IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 20 OF 2016

BETWEEN

MIDDLE EAST BANK KENYA LIMITED…….. APPELLANT

AND

THALIA KATIA MARIA CASTANHA…….....……..RESPONDENT

(Being an appeal from the Judgment of the Environment & Land Court at Mombasa (Omollo, J.) dated 19th February, 2016

in

E.& L.C.C. No. 300 of 2014 (Formerly H.C.C.C. No. 137 of 2014)

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JUDGMENT OF THE COURT

By an advertisement carried in a local daily, the Daily Nation on 27th January, 2006, the appellant advertised all that piece or parcel of land known as **L.R MN 1581/I/MN** *(the suit premises)* for sale by public auction through the firm of **Thaara Auctioneers** *(the auctioneers)* in the exercise of statutory power of sale. Following a successful bid at the auction on 24th February, 2006, the respondent was declared the highest bidder at Kshs.9 Million, pursuant to which she paid a deposit of Kshs.2,250,000/- being 25% of the bid price. A sale agreement was executed on the same day, between the respondent and the auctioneer. It was a term of the said agreement that the balance of the purchase price would be paid within sixty (60) days of the date of the agreement. However, this was not to be; for just after the payment of the deposit and execution of the agreement, the respondent learnt of a suit filed against the appellant by a third party, over the suit premises; the same being **MSA HCCC No. 40 OF 2006: Austin Salmon Kitololo v. Middle East Bank (K) Limited & 3 others**. In addition, she also learnt that on 15th March, 2006, interlocutory injunctive orders were issued against the appellant in the said suit, forbidding any further dealings in the suit premises. Apprehensive that the outcome of that suit might affect her rights as a purchaser, the respondent halted the payment of the balance of the purchase price and instead sought successfully to be enjoined in the said suit as a co-defendant. Thereafter, she and the appellant contemporaneously filed independent but identical applications therein, each seeking orders of dismissal of the suit with costs, which orders were finally granted. With that dismissal, the subsisting injunctive orders were vacated.

Consequently, the respondent revived the conveyance process in earnest and by a letter dated 25th June 2014, proposed to tender the balance of the purchase price to the appellant. While the appellant was agreeable to the proposal, it however demanded that such payment be coupled with interest on the balance at 18% per annum from 24th April, 2006 till payment in full. This demand for interest formed the crux of the dispute between the parties. The respondent saw the demand as an attempt by the appellant to unjustly enrich itself at her expense, given that her failure to timeously settle the balance of the purchase price was due to factors neither of her own making nor within her control. If anything it had everything to do with the appellant. In her view, the interest demanded was uncalled for, as her completion of the agreement was interrupted by an injunction issued against the appellant which froze transfer of the suit premises. With this conviction, she filed suit against the appellant, seeking the following orders:

> "a)A declaration that the Defendant's action of demanding interest that accrued during the period when payment was suspended by operation of the law/ court orders is unconstitutional, null and void for being in breach of the rule of law.
>
> b)An order of specific performance.
>
> c) A mandatory injunction directing the defendant to execute and provide a discharge of charge and transfer of the suit property L.R 15811/I/MN in favour of the Plaintiff and surrender of original title and deed plan for the same to facilitate registration.
>
> d)Costs of and incidentals to this suit."

The suit was defended, with the appellant contending firstly, that it had not executed the agreement and as such, the contract was not binding, for it offended the provisions of **section 3(3)** of **The Law of Contract Act**. In the alternative, that once the respondent defaulted in settling the balance of the purchase price within the stipulated period, the same automatically began attracting interest at 18% per annum for the period it remained outstanding. Further that in the event of default by the respondent, the appellant reserved the right to rescind the contract and forfeit the deposit. The appellant thus maintained that it had acted well within its rights in demanding interest. It was also the appellant's case that the injunction had no effect on the transaction because it was a defective order and at the time it was issued, the respondent was not a party to the suit and the same was thus not binding upon her. Further, that even if the order held any sway over the transaction, the same having lapsed on 13th June, 2014, the respondent could have still taken steps to settle the balance but did not. Consequently, by a notice issued on 17th October, 2014, the appellant rescinded the contract. Lastly, the appellant also asserted that the contract was void ab initio as the consent of the lessor was never sought and obtained, contrary to the terms of the lease.

