in mind that the appellant was admittedly in possession of the suit premises, it followed that the 2nd respondent was aware or ought to have been aware of the appellant's interest in the suit premises. In the circumstances, in making the order in favour of the 2nd respondent, the learned judge allowed the 2nd respondent to benefit from its own wrong doing, at the expense of the appellant which was the innocent party and contrary to established legal principles. For this proposition, the appellant referred to the case of Nabro Properties Limited v Sky Structures Limited & 2 Others [2002] 2 KLR 299. In conclusion, the appellant orally told us that it was no longer pursuing orders of specific performance, but it was only interested in damages and in particular, loss of profits.

In response, the 1st respondent submitted that the appeal could only suffer one fate - dismissal with costs, as there were simply no reasons to interfere with the judge's decision; that the findings of the judge cannot by any stretch of imagination be faulted as they are not as a result of any misdirection; whether of fact or law. The appellant failed to comply with the terms of the agreement by not paying the balance of the purchase price on the final mutually agreed completion date of 30th September, 2007, time having become of essence.

The 1st respondent further submitted that the appellant's argument founded on Clause 4(7) of the LSK Conditions was misplaced. There was simply no period that time was never of essence during the tenure of the sale agreement. In consideration of the 1st respondent granting a final extension of the completion date to 30th September 2007, the requirements of the completion notice had, by mutual agreement, been waived. It was submitted that the appellants neither rejected the extension of the completion date, nor did it reject the rider attached and or implied thereto, that its default would be inferred as the appellant's repudiation for which no default or completion notice was necessary.

Further, that at the time of seeking extension of the completion date, the appellant did not request for a change in the mode of payment of the balance of the purchase price. Citing the case of Nabro Properties Limited (supra), it was the submission of the 1st respondent that it was indeed the appellant who was seeking to benefit from its own mischief. Finally, it was submitted that anything other than rejection of the appeal would be giving a seal of approval to the unconscionable commercial conduct; and that courts are there to enforce the terms of the contract and not to re-write contracts for parties. On damages, it was submitted that the damages sought were purely speculative as they were based on a project yet to be undertaken.

As already stated, the 2nd respondent did not file its written submissions neither did it appear at the hearing to orally submit in support of or in opposition to the appeal. Satisfied that there was no reason given for their absence, we dispensed with their appearance.

This is a first appeal. Being so this court is enjoined to revisit the evidence that was adduced before the trial court afresh, analyse it, evaluate it and come to its own independent conclusion, but always bearing in mind that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanor for which allowance should be given. See Seascapes Limited v Development Finance Company of Kenya Limited [2009] KLR 384.

There are several factual matters that are common ground. These are that the 1st respondent was at all material times the registered proprietor of the suit premises; the appellant and the 1st respondent entered into an agreement for sale of the suit premises at a sum of Shs. 77,250,000/- and a 10% deposit (Shs. 7,725,000/-) paid on the execution of the sale agreement; the balance of the purchase price in the sum of Shs. 69,525,000/- was to be paid on or before the completion date, which, under Clause 5 of the sale agreement was 180 days from the date of the agreement; the appellant was unable to complete and through a letter dated 9th July 2005, requested for a 90 day extension of the completion date together with partial possession, and following negotiations, on 9th June 2006 the parties executed a Deed of Variation which, among other things, extended the completion date to 30th July 2007. Notably, this extension also granted possession of one acre to the appellant which it subsequently assigned to its affiliate, Housing Group Limited, which was to pay to the 1st respondent on its behalf a minimum monthly sum of Shs. 500,000/- towards the settlement of the balance of the purchase price.

The appellant once again defaulted in paying off the balance of the purchase price, whether directly or indirectly through its affiliate aforesaid and this resulted in the 1st respondent's letter dated 9th July 2007 in which it, not only reminded the appellant of its continuing default, but also gave it notice that with the completion date fast approaching on 31st July 2007, any non-payment of the entire balance would entitle it to exercise its various options under the agreement. Still the appellant did not comply.

Indeed through a letter dated 26th July 2007, the appellant confirmed that it did not have the funds and would not be able to pay the outstanding balance of the purchase price, Shs. 37,225,000/- and which was due on 31st July 2007. The letter though forwarded a bankers cheque of Kshs. 3,000,000/- towards the purchase price and requested for a final 60 day extension from 31st July 2007; the request for a final 60 days extension was accepted by the 1st respondent through its letter dated 2nd August 2007 and the completion date was expressly extended to 30th September 2007. By the same letter, the 1st respondent also made it clear that the time agreed upon was of the essence and in default of settling the entire balance on this day, the 1st respondent would be at liberty to invite other offers, effectively treating the agreement as repudiated by the appellant. A further reminder of the deadline was sent on 22nd August 2007. The appellant then unilaterally altered the mode of payment of the outstanding balance by providing its lawyers' undertakings, not in respect of actual funds, but monies supposedly due to it on an undisclosed date in the future and conditional bank guarantees. All these factors necessitated the rescission of the agreement by the 1st respondent.

In short therefore, the appellant was not only seeking to unilaterally change the completion date from 30th September 2007 to an uncertain date of its convenience in future, but also unilaterally pay the balance as and when it suited it, and thus treated the fixed time for performance, 30th September 2007, as if it had ceased to be of the essence, despite the notice given of 2nd August 2018.

The main issue for determination in this appeal is whether or not the rescission or repudiation of the agreement of sale by the 1st respondent was valid and the consequences ensuing therefrom. In determining the issue, we must fall back to the question of whether time was or not of essence and if it was, whether or not completion notice was issued and served in accordance with LSK conditions. The centre piece of the decision will turn on the interpretation of the letters dated 2nd and 22nd August 2007, respectively. The appellant's position is that time was never made of essence, and even if it was, the notice of completion served on it was invalid as it did not comply with LSK Conditions. On the other hand, the respondent's position is that, following the Deed of Variations, extensions granted to the appellant at its request, and correspondence exchanged between the appellant and the 1st respondent, time being of essence was by mutual agreement introduced pursuant to which completion notice was issued and served on the appellant. As a result, and at the expiration of the notice, and the appellant having not paid the full purchase price, introduced a mode of payment not contemplated by the parties in the agreement and thereby unilaterally changed the completion date from 30th September 2007 to an undisclosed date on account of advocates' professional undertakings and bank guarantees. For all these reasons, the 1st respondent deemed the agreement as rescinded and or repudiated by the appellant.

What was the learned judge's view on these contrasting positions?

That the agreement of sale between the appellant and 1st respondent incorporated the 1989 LSK Conditions; that the Deed of Variation as executed by the appellant and the 1st respondent substituted the completion date of 30th July 2007 and also granted vacant possession of an acre of the suit premises. The letter addressed by the 1st respondent to the appellant dated 9th July 2007 that gave a 21 days' notice to the appellant in which to pay the balance of the purchase price, was an actual notice in writing which specified the default of the appellant and required it to remedy the same before the expiration of such notice as per Clause 10 of the agreement.

The clause was in these terms:

"if the purchaser shall fail to comply with any of the conditions hereof, the vendor may give to the purchasers at least twenty one (21) days notice in writing specifying the default and requiring the purchaser to remedy the same before the expiration of such notice AND if the purchasers shall not comply with the said notice the vendor shall at the vendor's sole option be entitled: -

a) To forthwith forfeit for the vendor's own benefit as liquidated damages a sum of Kenya Shillings Seven Million,

Seven Hundred and Twenty five thousand (Kshs.7,725,000/-) and declare this agreement to be rescinded; or

b) To sue the purchasers forthwith for all sums due and unpaid by the purchasers under the terms thereof and for specific performance, and the vendor shall be at liberty to deal with the property in whatever manner the vendor shall decide."

It would appear therefore, that in dispatching the letter in question, the respondent was merely invoking sub clause (a) above.

As regards the letter from the 1st respondent dated 22nd August 2007, the judge's view was that the 1st respondent did not allow a further 60 days for completion of the agreement as from the date of that letter. The letter was confirming the contents of the appellant's letter dated 2nd August 2007 and therefore the date of 30th September 2007 was the last day upon which the appellant could render monies sufficient to complete the transaction contemplated in the agreement; that the appellant, rather than paying in accordance with Clause 4 of LSK conditions, the balance of the purchase price by 30th September 2007 attempted to do so by a bank guarantee from Chase Bank and two professional undertakings from two law firms. These alternatives however, did not secure payment of the balance of the purchase price by 30th September 2007. Though the 1st respondent issued a 21 days' notice for completion of the sale by the letter dated 9th July 2007, it was not the notice contemplated as per clause 4 (7) (b) of the LSK conditions. However, this clause could only apply where a sale is not completed on the stated completion date. Therefore, when that letter was sent by the respondent to the appellant, the completion date as per the Deed of Variation had been extended to the 31st July 2007. Finally, the appellant having failed to complete the sale of the suit premises by 30th September 2007 the 1st respondent had the capacity and indeed the right to sell it to the 2nd respondent.

We have absolutely no reason(s) to differ with the judge's reasoning, analysis and conclusions reached as above.

It is settled law, as correctly submitted by the 1st respondent, that contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties. Indeed, when a contract is clear and unambiguous, a court's role is to interpret the contract as written and not rewrite it because, just as with any other contract, a contract for the sale of land can only be changed with the agreement of both parties and not unilaterally, and the learned judge's ultimate findings cannot by any stretch of imagination be faulted.

The appellant cannot, in good faith, insist that it was not in breach or did not understand the nature of the letter dated 2nd August 2007 because the facts themselves clearly demonstrate that despite being put on notice through the letter, that failure to pay the balance of the purchase price on the final mutually agreed completion date of 30th September 2007, would constitute a breach going to the root of the contract, and failure to comply would be construed as conduct which would be inferred as the appellant's repudiation in light of the more than 783 days extension given previously to all its request beyond the original 8th June 2005 completion date, a fact which was clearly appreciated by the learned judge.

Accordingly, the appellant's arguments founded on Clause 4(7) of the Law Society Conditions are wholly misplaced as the appellant cannot on the one hand assert that the sale agreement dated 9th October 2004 did not have a special condition expressly stating that time was of the essence, while at the same time recognising that time had in fact been made of the essence through mutually agreed extensions of the original completion date and from which it benefited.

Time had clearly been made of the essence in respect of the completion date of 30th September 2007, as a result of the appellant's own request for a final extension of 60 days and granted as per the letter of 2nd August 2007. This is clear from the 1st respondent's preceding letter dated 9th July 2007.

An objective consideration and analysis of the letter dated 2nd August 2007 in the context of the facts already disclosed and the history of the appellant's previous repudiatory conduct, in any event, demonstrates that in consideration of the appellant's granting a final extension of the completion date to 30th September 2007, the requirements of completion notice had, by mutual agreement, been waived as the appellant itself had clearly made time of the essence in respect of the completion date when it sought several extension periods. In response, the 1st respondent made it clear that should the appellant default, it would be at liberty to accept other offers, effectively, breach would be considered fundamental, going to the root of the contract, and failure to comply would be construed as conduct which would be inferred as the appellant's repudiation for which no completion notice was necessary.

To emphasise the point, in the last paragraph of this letter, the 1st respondent requested the appellant to provide its written confirmation that it would indeed finalise the transaction on or before the completion date. The appellant neither rejected the extension of the completion date nor did it reject the rider attached thereto, that its default would be inferred as repudiation for which no completion notice was necessary.

To underscore what we are saying, we reproduce here below in extenso the correspondence we have referred to, starting with letter dated 9th July 2007. It was framed thus:

> "SF/A/10/249 VOL. I/61 The Director
>
> Housing Company of E.A. Ltd P. O. Box 52748-00200 NAIROBI
>
> Dear Sir,
>
> RE: PURCHASE OF L.R NO. 209/11408 - STATE HOUSE RD NSSF
>
> TO HOUSING COMPANY OF EAST AFRICA LTD.
>
> Reference is made to the Sale Agreement dated 10th December, 2004 and the Deed of Variation executed thereafter. The Deed of Variation pushed the completion date upto 31st July 2007. The Fund has noted that you have so far paid Kshs. 40,025,000.00 out of the sale price of Kshs. 77,250,000.00.
>
> Under the terms of Lease Agreement you were required to commit yourselves to pay at least between Kshs. 500,000/- - 1,000,000/- monthly which amount would be credited as part of the purchase price. However it has been observed that you have not been making these payments accordingly.
>
> In view of the fact that you have defaulted in making these payments, we hereby give you 21 days notice from the date herein to pay the balance of the Purchase price as per clause 10 of the Sale Agreement. Take note that in the event that the payment is not made within the notice period, NSSF shall be at liberty to exercise the options set out in clause 10 of the Sale Agreement.
>
> Yours faithfully
>
> J. M. MAWEU
>
> For: MANAGING TRUSTEEE."

Quite clearly, this demand was outside the conundrum of "time being of essence" and the notice required. Accordingly, 30th September, 2007 was the last day upon which the appellant was expected to tender the balance of the purchase price. It did not do so. But as correctly observed by the trial court, this was a mere notice by the 1st respondent to the appellant pointing out the breach of the agreement and consequences that may ensue there from.

In response, the appellant sent this letter; "26th JULY 2007

> THE MANAGING TRUSTEE NATIONAL SOCIAL SECURITY FUND P.O. BOX 30599 NAIROBI
>
> Dear Madam,
>
> FURTHER EXTENSION TO COMPLETE PURCHASE OF PLOT NO. 209/11408 STATE HOUSE ROAD.
>
> Kindly refer to the above transaction where you had earlier granted us an extension period to complete the purchase of the said plot, this extension is due to expire on 31st July 2007.
>
> Due to various reason (sic) we will be unable to complete the above transaction within the specified time frame.

The purpose of this letter is therefore to request for additional 60(SIXTY DAYS) to enable us complete the purchase, we want to assure you that we are making all the necessary arrangements to complete the transaction at the earliest possible.

To show our commitment, we have attached a banker's cheque of Kshs. 3,000,000/- (THREE MILLION SHILLINGS) as further payment, we shall make a similar payment within the next five working days.

The sixty days will enable us reorganise our finances and be able to complete this transaction within the said period.

We thank you and look forward to a favourable response.

Yours faithfully,

JOSEPH MACHARIA DIRECTOR"

From these letters there can be no doubt that 60 days extension was at the request of the appellant and was to run from 1st August to 30th September, 2007 respectively and not as suggested by the appellant in its submissions, that it was to run from 22nd August, 2007 hence pushing the completion date to 21st October 2007. The appellant relied on the subsequent letter dated 22nd august addressed to it by the 1st respondent for this proposition. However, if the subsequent letter is read in its proper context, the interpretation given to it by the appellant is obviously misplaced.

The letter was penned in these terms.

"SP/A/10/249 VOL.1 22nd August 2007

Housing Company of East Africa Ltd.,

P. O. B ox 52748-00200,

NAIROBI

Attn: Joseph Macharia

Dear Sir,

"RE: FURTHER EXTENSION TO COMPLETE PAYMENT ON PLOT 209/11408

Your letter dated 26th July refers;

Please find attached herewith receipt number M01002140 dated 7th August 2007 for Kshs. 3,000,000.00 (read Three Million Shillings). This is part payment of the above referenced plot.

The management has accepted your request for additional 60 days within which you have committed yourself to pay the balance.

Please note that failure to complete the transaction will lead to the Fund repossessing the plot without further reference to you.

Yours faithfully,

J.G. MABIRIA

For: MANAGING DIRECTOR."

The extension period came and went without the appellant meeting its undertaking such that by 30th September, 2007 the purchase price had not been fully paid. Indeed the outstanding balance was Kshs. 37,250,2502-. In terms of clause 10 of the agreement, the 1st respondent was on that ground entitled to repudiate and or rescind the agreement on the basis that the appellant had breached the agreement. Of course the learned judge did not err at all in relying on the authority of JEM Construction Ltd (Supra). The authority was on all fours with the circumstances of this case. He was entitled to rely on it as a persuasive authority contrary to the submission of the appellant that it was of doubtful authority. The words expressed in the said judgment ring true to the circumstances of this case. As correctly observed by the judge, where a purchaser has dragged his feet and has been guilty of unnecessary delay as was the case here, the vendor was perfectly entitled to serve upon the purchaser a notice limiting time, at the expiry of which the vendor would treat the sale agreement as rescinded. This is also in consonance with this court's decision in Njamunyu v Nyaga [1983] KLR 282 in which it was observed thus;

"... before an agreement such as this can be rescinded, the party in default should be notified of the default and given reasonable time within which to rectify it. Once notice of default has been given, failure to rectify will result in rescission of the contract"

That is precisely what happened in this case. We may go further and state that we find it unconscionable and highly objectionable that the appellant who had failed to pay the full purchase price, even after being granted several extensions at his request, failed to pay the agreed rent of Kshs. 500,000/- for the one acre it had taken possession of. Instead it went ahead to unilaterally change the mode of payment of the balance of the purchase price. Its counsel even had the courage to submit orally that "despite our (mis)conduct, we were entitled to the 21 days' notice".

The authorities cited by the appellant in support of its submissions on the question of time being of essence and the mandatory 21 days' notice are clearly distinguishable from the facts obtaining in this case. In majority of the cases, the clause on time being of essence was incorporated in the agreement. This is not the case here. Secondly, the offended party in those cases purported to issue notice of completion before the due date. Thirdly, the facts and circumstances obtaining in those cases are different. In this case the 1st respondent invoked clause 10 of the sale agreement which allowed it to retake possession of the suit premises following fundamental breach of the terms of the agreement and reasonable notice being given. Lastly, in this case, it is the appellant who severally sought for extension of time and bound itself by giving timelines, but which it never met. But again even if the appellant is looking for evidence of time being of essence, we agree with the 1st respondent's submission that it was mutually introduced with the appellant's constant requests for extension of time to complete. Further, it was the appellant who was specifically giving the timelines and more important, it is the letter of the 1st respondent dated 2nd August, 2007 that should be the point of reference.

Further, at the time of seeking extension of the completion date, the appellant did not request for a change in the mode of payment of the balance of the purchase price on the completion date. Indeed, on this aspect Mr. Mabiria the author of the letter testified on behalf of the 1st respondent. He stated that the contents thereof were clear, as it was in reference to the earlier letter of the appellant dated 26th July 2007 to the 1st respondent requesting for a further extension of 60 days. The letter also used similar phraseology as used by the appellant in seeking extension. The period therefore that the appellant was implying from 22nd August to 21st October is clearly erroneous. That it was collectively decided by the 1st respondent as a body corporate that after fundamental breach by the appellant, the suit premises were available for sale and was without encumbrances and that the 2nd respondent was a purchaser for value without notice. The appellant cited the Court of Appeal decision in Nabro Properties Limited vs Sky Structures Limited & 2 Others (supra) which applied the well established maxim that "no man shall take advantage of his own wrong" yet as demonstrated above, this is what the appellant actually seeks to do by relying on an abstract assertion under Clause 4(7) of the LSK Conditions of Sale. As we have not discerned any ambiguity in the letter of 22nd August 2007,

we resist the invitation to invoke the contra-proferentem rule. With regard to the order that the appellant do indemnify the respondents for any consequential loss resulting from the lodgment of the caveat, we do not see how such an award can fall in the realm of special damages that should be pleaded and specifically proved. The key word here is consequential. This is all about future loss that the respondents were bound to suffer as a result of the caveat lodged by the appellant on the title to suit premises. Such can only be computed at the time when the caveat is eventually removed. As explained in the case of

Zacharia Waweru Thumbi v Samuel Njoroge Thuku;

> "... if I were to explain or define special damages to a layman, I would say, they are reimbursements to the plaintiff/victim of the tort, for what he has actually spent as a consequence of the tortuous act(s) complained of. the claimant of special damages must not only plead the claim, but must also go further and strictly prove, usually by documentary evidence, that he actually spent the sum claimed. Claimant must produce receipts to support his claim for special damages . given the requirement future loss of strict proof. An invoice would not suffice. Only a receipt, for payment, will meet the test."

To that extent, what was claimed under this head was prospective future loss. The trial court in awarding such damages without the strictures of specific pleading and strict proof, as enunciated in the case of Provincial Insurance Co. East Africa (supra), the judge was right in awarding them as consequential loss and not special damages.

In view of our holding that the trial court was right in holding that the 1st respondent was entitled to rescind or repudiate the agreement following the fundamental breaches of the same by the appellant, it is not necessary to go into the complaint by the appellant that the trial court erred in determining that the appellant could not claim both damages and an order of specific performance.

Coming to the complaint that the award of interest was erroneous in that the same did not specify the period over which it would be charged, we find this complaint to be completely without merit. The judgment and the decree ensuing therefrom is clear. Interest on the sum of Kshs. 36,780,000/- reimbursable to the appellant shall attract interest at court rates from the date when each instalment was paid.

With regard to interest on costs, though the trial court did not specify the commencement date for such interest, it is trite that it is ordinarily from the date of judgment unless the trial court directs otherwise. This was not the case here.

Finally, on the question of whether the 2nd respondent was a bona fide purchaser for value of the suit premises without notice, in view of our finding again that the 1st respondent had every right to rescind the agreement and consider offers from third parties, it is not necessary to dwell or interrogate this ground of appeal.

Guided by the aforesaid facts, considered in their proper and actual context, it is clear that the learned judge cannot be faulted for arriving at his ultimate findings that the appellant was in breach and therefore the sale agreement was lawfully rescinded by the 1st respondent and the 10% deposit forfeited. He similarly cannot be faulted for the consequential orders he made, and this appeal should therefore suffer only one fate, dismissal with costs as there are simply no reasons to interfere with the learned judge's decision and it is so ordered.

Dated and delivered at Nairobi this 7th day of December, 2018.

W. OUKO, (P)

JUDGE OF APPEAL

ASIKE MAKHANDIA

JUDGE OF APPEAL

D. K. MUSINGA

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR