IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 54 OF 2015

BETWEEN

PATRIZIA BINI ………………………………………………..APPELLANT

AND

MELINA INVESTMENT LIMITED ……………………..1ST RESPONDENT

GIUSEPPINO VALSESIA ………………………………..2ND RESPONDENT

PAOLA SASSO ……………………………………………3RD RESPONDENT

ROBERTO SASSO ………………………………………4TH RESPONDENT

(Being an appeal from the Judgment and/or decree of the High Court of Kenya at Malindi (Angote, J.) dated 8th May, 2015,

In

ELC No.11 of 2012)

****

JUDGMENT OF THE COURT

Central to this dispute are, first, what the parties christened, in a rather mouth-filling agreement, as "Preliminary Sub-Lease Contract For a Residential Real Estate To be Completed" (the pre-sale agreement), dated 23rd May, 2011, and secondly, two letters dated, 20th and 22nd December, 2011. The pre-sale agreement was executed between the appellant as the purchaser and the 1st respondent as the vendor. The 1st respondent, a limited liability company in which the 2nd, 3rd and 4th respondents are directors, is the registered lessee of a parcel of land known as **Chembe/Kibabamshi/402** within Mayungu, Watamu in Kilifi County (the property), measuring approximately 3 hectares with a beach frontage.

In 2010 the appellant approached the respondents who were developing a residential tourist settlement on the property called **Nyumba Baharini Village,** with an offer to purchase one unit of the development identified and marked No. 2 consisting of 2 bedrooms, 2 bathrooms and a kitchen covering

surface area of 105 sqm at a consideration of €150,000. Pursuant to that understanding the parties agreed to enter into the aforesaid pre-sale agreement in which it was agreed, among other things, pending execution of the main sub-lease, that out of the sale price of €150,000, the appellant would make a "down payment" of €30,000 upon signing the pre-sale agreement, €45,000, the "first deposit" was to be paid upon completion of certain common area works, such as fencing of each unit, common parking bay, servants' quarters, connection of electricity to the units, plumbing and sewerage works, and in any case the works were to be completed by 30th December, 2011. The final balance of €75,000 was to be paid by the month of December, 2011.

It was further agreed that the respondents would permit the appellant to undertake extension works at her expense on the first floor of the unit, while the respondents would similarly, at their own expense extend the roof in *makuti* to cover the extension. The pre-sale agreement was clear that the 1st respondent intended to sell to the appellant the remainder of period of their 99-year lease from 1st March, 1992 of the portion of land on which the property stood. Of significance in the pre-sale agreement was **clause 5** which provided that the drawing and signing of the transfer of the property would "***not be beyond 22nd December, year 2011***," after which the property would pass to the appellant. The respondents guaranteed and confirmed that they were in exclusive ownership of the property; that all the eleven units on the property would exclusively be for touristic residential use and not for commercial enterprise. The respondents also guaranteed that the property would be transferred to the appellant free of any mortgage or any form of prejudicial registration by any person.

Clause 7 was also vital as it provided for the withdrawal by the appellant from the pre-sale agreement. Specifically parties agreed that the appellant would be at liberty to withdraw in the event the common area works identified earlier were not carried out as stipulated by 30th November, 2011. Upon withdrawal the appellant would be entitled to a refund of twice the sum paid as down payment (€30,000 x 2) and the cost of extension works (€30,000) amounting in total to €90,000, within 30 days of the date of withdrawal.

In case of any controversy over the terms, the agreement further provided, for arbitration by 3 arbitrators, two nominated by each party and the third one nominated by the two arbitrators in common accord. If there was no agreement between the first two arbitrators on the third nominee the parties would move the High Court at Mombasa to appoint the third arbitrator.

In order to carry out the extension works the respondent allowed the appellant to take possession specifically for extension works. As the completion date drew nearer each party began to allege breach of the terms of the pre-sale agreement against the other. The respondent claimed that the appellant had failed to pay the balance of the purchase price and to execute the main sub-lease. The appellant, on the other hand, alleged that at the completion date the works in the common areas were incomplete as a result of which she could not pay the balance of the purchase price which was dependant on the respondents completing these works. Things came to a head when on 9th December, 2011 the 1st respondent issued to the appellant a notice of breach of the pre-sale agreement and demanded that she vacates and hands over the property forthwith.