The suit was heard by **Omollo J.,** and judgment thereof delivered on 19th February, 2016 in favour of the respondent. The gist of the judgment was that no interest was payable to the appellant, as the contract had not been frustrated and that to the contrary, the appellant was obligated to complete the transaction as per the prayers in the plaint. The appellant's purported repudiation of the contract was thus held to be an afterthought and the court directed the appellant to execute a transfer and discharge of charge over the suit premises within thirty days to facilitate registration in favour of the respondent. That judgment has in turn sparked this appeal.

The appellant impugns the judgment on a whopping 44 grounds some of which are repetitive, overlapping, not concise and argumentative. They are therefore not in consonance with **rule 86** of this Court's rules. However we are able to discern about four broad grounds that will fall for our determination. The respondent responded to the appeal by filing grounds affirming the judgment; in which she states that the matter was *res judicata,* having been determined in Mombasa H.C.C.C No. 40 of 2006.

The sum total of the appeal is that the learned Judge is said to have erred by; framing and determining issues suo motu whilst ignoring the issues framed by the appellant; misapprehending the appellant's submissions and instead dealing with issues that fell outside the ambit of the pleadings and evidence;

failing to appreciate that specific performance as a remedy was unavailable, because the memorandum of sale relied on was not a valid sale agreement for three reasons; firstly because it was not executed by the appellant- meaning it offended the provisions of **section 3(3)** of **The Law of Contract Act**, secondly, that the consent of the Commissioner of lands, the lessor herein was never sought as required, thirdly, the public auction was conducted by an un licensed auctioneer, that the sale was not backed by the lessor's consent to transfer; further, that the judge also erred when she failed to appreciate the appellant's case that no deposit was made at the fall of the hammer as required under the agreement thus rendering it null and void and incapable of giving rise to an order of specific performance sought; that the judge also misapprehended and misconstrued **condition 10** of the Memorandum of Sale by holding that payment of interest by the respondent is tantamount to imposing an undue penalty, an issue neither raised nor argued at trial; that the judge in effect erroneously re wrote the contract between the parties on the issue of interest; that having held that the sale was premised on the memorandum of sale dated 24th February 2006, the judge ought to have dismissed the case, since the claim was not based on this memorandum of sale; that she also erred when she failed to hold that the injunction could not assist the respondent justify her default in settling the balance of purchase price; that she erred in failing to appreciate that the appellant was entitled to terminate the agreement on account of the default in payment; that the doctrine of *res judicata* as pleaded by the respondent herein is inapplicable as the same was neither pleaded before the trial court, nor is it applicable to the matter at hand. Finally, it is the appellant's assertion that the issue whether or not the memorandum of sale is enforceable or not is a matter that was never an issue in Mombasa H.C.C.C. No. 40 of 2006.

With the leave of court, the parties filed written submissions and orally highlighted the same at the plenary hearing. In his summary of the dispute, **Mr. Esmail**, learned counsel for the appellant, conceded that an auction indeed took place, with the respondent emerging the highest bidder and subsequent purchaser of the suit premises. He however reiterated that in the course of completing the agreement, the respondent defaulted in two ways. Firstly, she failed to pay the deposit at the fall of the hammer, a condition precedent in the agreement; nonetheless, the appellant accepted a belated payment thereof and went on to draw up the sale agreement. Secondly, that she failed to pay the balance of the purchase price within the requisite 60 days of signing of the agreement, citing an *ex parte* injunction issued against the appellant in a suit filed by a third party as the cause for her default, which the appellant terms as inexcusable because not only was the injunction null and void, the same was in no way binding upon the respondent as she was a stranger to the suit at the time the injunction was issued. In addition, that as per the agreement, any default in payment by the purchaser attracted a penalty in the form of interest, charged on the balance outstanding at 18% per annum from the date of default until payment in full. Accordingly he submitted, the appellant was well within its rights to demand the payment of interest and that the respondent remained indebted to the appellant on the interest, her subsequent settlement of the balance notwithstanding. In conclusion, counsel submitted that the appellant's rescission of the contract, was thus well founded.

Appearing for the respondent, **Mr. Mogaka**, learned counsel submitted that the sale was in exercise of the statutory power of sale, as opposed to a sale by the lessee; and as such, the consent of the lessee was presumed to have been granted the moment the suit premises were charged. In any event, he submitted, the issue of consent as a necessity was neither raised nor proved at trial. On the issue of interest, Counsel submitted that since there was no counterclaim by the appellant for the same, the appellant cannot not now seek to re-litigate the issue. In addition, given the operation of the law and the subsequent full payment of the purchase price, the parties were thereby bound and estopped from disowning the agreement which was enforceable regardless of whether it was termed a memorandum of sale or sale agreement. While conceding that the agreement was never executed by the bank, counsel submitted that the auctioneer was the appellant's agent and that whether or not the said auctioneer was licensed and/ or authorized to act for the appellant were facts to be proved by the appellant. It was counsel's contention that the appellant's claim for interest only serves to prove that the agreement was enforceable and that the learned judge was right in holding as much. Lastly, that the issues as determined by the learned judge were in accordance with the pleadings and as framed by the parties and the judge cannot be said to have addressed extraneous issues.

Based on the memorandum of appeal and the submissions aforesaid, this appeal has in our view, spawned

four main issues for determination;

a) Whether the trial judge failed to consider issues as drawn by the appellant and/or considered extraneous issues;

b) Whether or not there existed a valid sale agreement between the parties;

c) Whether the sale was completed and the consequences thereof; and,

d) Whether interest was payable to the appellant.

This being a first appeal, *this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect* (see **Selle & Another v. Associated Motor Boat Co. Ltd & Others [1968] EA 123*).*** An appellate court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the findings he did (see. **Ephantus Mwangi & Another v. Duncan Mwangi Wambugu [1982-88]1 Kar 278).**

Firstly, a preliminary point of the matter being *res judicata* was raised by the respondent. This being an issue that goes to the court's jurisdiction, the same must be addressed first, for it informs whether or not the Court shall delve into the other issues. Through her grounds affirming the judgment, the respondent primarily contends that the appellant's defence was barred by the doctrine of *res judicata,* as the question of whether or not a sale by public auction took place was conclusively heard and determined in **MSA HCCC No. 40 OF 2006: Austin Salmon Kitololo v. Middle East Bank (K) Limited & 3 others**. That determination forms part of the record. In that suit, a third party had sought to impugn the validity of the charge placed over several parcels of property, among which was the suit property herein. Apprehensive that attacks levelled on the validity of the charge would in turn impact on her rights as a buyer of the land; the respondent successfully applied to be enjoined in the suit as aforesaid. In essence, what she contended as against the third party, was that the ship had sailed, in so far as contesting the charge was concerned. That subsequently, as a purchaser for value, her title was beyond reproach. Accordingly, she sought dismissal of the suit on that ground. Ruling on the application, **Tuiyott J.** held that in the absence of any allegation or proof of fraud or wrongdoing on the part of the respondent, she remained a lawful purchaser for value without notice, whose title is protected under **Section 23** of the **Registration of Titles Act** and **section 69B** of the **Transfer of Properties Act** and cannot be impeached.

We hasten to add however, that while the court upheld the sanctity of the respondent's title, the mainstay of those proceedings was the challenge on the validity of charge. It was not a challenge of the sale agreement itself. Under **Section 7** of the **Civil Procedure Act,** it is provided that:-

> **"No court shall try any suit or issue in which the matter directly or substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."**

This is what prescribes the doctrine of *res judicata.* To be successfully invoked, it must be shown that there exists:-

1. A previous suit in which the same matter was in issue;

2. The parties are the same or litigating under the same title;

3. A competent court heard the matter in issue and determined it; and;

4. The issue has been raised once again in a fresh suit.

(see. **Uhuru Highway Development Limited v. Central Bank of Kenya & 2 others [1996] eKLR**). In our view, the applicability of the doctrine to this case runs into headwinds because the matter in issue was not the same in the two suits. As stated, the issue in MSA HCCC No. 40 OF 2006 was whether or not the charge was valid or could be challenged. Conversely, the issue before the trial court in this matter was *inter alia,* the validity of the sale agreement. The main focus of the court and the parties in MSA HCCC No. 40 OF 2006 was not for example, whether the sale agreement met the requisites of a valid contract. Instead that suit was confined to the issue of whether the third party could challenge the validity of the charge. That might explain why the learned judge in the aforesaid ruling surmised as follows:-

> **"The plaintiff's claim on fraud is that the signature on the charge document did not belong to him. In essence, it was a forgery…..**
>
> **…..I hold that any challenge to the validity of the charge dated 18th March, 1999 is beyond the reach of the plaintiff. In addition, the sale and transfer of LR. 780 (CR. No. 10286) to the 4th defendant cannot be impeached. To that extent, the plaintiff's entire claim against the 4th and 5th defendants must collapse..."**

The suit revolved around the validity of the charge and how that charge could be impugned. The validity of the sale agreement was never made an issue. Yet that is what was challenged before the trial court in this case. The validity of the sale agreement was not an issue that was raised and determined on merit before the court in MSA HCCC No. 40 OF 2006. Secondly, the determination of the rights of the respondent as a purchaser in MSA HCCC No. 40 OF 2006 was in relation to the third party. The dispute in that case was never between the respondent and the appellant. Consequently, it cannot be said that the parties in the two suits were the same or litigating under the same title. We are therefore of the view that the doctrine of *res judicata* fails to find application herein. This holding disposes of the respondent's notice of grounds for affirming the judgment.

Back to the first issue, the appellant has from the outset faulted the trial judge for failing to address issues it had raised, instead addressing issues extraneous to those raised by the parties. The law on framing and determination of issues is succinct. A court is not always bound to deal with each and every issue the parties frame. Agreed issues are merely intended to enable the trial court appreciate the matters in controversy between the parties upon which they shall be obliged to call evidence. (see. **First Assurance Co. Ltd. –vs- Seascapes Ltd - Civil Appeal No. 246 & 263 of 2002** -as cited by this court with approval in **Epaphrus Muturi Kigoro v William Mukui Nyaga [2015] eKLR**) where the Court went on to add that:-

> **"If at the close of the hearing he (the judge) is convinced that some of those issues were unnecessary he is not precluded from saying so."**

Similarly, in **Odd Jobs v. Mubia, 1970 EA Page 47**6, this Court held that:

> **"(i) A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision; …."**

From the foregoing, it is apparent that the law allows a court ample leeway to determine what the issues in a dispute are. While it may be obliged to determine all the framed issues to the dispute, it also enjoys wide discretion and as such, may also determine additional issues as they emerge, notwithstanding that the same have not been specifically framed by the parties themselves. It all depends on the weight and bearing the issues may have on the dispute at hand and whether the parties have had a fair opportunity to address them.

Did the trial court in this case fail to consider issues placed upon it and in place thereof considered irrelevant or extraneous matters? A re-analysis and re- evaluation of the pleadings and evidence placed before the trial court, show that it was common ground that a public auction took place on 24th February, 2006; and the respondent was declared the highest bidder. However, while the respondent maintained that she promptly paid the deposit of the purchase price with a sale agreement to that effect being executed

between herself and the auctioneer on the same day and that payment of the balance of the purchase price was only temporarily hindered by the injunction, the appellant hotly contested these claims. To the appellant, neither the deposit nor the balance of the purchase price were paid on time; nor was any agreement executed between itself and the respondent. In fact, it is the appellant's assertion that the purported sale agreement was void *ab initio* owing to several shortcomings, that is to say; want of consent to transfer from the lessor; failure by the respondent to pay the deposit of the purchase price at the fall of the hammer; failure by the respondent to pay the balance of the purchase price on time; lastly, want of execution of the agreement by the appellant in line with the provisions of the Law of Contract Act and that in any event, the agreement on record is not the one upon which the claim was premised. Accordingly, that the respondent was liable to pay interest on the balance of the purchase price at 18% per annum as per the agreement, failure to which, her claim should have failed.

On its part, the trial court captured the issues it set out to determine as follows:

> **"(a) Whether there was a sale by public auction**
>
> **(b) If the answer to (a) is positive, was the plaintiff to blame for the default in completing the sale and therefore should she pay the balance with interest at 18% per annum.**
>
> **(c) Is the defendant obligated to complete the transaction by releasing the executed documents to the plaintiff?"**

These issues in our view reflected the bone of contention between the parties; for what was disputed was the validity of the contract, its performance and the consequences of default in completion, if any. Bearing in mind the wide discretion accorded to the trial court in framing and determination of issues, the trial court cannot be faulted for it seems to have captured the key issues in the dispute for determination. We discern no extraneous issues that the trial court delved into.

With regard to the second issue in this appeal, the appellant contested the validity and performance of the sale agreement on several grounds. Firstly, that the same was null for want of execution by itself. It is not in doubt that for it to be enforceable, a contract for the sale of land must be in writing, signed by the parties thereto. Indeed, **Section 3** of the **Law of Contract Act** provides in part as follows:-

> **"(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-the contract upon which the suit is founded-**
>
> **(a) is in writing**
>
> **(b) is signed by the parties thereto."**

In this case, the respondent relied on the memorandum of sale dated 24th February, 2006; a document executed by the auctioneer on one hand and the respondent on the other. The appellant has contended that the auctioneer was neither licensed to practice nor authorized by the appellant to act on its behalf.

Regardless of these assertions, the appellant has not disowned the advertisement placed in the Daily Nation newspaper of 27th January, 2006 by the auctioneers in question on its behalf. To the contrary, it has admitted that an auction was advertised and conducted by the said auctioneer on its behalf in exercise of its statutory power of sale, with Kshs.2,250,000/- being received by itself from the respondent, on account of deposit on the purchase price. The payment was effected vide a banker's cheque, albeit belatedly paid. Infact, according to the sole witness who testified, **Anne Njeri Gathog***o (PW1)*, the auctioneer only drew up and executed the agreement upon the appellant's instructions which the auctioneer confirmed through a telephone call to the appellant. That testimony was not controverted. In addition to the admission of receipt of deposit, the appellant, by a letter dated 29th May, 2006 written by its advocates and addressed to the respondent's advocates also stated in part as follows:

> **"……We do not agree that the contract to purchase has been frustrated; there is only a**

> **temporary injunction which prohibits our client from completing the sale. There was never any impediment to your client completing her part of the bargain and had she tendered the balance of the purchase price on the due date, our client would have accepted the same subject to the consent of the court, and if necessary, made an appropriate application to the court."**

It would thus appear that all along, the appellant recognized the sale and ratified the acts of the auctioneer. In any event it is the appellant who appointed the auctioneer. He ought to have known whether or not he was licenced. It was not the business of the respondent to conduct due diligence to establish the legal status of the auctioneer. Accordingly, the appellant cannot now turn around and claim that the auctioneer was not licenced in a bid to escape its obligations. In any event an act though done by an unauthorized agent which act is later adopted by the principal as true is binding upon the principal by virtue of his adoption (ratification). Ratification can apply retrospectively provided the act done though unauthorized, was lawful. (see **East African Safari Air Limited v Anthony Ambaka Kegode & another [2011] eKLR).** By virtue of that ratification, the memorandum of sale signed by the auctioneer became binding upon the appellant. Therefore, the contention by the appellant that the judge gave a wild and unnatural interpretation to **section 3(3)** of the **Law of Contract Act** is in our view a misplaced argument. Further, while the appellant alleged that the agreement was also void because the auctioneer had failed to take out a license under the **Auctioneer's Act**, no evidence was adduced in support of that allegation. **Sections 107 & 108** of the **Evidence Act** place the burden of proof upon he who alleges a fact. It behooved the appellant to prove that the auctioneer. As a result of the failure to adduce evidence in this regard, that assertion too must fail. The same applies to the contention that the sale was also invalid for want of the lessor's consent. No evidence was lead to demonstrate the necessity of the said consent. Given that the suit premises had been charged and were sold at a public auction in the exercise of statutory power of sale, the consent of the lessor was not necessary and even if it was, it was presumed to have been given the moment the suit premises were charged to the appellant. Besides, as held by this Court in **Govindji Popatlal v Nathoo Visandjee [1962] E. A. 372;**

> **"The certificate of title was, in terms of section 23 conclusive evidence of the title of the mortgagee to the property. The charge when registered under section 32 has by section 46 the effect of a legal mortgage which transfers the property to the mortgagee leaving only an equity of redemption to the mortgagor."**

Further and as correctly submitted by the respondent, the issue was, in any event, never raised and or canvassed at the trial.

Then there was the assertion that the sale was also invalidated by the respondent's failure to fulfil a condition precedent, namely the timely payment of deposit at the fall of the hammer. The evidence on record does not support this assertion at all because the banker's cheque produced in evidence shows it was drawn on the date of the auction. In any event, the appellant's conduct of demanding for interest on the balance of the purchase price is consistent with a party who acquiesced to the belated payment (if at all). As earlier said these acts by the auctioneer were never disowned by the appellant, rather, they were later ratified by its acceptance of the deposit and demand for interest. The totality of the foregoing is that contrary to the appellant's assertions, a valid sale agreement existed between the parties.

On the third issue, the mode of discharge of the contract was also disputed. The appellant accused the respondent of willful default in completion, saying that the contract stood repudiated by the respondent the moment she failed to settle the balance on time. In line with that, and notwithstanding the subsequent full payment of the balance, the appellant treated the contract as rescinded and on the strength of **condition 10** of the agreement, also claimed for interest on the balance of the purchase price at 18% per annum from the date of default.

The respondent on the other hand cited the operation of law as the reason for her failure to effect punctual payment of the balance of the purchase price, namely the injunction issued against the appellant on 15th March, 2006 in MSA HCCC No. 40 OF 2006; a reason the appellant dismisses as a mere excuse because at the time the injunction was issued, the respondent had not been enjoined in that suit and the order was

thus not binding on her. The pertinent part of the injunction in question stated that:

> **"5. That the first and second defendant be and are hereby restrained from transferring, auctioning, selling or otherwise interfering with the property known as L.R MN 1581/I/MN Nyali (CR 13765) and CR 10286 until the hearing and determination of this suit."**

The appellant was the said first defendant in the said suit. However, at the time this injunction was issued, the sale agreement between the appellant and the respondent had already been executed with the initial deposit of the purchase price already paid as earlier stated. The contention that the respondent was unaffected by this order can thus not hold because any order which hampered the ability of the appellant to effect a transfer of the suit premises in her favour automatically impacted on the respondent's ability to secure the suit premises. In addition, suits pertaining to the possessory and/or proprietary rights over immovable property are actions *in rem* and thus enforceable against the world at large. By definition, an action *in rem* is:

> **"1. An action determining the title to property and the rights of the parties, not merely among themselves, but against all persons at any time claiming an interest in that property; a real action.**
>
> **2. An action brought for the protection of possession, ownership, or other real rights in immovable property.**
>
> **3. An action for the recovery of possession of immovable property…'** (see. **Black's Law Dictionary, 9thEdn**)"

The rule of law enjoins the parties to comply with all existing orders issued by courts. Therefore the mere fact that the respondent was neither a party to the suit nor a party against whom the order was issued does not absolve her from deferring to the said order as long as the same was an order *in rem.* Orders in rem are binding on all and sundry.

As was held in the case of **Kamunyu and Others vs. Attorney General & Others [2007] 1 EA 116** actions *in rem* are unique in the sense that while they are not instituted against the world and while they do not confer rights on the world at large, their orders are nonetheless binding upon the entire world. The court had this to say on the matter;

> **"In a suit seeking judgment in rem, that is a judgment applicable to the whole world, an individual does not sue on behalf of the whole world, but sues for judgment which is effective against the whole world. In other words, in the present case, the appellants when successful in the suit obtain judgment, which is effective against the whole world but does not confer benefits upon the whole world."**

The injunctive orders issued against the appellant meant that the transfer of the suit premises to the respondent was frozen in its tracks. At that point in time, her completion of the contract was immaterial as no conveyance could be effected in her favour. The payment of the balance would have being contrary to the pendens rule. Even if she paid the full consideration, the appellant was not in a position to fulfil its side of the bargain. It is trite law that a contract can never supersede the provisions of the law. The law always takes precedence. So that while the parties may have agreed on the completion period, the running of time was automatically suspended the moment an injunction was issued.

This leads us to the fourth issue; whether interest was payable to the appellant by the respondent. Given what we have already stated, **can the appellant still maintain a claim for interest during the period when the injunction was in force? We think not. Enforcing the payment of interest in such circumstances would be tantamount to enforcing an unconscionable bargain. An unconscionable agreement has been defined as:-**

> **"An agreement that no promisor with any sense, and not under a delusion, would make, and**

that no honest and fair promisee would accept' (see. Black's Law Dictionary, 9th ed)"

The moment it was clear that performance on the appellant's part was hampered by the injunction in force, prudence demanded that the respondent mitigates her potential loss by holding off further payment until such a time as the issue would be addressed and resolved. Worth remembering as well, is that save for a denial that a valid contract existed and assertion that specific performance should not have issued because the respondent was yet to settle the interest, no counterclaim was filed claiming for the said interest by the appellant. In any event, the appellant never adduced evidence to prove its entitlement to the interest alluded to given the unique circumstances of the case. It is thus unconscionable for the appellant to demand from the respondent the interest.

From what we have said so far, it should be readily apparent that this appeal is for dismissal. It is so ordered. The respondent shall have the costs of the appeal.

Dated and delivered at Malindi this 30th day of September, 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