On 20th December, 2011 the appellant through the firm of Michira Messah Company Advocates addressed the firm of Kilonzo & Aziz Company Advocates, who were acting for the respondents, in part, as follows in reference to the pre-sale agreement.

> ***"… It has so far been agreed by both parties that our client do commit herself in the following terms and conditions which we do hereby confirm that our client is committed to comply with;***
>
> ***1. To execute a sale agreement for the leasehold property by 23/12/2011 in Kenya/Malindi/Watamu.***
>
> 2. ***To pay the residual of €45,000 plus €75,000, a total of € 120,000 only. The said money to be sent from Italy to the account of Melina Investment Ltd on or before end of January 2012.***

3. **…………**

4. ***Melina Investments Ltd do acknowledge its acceptance of our client's commitment by communicating to Patrizia Bini a signed document."***

That letter was personally signed by the appellant and witnessed by her advocate, Michira Messah. Two days later on 22nd December, 2011 the respondents' advocates in Italy, **Studio Legale Associato** wrote to the firm of Kilonzo & Aziz Company Advocates, communicating the respondents' acceptance of the settlement of the dispute as follows;

> ***"1. Payment by 15th January, 2012 of the whole amount still overdue (€ 120,000,00), with binding intention of both parties to sign the final agreement only after Melinda has received the full payment;***
>
> ***2. Acceptance by Ms Bini of the following amendments to the "Regolamento generale contrattuale del complesso turisitico-residenziale Nwumba Baharini" (**not translated**):-***
>
> ***-Cancellation of any restriction to the use of the swimming pool and introduction of a general rule to use the quiet pool with high politeness and full respect for the other people living in the residence. In any case, the access to the quiet pool is strictly forbidden from midnight to 7 o'clock.***
>
> ***-Amendment to section 10 to grant to everybody the right to rent its own property for residential use only, with exclusion of any commercial or industrial use.***
>
> ***3. Full waiver by Ms Bini to all claims and pretentions**(sic)** against Melina Investment Ltd for any defect, hidden or apparent, of the house of Ms Bini and of all common parties(sic) of the residence;***
>
> ***4. Acceptance by Ms Bini of the provisions under legal notice no. 99/68, stating the designated Landing Station is only 30 metres.***

By signature of the above mentioned conditions by Ms Bini, Melinda Investment Ltd is available to grant immediate possession of the house to Ms. Bini and her family, under condition the payment and the final agreement will be fully executed by 15th January, 2012."

This letter, according to the respondents was an acceptance of the terms set out by the appellant in her earlier letter also reproduced above and that the appellant accepted the 1st respondent's above letter. Pursuant to this development the 1st respondent forwarded the sub-lease and agreement of sub-lease to the appellant who by a strange turn totally and completely refused to execute the documents.

The appellant instead made a report to the police alleging that the 2nd and 4th respondents had obtained money from her by false pretences. The two respondents were consequently charged in Malindi Chief Magistrate's Court Criminal Case No. 212 of 2012 with the offence of obtaining money by false pretences contrary to **section 313** of the Penal Code; that they obtained, with intent to defraud the appellant €75,000 and €120,000 pretending they could sell to her the property. They were detained in prison between 5th and 13th April 2012 when the charges were finally withdrawn and the two discharged under **section 87 A** of the Criminal Procedure Code. This marked the turning point in the relationship between the parties and became the proverbial straw that broke the camel's back.

The appellant brought an action against the respondents in the Environment and Land Court alleging that she had discovered that the 1st respondent's title to the property was disputed as a result of which the Government had imposed an embargo against any dealings with the property; that the respondents had

threatened to evict her; that the respondents were in the process of committing fraud on her, by changing the name of the 1st respondent while at the same time scouting for unsuspecting potential buyers to sell the property to; that the respondents were in breach of the pre-lease agreement for failing to undertake and complete the works in the common area; that the respondents failed to disclose that they did not comply with Malindi Municipal Council's by-laws and pre-conditions for constructing the property; that the respondents concealed material facts as to the ownership of the property; and that during this period the appellant was attacked and robbed by a gang at gunpoint in circumstances that suggested that it related to the dispute. In the result the appellant asked the trial court to enter judgment against the respondent for €301,145, representing a refund of the money spent upto that point by the appellant in the purchase and extension of the property. In the alternative, the appellant sought an order directing the respondents to comply with the terms of the pre-sale agreement, more specifically to adhere to the terms relating to the completion of common area works and conferment of a good title on the appellant within set timelines. The appellant demanded that only after the respondents fulfilled their part of the bargain would she pay the balance of €75,000 and then execute the main sub-lease. The appellant also prayed for "general damages for fraud, inconvenience and loss of planning."

The respondents naturally denied these allegations. They specifically averred in their amended defence and counter-claim that, in fact it was the appellant who breached the pre-lease agreement by refusing to execute the sub-lease, taking possession of the property without authorization before payment of the full purchase price and making major alterations to the property which were not permitted. Therefore, according to the respondents the appellant was a trespasser. They also insisted that they had all along a good and clean title; that the construction of the property was approved by Malindi Municipal Council; and that if at all they were in breach of any of the terms of the pre-lease agreement, the remedy available to the appellant, within the terms of that agreement was a withdrawal by the appellant from it.

For failing to settle the purchase price, to execute the sub-lease and for causing their arrest and being charged with a criminal offence and incarcerated in prison, the respondents counter-claimed against the appellant for damages pleading breach of the pre-sale agreement, malicious and injurious false complaint and confinement of the 2nd and 4th respondents, slander of the validity of the respondent's title, trespass, and *mesne* profit from 9th December, 2011 until vacant possession was given. They further sought declarations that the appellant was in breach of the pre-sale agreement; that the monies paid by the appellant pursuant to the pre-sale agreement were not recoverable; and that the appellant was a trespasser.

Both sides presented oral evidence with the appellant calling Harrison Musembi, a construction engineer to prove that upon inspection of the property on 10th May 2014, he found construction works still going on, the southern wall incomplete, the 2nd gate and the parking bay similarly unfinished.

The next witness, Nicholas Musula Mwati, a Works Officer with the Town Administration of the Malindi Municipal Council explained how the respondents' applications for development in 2010 were rejected by the Malindi Municipal Council for failing environment impact assessment test and how the embargo was imposed on the land in the area where the property was located. He however confirmed that there were approvals by the Council for some respondents' units in 2006 but was not able to tell if any of those approvals related to the property in this dispute as he did not have in court the file containing the 2006 transactions. He could not also tell when the unit in question was constructed and that he never visited the property.

Lennox Mwadzoya Mwasile the 4th witness, a civil technician with a Diploma in Civil Engineering made a rather sketchy report on the status of the house and the ownership of the property. According to him, relying on unsigned report of the Task Force inquiring into the land question in the area, the property was in the names of Kavumbi Kazungu Nyanje and Charo Kalama Fondo; that following the recommendations of the Task Force an embargo was imposed on all land transactions.; and that the embargo was finally lifted.

A legal Officer with National Land Commission, Wahome Murugaru, was called by the appellant to confirm the fact that the Government imposed an embargo on all land transactions in the area where the

property is located; that on 9th February 2012 the Commissioner of Lands wrote to the District Land Registrar, Kilifi directing the lifting of the embargo on the property. He further confirmed that during the embargo all transactions were suspended unless allowed by the Commissioner of Lands. He presented an official Certificate of Search issued on 16th January, 2008 confirming that the property was registered in the name of the 1st respondent and that no encumbrances were registered against the title. In his view the embargo, not being a registrable encumbrance, was a mere administrative fiat.

Michael Chinyanga, the 6th witness was the District Land Registrar, Kilifi during the period under review. He also confirmed the decision of the Government to impose an embargo on land transactions in Jimba, Madeteni and Chembe areas of Watamu. During this period consent of the Commissioner of Lands was required before registration of a lease or the conduct of any land-related transaction. The embargo, he went on to explain, was general in nature and did not target any specific parcel. There was no restriction registered in respect of the property, he confirmed. Following the lifting of the embargo the witness listed **84 leases** that were registered as a demonstration from February 2012 the operations in the land registry in Kilifi normalized.

Before turning to the respondents' case, the appellant herself testified that while in Italy she came by an online advertisement of the property development in Kenya which interested her. Thereafter she got in touch with the 2nd respondent who was in Italy and the two of them travelled to Kenya. Upon returning to Italy they entered into the aforesaid pre-sale agreement. She insisted that the respondents were in breach of the terms of the pre-sale agreement, specifically the term requiring them to complete works in the common area before final settlement of the purchase price. It was her contention that the respondents made a misrepresentation that they could grant her a lease when they knew that with the embargo in place this was not possible. She also alleged that she stood to lose the property should it be demolished by the Municipal Council for want of building plan approval.

The appellant complained that she was coerced and threatened by the 2nd respondent and the 3rd respondent's husband into signing the deed of payment contained in the letter dated 20th December, 2011. She, however, conceded that she understood the purport of the pre-lease agreement, that it was a preliminary document before the main agreement was entered into and the lease executed and the property transferred to her. This she insisted, was, however dependent on each party fulfilling their respective parts of the agreement; that after paying the deposit of €30,000 she was granted possession of the property and was therefore not a trespasser. It was when she consulted Muli Advocate that she learnt of the embargo and its consequences; that she refused to sign the sub-lease as a result of the embargo and for the respondents' failure to complete works on the common area; that she carried out expansion of the property in accordance with the pre-lease agreement; and that for the period she was in possession she did not pay service charge. When the appellant learnt of the embargo and as the respondents pressed her for the balance of the purchase price, she decided to make a report to the police which culminated in the 2nd and 4th respondents being charged with a criminal offence.

On behalf of the respondents, the case was presented by the 2nd respondent, the administrator of the condominium, an architectural draftsman, a private building contractor and an advocate. The combined effect of their evidence before the trial court was that as soon as the pre-sale agreement was signed €30,000 was paid to the respondents. The balance was to be paid in two tranches within specific periods; that the appellant was to take possession only for purposes of effecting some extension works and not to live in as she did; that the building of roads in the condominium were almost completed, while the workers' quarters, the gate and other common area works were completed. It was also the respondents' case that the embargo did not affect the property; and that the 1st respondent's title was free from any encumbrances. The appellant was blamed for going back to her word even after changing the terms of the pre-sale agreement and agreeing to execute the sub-lease and to pay the balance of the purchase price. The respondents insisted that the development plan for the property was approved by the Malindi Municipal Council. There was also evidence that for the period the appellant occupied the property she did not pay service charge for condominium.

The learned Judge (**Angote, J**) considered the totality of the evidence presented by the parties and in an unusually lengthy judgment, found no merit in the suit by the appellant, dismissed it with costs and allowing the respondents' amended counter-claim in the following terms;

> ***"(a) The Plaintiff to pay to the Defendants Kshs.7,000,000 being damages for trespass with interest at court rates from the date of this Judgment until payment in full.***
>
> ***(b) The Plaintiff to give vacant possession of the house she is occupying otherwise known as house number 402/16, situated within CHEMBE/KIBABAMSHE/402.***
>
> ***(c) The plaintiff to pay to the Defendants the costs of the counter-claim."***

This is the reasoning by the learned Judge in arriving at that decision. First the learned Judge asked:-

> ***"(a) Who, between the plaintiff and the defendant, if at all, breached the preliminary sub-lease agreement dated 23rd May, 2011?***
>
> ***(b) Did the defendants commit a fraud in offering for sale the suit premises?***
>
> ***(c) Is the plaintiff a trespasser in the suit premises?***
>
> ***(d) Who is liable for damages, if at all?"***

Based on the pleadings, oral evidence and submissions by the parties, the learned Judge found that the common area works were in progress but not complete in December, 2011; and that other than six units including the property in question the remaining units were still under construction. He, however, did not make any definite determination one way or another regarding the accusation that the respondents were in breach of the pre-sale agreement by failing to complete works on the common area. He merely said;

> ***"181. In view of those facts, it would be difficult for this Court to know the intention of the parties in so far as the completeness of the common areas was to look like before the plaintiff could pay the second installment of 45,000 Euros.***
>
> ***182. I say so because the plaintiff was aware that other than completing the common areas, the defendants were still building more houses on the suit property. The site as it were was under construction as at the time she signed the pre-sale agreement. It therefore, follows that things like the road, fencing of individual units, parking bays and landscaping were either incomplete or were not to the standards that the Plaintiff would have expected, at least until the site was not under construction."***

The learned Judge went on to state that, if indeed the works were not complete or complete below the standard expected by the appellant, the latter had a recourse under **clause 7** of the pre-sale agreement which gave her the liberty to rescind the contract. The learned Judge found that instead of invoking **clause 7** the appellant went ahead and paid the second instalment of €45,000. Relying on this Court's decision in **<u>Wachiengo</u>** v **<u>Gerald</u>** (1988) KLR 406 he concluded that, if anything, the appellant was in fact to blame for the breach of an essential term when she refused to sign the sub-lease documents despite her undertaking to do in her letter dated 20th December, 2011.

The learned Judge expressed the opinion that although a pre-sale agreement was capable of giving rise to an order of specific performance, that would however depend on its terms. In the instant case, he held, the pre-sale agreement was incapable of being enforced as prayed by the appellant because it was not made in consonance with **section 3 (3)** of the Law of Contract Act. On the second issue, the learned Judge held that the appellant failed to prove fraud as there was sufficient evidence that the 1st respondent was the registered proprietor of the property; that no encumbrance was registered against the title; that the so-called embargo is an alien concept in land law; and that the building plans approval by the Council. Having found that the breach was committed by the appellant and not the respondents the learned Judge

dismissed the appellant's suit in its entirety. He also held that, other than the payment of €75,000 the appellant failed to prove her claim of €226,145.

Turning his attention to the prayer for the damages for breach of contract in pleaded in the counter-claim by the respondents, the learned Judge relied on the case of **Hadley** v **Baxendale** (154) 9. Exch.214, for the proposition that in cases of breach of contract only damages as may fairly and reasonably be considered either as arising naturally from such breach and which may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, are payable. Because the appellant took possession of the property in violation of the provisions of the pre-sale agreement which permitted her only to carry out extension without occupation thereof, her possession amounted to trespass after the issuance of a notice terminating the pre-sale agreement, and the respondents were entitled to either damages for trespass or *mesne* profits but not both since damages for trespass cannot be claimed together with *mesne* profit. Damages recoverable would be from the date of the notice until vacant possession.

In awarding Kshs.7,000,000 as damages for trespass the learned Judge considered the fact that the property is:-

> ***"…a high-end storeyed house fronting the sea which could generate rent in excess of Kshs.150,000 per month… and … the fact that the plaintiff has been in unlawful occupation of the …house since 9th December, 2011 having failed to sign the sale agreement, the sub-lease and to pay the balance of the purchase price…. the plaintiff has never paid service charge … since she took possession of the suit premises in November, 2011 despite receiving services provided in the condominium."***

We have duly considered the foregoing rival submissions and bearing in mind our primary role as the first appellate court to re-evaluate afresh the material on record so as to draw our own independent conclusion, bearing in mind that we have neither seen nor heard the witnesses, we hold the following view of the issues raised herein. In order for the court to disturb the judgment, we must be satisfied, through re-assessment and re-evaluation of the evidence on record that the learned Judge improperly directed himself on the law and facts and thereby arrived at the wrong conclusion, See **Kenya Ports Authority** v **Kuston (K) Ltd** (2009) 2 EA 212.

It is common ground that the appellant and the 1st respondent entered into a pre-sale written agreement in which it was agreed, *inter alia,* that pending execution of the main sub-lease for the sale of the property, €30,000 would be paid upon execution of the pre-sale agreement and €45,000 after common area works were completed. The works were identified as fencing of each completed dwelling, common parking bay, servants' quarters, connection of electricity to the property, plumbing and sewerage works. Also included were the election of a local administrator (we believe, of the condominium) and a contract for security surveillance. These were to be done by 30th December, 2011. The balance of

€75,000 was to be paid by December, 2011. No date in December 2011 was specified. Parties also contracted that should the 1st respondent fail to execute and complete the common area works within the time stipulated, by 30th November, 2011, the appellant would:-

> ***"… have the opportunity to withdraw from the contract. In such a case, the (appellant would) have the right to receive, other than the double of the down payment paid upon signing the contract but also the amount of the works carried out in relation to the execution of the 1st (first) plan as agreed for €30,000 (Thirty Thousand Euros) within thirty days of the communication confirming the withdrawal to be sent to Melina Investment in Malindi."***

In construing these terms we bear in mind the evidence presented at the trial alleging breach of the agreement and also guided by the cardinal rule of contract construction, that it is not in the province of the court to re-write the contract for the parties. See **Jiwaji** v **Jiwaji** (1968) EA 547. The court must confine

itself to the document or documents constituting the contract in determining its meaning within its four corners. See **<u>Harambee Co-operative Savings & Credit Society</u>** v **<u>Mukinye Enterprises Ltd</u>** Civil Appeal No.25 of 1981. Extrinsic evidence cannot be received on the question of construction. Documents that may bear upon the interpretation of the main document may, however be received since evidence of surrounding circumstances is admissible to assist in the interpretation of any contract.

The competing and fundamental contentions by the parties according to their pleadings and oral evidence were, first that the 1st respondent had failed to complete the works in the common area within the time specified in the agreement, and that it committed fraud on the appellant by purporting to enter into a pre-sale agreement to sell to the appellant a property that it could not transfer due to a Government-imposed embargo and its failure to comply with the by-laws regarding approval of building plans.

The respondents on the other hand accused the appellant of taking possession of the property contrary to the terms of the agreement; that she had refused to pay the balance of the purchase price and service charge; and that she had also refused to execute the sub-lease.

The appellant told the trial court when she testified in May 2014 as follows regarding the breach by the 1st respondent.

> ***"As at now, the defendant has not complied with the agreement because the works were not completed; there were no title deeds and I was not told of any problems in the land or an existing embargo on the land. On the common areas, they are now finishing. The work is still going on…. At this time they are finishing doing the road, the parking is completed, but not all of the (*** *sic* ***). These things were to be completed in November, 2011".***

On cross examination she went on to say:

> ***"When I came to Kenya in June 2011, I went and saw the house. The house was already build (*** *sic* ***) when I came to Kenya. …By June 2011, the only problem was the common areas."***

It was apparent from her testimony that the works in the common area were not completed within the time specified in the pre-sale agreement. That position was confirmed by her witnesses, Harrison Musembi and Lennox Mwadzoya Mwasile. The 2nd respondent, who was a director of the 1st respondent himself conceded in his testimony that indeed the roads were in existence, motorable though not fully ready. However he explained that they could not be completed because work in the entire site was still going were on. He maintained however that the workers' quarters, the gate and the roof extension were completed by October, 2011. He also maintained that the parking bay was finished 1 ½ to 2 years before the time he testified in 2014; that fencing was already done and that the southern boundary wall could not be erected because it fronted the sea. In other words it was the respondents' case that other than the road and the Southern boundary wall, the rest of the common area works were complete.

To begin with, and clearly from the terms of the pre-sale agreement, road works and southern boundary wall were not part of the agreement. Only parking bay, servants quarters, electricity connection, plumbing and fencing of the unit were, according to the agreement to be completed by 30th December, 2011. The determination of the question whether the works were complete or not boiled down to believing either the word of the appellant that the works in common area were not complete or the respondents' that parking bay, servants quarters and fencing were completed. The only other critical question, if we are to believe either of the parties is whether the timelines set by the agreement for completion of these works were met. The learned Judge found difficulty in who between the two parties to believe because in his view, it was not clear from the pre-sale agreement what the parties intended or meant by stating that the works be "*completed*". He wondered how parties intended the common areas to look like in order to be complete. We do not think this issue posed such a difficult problem of interpretation to warrant the learned Judge to adopt such an escapist route. We cannot see any technical meaning to be attached to the word "complete". The parties themselves gave their respective positions

regarding the stage of the works. It was in error for the learned Judge to read into the terms of the agreement things the parties themselves did not contemplate. For instance, his conclusion that the respondents could not complete works in the common area due to on-going construction in the site was a misdirection. Indeed from that misdirection it is apparent that the learned Judge appeared persuaded with expressing it that the works were not complete.

It is a function of the courts to resolve disputes by determining one way or another parties' rival positions. From our own re-evaluation, the totality of the evidence, and the shy finding of the learned Judge, we are of the opinion that not all the works identified in the pre-sale agreement were completed within the specified time. We are convinced that the only area that was not completed by 30th December, 2011, was the parking bay. Having come to that conclusion we must now consider if the delayed completion of these works amounted to a breach for which the appellant would be justified for avoiding the contract by refusing to settle the purchase price and sign the sub-lease.

The parties by their express stipulation in the pre-sale agreement set certain time lines. For instance it was agreed that €45,000 was to be paid by 30th December, 2011 upon the 1st respondent's undertaking certain works. The balance and final payment of €75,000 was to be settled by December, 2011. Finally **Clause 5** provided that the transfer would be drawn and signed "**not beyond the 22nd December, 2011**". Under **clause 7** stipulated that should the 1st respondent fail to complete the works on the common area by 30th November, 2011 the appellant would be at liberty to withdraw from the agreement altogether. We note at this stage that the same agreement at **clause 4,** it appears that the period within which the works were to be completed was 30th December, 2011, one month more. Whatever the case parties agreed on these time frames. In **Saggo** v **Dourado** (1983) KLR 366 this Court, citing with approval a passage in **9 HALSBURY'S LAWS** (4th Edn) P.338, held as follows;-

> ***"…in the case of contracts of all types, time will not be considered to be of essence unless,***

a. ***The parties expressly stipulate that conditions as to time must be strictly complied.***

b. ***The nature of the subject matter or surrounding circumstances show that time should have been considered of the essence; and/or***

c. ***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 **Bir Singh** v **Parmar** (1972) EA page 212, the Court held that;-

> ***"This appeal concerns an agreement for the sale of land, a condition of which was that a deposit was payable. The agreement did not specify that the time was of the essence in connection with the payment of the deposit, and the judge refused to imply a stipulation making time of the essence. He preferred to apply the general rule as stated in 8 HALSBURY'S LAWS, 3rd Edn.Pg.164-165, and held that in the absence of an express stipulation or clear implication that time in relation to the payment of the deposit was of the essence of the contract, failure to pay the deposit did not entitle the vendor unilaterally to avoid the contract. The position would of course have been different if the vendor had given notice making time for payment of the deposit of the essence of the contract and specifying a reasonable period for payment, but this he did not do. He preferred to treat the contract as not binding on him but I agree with the judge that in these circumstances the contract continued in force.***

Finally in **Aida Nunes** vs **J.M.N. Njonjo & C. Kigwe** (1962) EA 89, the Court reiterated this principle stating that:

> ***"When time has not been made of the essence of a contract, it is clear that at least in***

contract for the sale of land and the grant of leases, one of the parties cannot avoid the contract on the ground of unreasonable delay by the other until notice has been served making time of the essence…. in the circumstances the respondents could have avoided the agreement only if they made time of the essence of the contract by fixing a reasonable time within which the sublease must be granted coupled with a notice that, if not granted then the agreement would be avoided and this they failed to do."

In this appeal we are satisfied parties intended time to be of the essence by setting different timelines for the doing of certain acts coupled with sanctions for delay. There are of course some confusion as we have noted earlier on the date the 1st respondent was required to complete the works on common areas. Whereas **clause 4** required the works to be completed by 30th December, 2011, under **clause 7** it is indicated that this was be done by 30th November 2011, a difference of one month. Under **clause 5** the transfer was to be drawn and signed **"not beyond the 22nd day of December, 2011**".

After refusing to sign the sub-lease and upon receipt of the notice of rescission of the pre-sale agreement, the appellant, on the eve of the deadline of 22nd December, 2011 gave a written undertaking which she personally signed, and which is reproduced earlier in this judgment, to the effect that she would sign the sub-lease by 23rd December, 2011, and pay €45,000 as well as €75,000 constituting the balance before the end of January, 2012. The 1st respondent agreed to the terms but fixed the 15th January 2012 as the date on which the balance of €120,000 would be settled. It also reiterated the intention of the parties to sign the final agreement only after the payment of the balance of the purchase price. Possession of the property by the appellant, it was also agreed would be taken only after the signing of the sub-lease and payment of the balance of the purchase price by 15th January 2012.

We note that the undertaking came ten (10) days before the date the 1st respondent was expected to complete the works in common area, if we take that date to be 30th December 2011, thereby rendering the time earlier fixed to cease to be of essence. There were no new time lines for the completion of the works in the common area and the 1st respondent or the other respondents could not be accused of not keeping to timelines already past and varied by new timelines. It was admitted by the appellant that even after the undertaking she only paid €45,000, and not the entire balance of €120,000. Instead, after she was advised that there was an embargo that would interfere with the transaction leading to loss of her investment and that there was no approval for the construction of the unit from the Malindi Municipal Council, she found no purpose of continuing with the transaction. Both allegations, as we have noted, were obviously unfounded as the respondents demonstrated that there was approval by the Malindi County Council for the construction and also that the embargo was lifted before this dispute was brought to court. In any case the Commissioner of Land had not rejected any application for registration of the sub-lease to warrant the unilateral decision of the appellant to avoid the contract. There were no restrains on disposition registered against the 1st respondent's title in the form of inhibition, restriction, caution or caveat.

The imposition of an embargo on the land in the area, in our considered view was a strange option for the Government to adopt while there are clear and legal mechanisms that would have been employed in dealing with the mischief that led to the imposition of the embargo. The only use of the word embargo that we know of is an international political concept to describe economic sanctions imposed by States against another to effect policy change by applying pressure. As far as we are concerned it has no application in land law. For what it was worth, its existence formed one of the reasons why the appellant avoided the contract.

At this stage the appellant made a report to the police culminating with the 2nd and 4th respondents being charged in court. There can be no doubt that the appellant took possession of the property in contravention of the pre-sale agreement, failed to pay the balance of the purchase price and to execute the sub-lease within the period she had herself fixed and caused the arrest of the 2nd and 4th respondents. We cannot find any fault in the learned Judges' decision dismissing her claim.

Regarding the counter-claim we are equally satisfied with the learned Judges' finding that there was no

substance in the 2nd and 4th respondents' claim for damages for malicious prosecution there being no evidence of malice. By making a report *per se* the appellant could not be responsible for the arrest. The police did not have to arrest if there was no merit in the complaint. The police was not joined in the claim. The claim for damages for slander similarly had no basis.

Regarding the award of Kshs.7,000,000 the learned Judge clearly erred by himself providing evidence that the property was high-end and fixing Kshs.150,000 as the probable rent without proof by the respondents who had merely prayed for damages for trespass.

For these reasons we set aside the award of Kshs.7,000,000, but dismiss the appeal. Because the appellant has partially succeeded in this appeal and bearing in mind the consequences of our decision, we make no orders as to costs.

Dated and delivered at Mombasa this 27th day of May, 2016

ASIKE-MAKHANDIA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR