THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION CIVIL APPEAL NO.43 OF 2020

(ARISING FROM CIVIL SUIT NO.066 OF 2014)

NDAWULA SAMUEL:::APPELLANT

VERSUS

MUTABAZI JOSEPH:::RESPONDENT

JUDGMENT

BEFORE HON JUSTICE HENRY I. KAWESA

This appeal was brought by the Appellant being dissatisfied with the judgment of Her Worship Babirye Mary, a Chief Magistrate at the Chief Magistrate Court of Entebbe at Entebbe.

The brief facts of the appeal are that the Appellant sued the Respondent vide Civil Suit No.66 of 2014 in the lower Court, together with Equity Bank Ltd, for breach of contract, and sought an order of specific performance, among others. The Respondent mortgaged his **land comprised in Busiro Block 265 Plot 6535 at Bunamwaya** (*hereinafter the suit land*), and other land, to the said bank. He defaulted on his obligations for three consecutive months prompting the said bank to demand immediate payment of all the outstanding loan balance, on the 7th of September, 2012.

In its demand notice, the said bank also informed the Respondent that the outstanding loan balance would continue attracting interest on a daily

basis, and that it might soon commence a foreclosure process unless the default was corrected. This caused the Respondent to consider selling one of the mortgaged properties, *the suit land; and through a broker, a one Mutesasira Ronald.* The Respondent was connected to the Appellant whom he offered to sell the suit land. Realizing that the suit land had a mortgage encumbrance of the said bank, the Appellant inquired from its officials about the viability of the intended transaction, and was given a green light to acquire the suit land from the Respondent provided he deposited Ugshs.30,000,000/- *(thirty million shillings)* only onto the Respondent's account.

On 17 September, 2012, the parties herein entered into an agreement for sale of the suit land at a consideration of Ugshs.30,000,000/- *(thirty million shillings)* only. Upon execution of the same, the Appellant deposited Ugshs.9,000,000/- (*nine million shillings)* only onto the Respondent's account maintained by the said bank. It was expressed in the same agreement that the bank would release the certificate of title for the suit land to the Appellant upon depositing Ugshs.30,000,000/- *(thirty million shillings)* only, but the time within which the whole amount was to be deposited was not stipulated.

The Appellant continued deposited monies on the Respondents account towards completion of the purchase price until August, 2013.

On the 30th of September, 2012, the Respondent obtained a loan of Ugshs.25,000,000/- (*twenty five million shillings)* only from a money lender to correct his loan default with the said bank.

Upon completion of the entire payment in August 2013, the Respondent declined to sign transfer forms in favour of the Appellant, and the bank refused, as well, to release the certificate of title for the suit land.

It was the Appellant's contention that he was entitled to complete payment within reasonable time because the written agreement did not stipulate the time within which this was to be done. Further, the Respondent breached the said agreement by failing to sign transfer forms in his favour. Similarly, that Equity Bank Ltd also breached the said agreement by failing to release the certificate of title for the suit land to him.

On the other hand, the Respondent denied breaching the said agreement. He rather faulted the Appellant for failing to deposit the whole agreed purchase price of the suit land on the day of execution of the said agreement. He alleged that on that day, the Appellant promised to return and clear payment but he went missing and all his efforts to locate him were in vain. That after the Appellant's disappearance, he looked for a possible way to redeem his property and business name, and that this was by securing a loan from a money lender.

At trial, the Appellant called one witness, that is himself (PW1); and the Respondent called two witnesses, that is himself (DW1), and Mutesa Ronald (DW2). The following issues were raised for determination by Court:

1. *Whether there was a complete sale agreement for the suit land between the plaintiff and the Respondent?*
2. *If so, whether there was any breach of the said agreement?*

3. *What reliefs are available to the parties?*

Addressing herself the evidence on record, the trial Magistrate found the first issue in the negative on ground that the Appellant had only paid Ugsh.25,000,000/- *(twenty five million shillings)* only .

As regards the 2nd issue, the trial Magistrate found that it was the Appellant in breach of the said agreement. Consequently, she issued the following orders as regards issue three:

1. That the plaintiff's case stands dismissed.
2. That the Respondent shall refund to the Appellant Ushs. 25,000,000/- (*twenty five million shillings*) only being the amount deposited onto his account by the Appellant.
3. That the Respondent and Equity Bank are awarded costs.

The Appellant being dissatisfied with the trial Magistrates decision, he appealed to this Court on the following grounds:

1. The learned trial Judge erred in law and fact in failing to correctly evaluate the evidence on record and thus arrived at the following wrong decisions:-
    a. That the Appellant had failed to pay the entire purchase price of the suit land.
    b. That the Appellant filed the suit prior to completing full payment of the purchase price.
    c. That there was no complete sale of the suit land to the Appellant.

2. The learned trial Magistrate erred in law and fact when she failed to hold that the property in the suit land passed to the Appellant upon payment of the initial deposit out of the total purchase price of the suit land.

3. The learned trial Magistrate erred in law and fact by wrongly exercising her discretion when she failed to order for specific performance of the parties' contract of sale of land dated 17th September, 2012 against the Respondent.

4. The learned trial learned erred in law and fact when she failed to hold that the Respondent's remedy for breach of contract of sale lay in a claim for damages.
5. The learned trial Magistrate erred in law and fact when she held that the Appellant was in breach of contract.

6. The learned trial Magistrate erred in law and fact when she held that the Appellant was in breach of contract with a counterclaim in the suit.
7. The learned trial Magistrate erred in law and fact when she only considered and relied on the Respondent's evidence without exhaustively considering that of the Appellant regarding payment of the purchase price.

Counsel for both parties filed written which I shall consider in determining the above grounds.

Before proceeding any further, I shall handle a preliminary objection raised by Counsel for the Respondent first. This is to the effect that the appeal is incompetent on ground that it was filed out of time as stipulated under

Section 79(1)(a) of the Civil Procedure Act Cap 71, that is; after seven months. This was disputed to by Counsel for the Appellant who argued to the opposite. I found it prudent to state the foundation of the preliminary objection.

The judgment appealed against was delivered on 20 December, 2019. On the 6th of January, 2020, the Appellant filed a letter in the lower Court requesting for a certified copy of the record of proceedings to enable him prepare his appeal. Before the same was availed to him, he filed a memorandum of appeal in this Court on the 28th of July, 2020. Later on, a certified copy of the record of proceedings was availed to the Appellant on the 18th day of August, 2020.

Now, Counsel for the Respondent argued that the Appellant did not need a certified copy of the record of proceedings; and that that is why his memorandum of appeal was filed before the same being availed to him. To him, the fact that the Appellant filed a letter requesting for a certified copy of the record of proceedings is irrelevant considering that he was able to file a memorandum of appeal without the same. Counsel seemed to suggest that the time within which the Appellant had to appeal started running immediately the lower Court's judgment was delivered, that is from 20th December, 2019.

On the other hand, Counsel for the Appellant contended that the time within which to appeal stopped running immediately the Appellant requested for a copy of the certified record of proceedings; and run again when the same was availed. He supported his submission with **Section 79(2) of the Civil**

Procedure Act., and ***Godfrey Tuwangye Kazzora versus Georgina Kitari Kwenda [1992-93] HCB 145***, wherein it was held that time within which to appeal does not begin to run until the Appellant receives a copy of the proceedings against which he or she intends to appeal.

It was his submission that the fact that the Appellant filed his memorandum of appeal before receiving the record of proceedings is not fatal considering his letter requesting for a copy of the certified record of proceedings. Further, that that the act of filing the memorandum of appeal was in the spirit of expediency knowing that the same would be amended, if necessary, upon the Appellant being availed a certified copy of the record of proceedings.

As argued by Counsel for the Appellant, once an intending Appellant requests for a certified copy of record of proceedings, the computation of the 30 days' period within which to appeal is reckoned from the date when the same is availed to him or her. *See* **Section 79(2) of the Civil Procedure Act;** ***Maria Onyango Ochola and Others versus J. Hannington Wasswa [1996] HCB 43 (S.C.)***.

It is not disputed that the Appellant filed a letter requesting for a certified copy of the record of proceedings to take benefit of a legal exception. Considering the aforesaid authorities, it is right to say that the Appellant's time, within which to appeal, started running after receiving the record of appeal, contrary to the Respondent Counsel's argument. I doubt whether this established rule is affected by the fact that the Appellant filed his memorandum of appeal prior receiving the said record of proceedings.

I believe, as the Appellant's Counsel argued, that the said memorandum of appeal was filed for purposes of expediency. It could be properly withdraw any time, and another filed within time upon receiving a certified copy of the record of proceedings. Seeing that the Appellant did not exercise this choice, the implication is that intended that the memorandum of appeal on record be adopted for purposes of his appeal. From the aforesaid reasons, I find no merit in the preliminary objection, and the same is hereby overruled.

I shall now proceed to determining the grounds of the appeal.

Both Counsel appreciated this Court's appellate duty to review the record on the lower Court and come up with its own decision bearing in mind that it did not have the opportunity to observe the witnesses' demeanor. The cases of ***M/s Ayume Jogo Tabu & Co. Advocates versus The Registered Trustees of the Church of the Province of Uganda HCCA No.016 of 2017, Uganda Breweries versus Uganda Railways Corporation SCCA No.6 of 2004***, and ***Gapco Ug. Ltd versus A.S Transport Ltd CACA No.7 of 2007*** were cited by both Counsel in support of this proposition.

Having reviewed the record, and appreciated the submissions of both Counsel on record, I observed that grounds 1(a), (b), and 7; 1(c), and 2; 3, & 4; and 5 & 6 are interrelated. As such, I shall determine them concurrently in that order.

Grounds 1(a), (b), and 7.

The learned trial Judge erred in law and fact in failing to correctly evaluate the evidence on record and thus arrived at the following wrong decisions:-

a. That the Appellant had failed to pay the entire purchase price of the suit land.
b. That the Appellant filed the suit prior to completing full payment of the purchase price.

The learned trial Magistrate erred in law and fact when she only considered and relied on the Respondent's evidence without exhaustively considering that of the Appellant regarding payment of the purchase price.

I note Counsel for the Appellant's argument about the Appellant testifying that he paid the entire purchase price Ushs.30,000,000/- Ugshs.30,000,000/- (*thirty million shillings)* only. He added that this testimony is corroborated by receipts of payment considered by the trial Court to reach its conclusion, and argued that the total sum therefrom is Ugshs.30,000,000/- (*thirty million shillings)* only not Ugshs.25,000,000/- (*twenty five million shillings)* only.

It was his submission also that the Appellant having completed payment of the entire purchase price in 2013, it was erroneous for the trial Magistrate to conclude that he brought his suit before completion of payment.

His argument is countered by the Respondent Counsel's argument supporting the trial Magistrate's finding and conclusion to the effect that the

Appellant had only paid Ugshs.25,000,000/- (*twenty five million shillings)* only at the time of bringing his suit.

In concluding as such, the learned trial Magistrate noted, at page 5 to 6 of her judgment, that the Appellant attached payment receipts on his plaint which included a deposit slip of Ugshs.5,000,000 dated 16th of August, 2013, a deposit slip of Ugshs 3,000,000 dated 22nd of November 2012, a deposit slip of Ushs.9,000,000/- (*nine million shillings)* only dated 17th of September 2012, a deposit slip of Ugshs.5,000,000/- (*five million shillings)* on dated 29th of October, 2012, and a deposit slip of Ushs. 3,000,000 /- (*three million shillings)* dated 23rd of August, 2013. The sum total of these figures is indeed Ugshs.25,000,000/- (*twenty five million shillings)* only, as the learned Magistrate found.

There is however some glaring error, as Counsel for the Appellant noted. The last deposit slip of 23rd of August 2013, is of Ushs.8,000,000/- (*Eight million shillings*) and not Ushs.3,000,000/- (*three million shillings)* only . If this defect is corrected, the sum total becomes Ushs.30,000,000/- (*thirty million shillings)* as the Appellant contends.

For this reason therefore, I agree that it was erroneous for the trial Magistrate to conclude that the Appellant had paid only Ushs.25,000,000/- (*twenty five million shillings)* only at the time of filing his suit.

In the circumstances, grounds 1(a), (b), and 7 are found in the affirmative.

Ground 1(c) and 2

1. The learned trial Judge erred in law and fact in failing to correctly evaluate the evidence on record and thus arrived at the following wrong decisions:-

   (c) That there was no complete sale of the suit land to the Appellant.

2. The learned trial Magistrate erred in law and fact when she failed to hold that the property in the suit land passed to the Appellant upon payment of the initial deposit out of the total purchase price of the suit land.

Counsel for the Appellant submitted that there was a sale of land between the parties herein, and that this accrued upon execution of the subject agreement and part payment of Ushs.9,000,000/- (*nine million shillings)* only by the Appellant.

He supported his view with ***Sharif Osman versus Hajji Haruna Mulangwa SCCA No.38 of 1995*, ** wherein *Tsekoko J.S.C*., quoted, with approval, the observations of *Lord Selborne, L.C., in* **Philips versus Silvester (1872) 8 *Cha. A. 173*** that:

> *"By the effect of the contract, according to the principles of equity, the right to the property passes to the purchaser, and the right of the vendor is turned into a money-right to receive the purchase money, he retaining a lien upon the land which he has sold until the purchase money is paid. The vendor became a trustee for the purchaser".*

Ultimately, the learned Justice of the *Supreme Court* observed that;

> "*even if there remains unpaid balance, the property in the lands passed to the purchaser when a deposit was made."*

The Appellant's Counsel further quoted an extract from ***Ismail Jaffer Allibhai & 2 Others versus Nandlal Harjivan Karia & Anor SCCA No.53 of 1995***, where the Supreme Court further noted that;

> "*in a sale of immovable property, upon payment of a deposit, property passes to the purchaser who acquires an equitable interest in the property and the vendor becomes a trustee who holds the property in trust for the purchaser*".

Relying on the propositions in the aforesaid cases, Counsel for the Appellant argued that the property in the suit land passed unto the Appellant upon execution of the sale agreement, and payment of Ushs.9,000,000/- (*nine million shillings)* only.

He further added that the Respondent was at that point only entitled to receive the purchase price, and damages, in case of breach, and not a refund of the suit land.

Accordingly, Counsel faulted the trial Magistrate for not holding as such.

On the other hand, Counsel for the Respondent argued that there was breach of the said agreement by the Appellant that led to repudiation by the Respondent. That because of the repudiation, the suit land never passed onto the Appellant. He elaborated his view by relying on DW2's evidence during cross-examination and insisted that the said agreement had a time limit, that is: Appellant had to pay the whole purchase price on the very day of execution of the sale agreement.

He further argued that although there was no stipulation as to time in the said agreement, the surrounding circumstances under which the Respondent opted to sell the suit land imply that time was of essence.

That because the Appellant did not pay within time, he fundamentally breached the sale agreement enabling the Respondent to repudiate the same. He bolstered his view by relying on the case of ***Future Stars Investment (U) Ltd versus Nasuru Yusuf HCCS No.12 of 2017*.**

It was observed in that case that a breach occurs where a party neglects, refuses or fails to perform any term of the contract without legitimate cause.

Counsel for the Respondent also submitted that although the parole evidence rule generally bars admission of evidence to vary, add, or contradict the written terms of an agreement, the same rule permits admission of extrinsic evidence in exceptional circumstances to prove fraud, illegality, want of due execution, a condition precedent, among others.

In this case, he argued that the Respondent adduced evidence to show that the purchase price was to be paid on the same day by the Appellant; and added that in considering whether to admit the Respondent's evidence relating to the time of payment, Court ought to consider the intention of the parties by taking into account the surrounding circumstances. He quoted a long extract from ***Future Stars Investment (U) Ltd versus Nasuru Yusuf (supra)*,** where **Justice Mubiru S.,** observed that;

> **"**The party's *intention is to be inferred from the rest of terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper date."* The learned Judge further noted that the *"Court has to determine the proper date for the parties in such circumstances by putting itself in the place of a "reasonable man." It has to determine the intention of*

> *the parties by asking itself how a just and reasonable person would have regarded the issue.*"

I choose to reserve the other long extract from the case.

Further, Counsel for the Respondent further quoted an extract from ***Sharif Osman versus Hajji Haruna Mulangwa SCCA No.38 of 1995*****,** to the effect that:

> *"The principle at common law and in equity is that, in the absence of a contrary intention, time is essential, even though it has not been expressly made for by the parties. Performance must be completed upon the precise date specified, otherwise an action lies for breach: Contract by Cheshire and Fifoot, 6th Edition, page 466.*
> *However, in equity time is essential:-*
>
> 1. *If the parties expressly stipulate in the contract that it shall be so;*
> 2. *If, in a case where one party has been guilty of undue delay, he is notified by the other that unless performance is completed within a reasonable time, the contract will be regarded as broken:* ***Stickney versus Keeble (1915) AC. 386****.*
> 3. *If the nature of the surrounding circumstances or of the subject matter makes it imperative that the agreed date should be precisely observed, See Cheshire (supra) page 467".*

Relying on the propositions from the above authorities, the Respondent's Counsel argued that the Appellant was to pay the purchase price on the 17th September, 2012; and that having failed to do so, there was no complete sale between the Appellant and the Respondent such that the

Respondent was entitled to rescind the contract. Whilst relying on some extracts from ***Sharif Osman versus Hajji Haruna Mulangwa*** **(***supra***),** as quoted above, he argued that the said case is distinguishable and therefore inapplicable to the instant case—on ground that time was stipulated in that case and the Appellant chose to waive his right to rescind the contract. Ultimately, he supported the finding of the trial Magistrate.

In rejoinder, Counsel for the Respondent disputed the submission that time was of essence in the said agreement. His contention was that this was not stipulated in the said agreement. That as such, the same cannot be implied or imputed therein. He bolstered his argument by relying the extracts about time, as above, in the case of ***Sharif Osman versus Hajji Haruna Mulangwa*** *(supra)***.**

It was his submission that the point that time was not of essence can be inferred from the fact that the Respondent did not stop the Appellant from making further payments on his account**.** This submissions was also supported by the case of ***Sharif Osman versus Hajji Haruna Mulangwa*** *(supra) where the Court observed that;*

> **"***the testimony of the Appellant that he asked the Respondent several times to pay the balance, this confirms the inference I draw that the Appellant did not treat time as of essenc*e."

As to whether the Respondent was entitled to rescind the said agreement, Counsel for the Appellant argued that it is a general principle in matters concerning land agreements that once a valid contract is entered between the parties, the vendor becomes in equity a trustee for the purchaser of the

estate sold, and that the vendor only retains a lien for the unpaid balance of the purchase price. His proposition was supported by the case of ***Lysaght versus Edwards (1876)2 Ch.D 499*** where it was observed that;

> *"That moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold i.e. the vendor loses right over the property and only and only maintains a lien for the rest of the installment of the purchase price. The purchaser thus becomes the beneficiary of the property. The vendor only holds the property until the last installment is paid. If there's no agreement to the contrary, the vendor should handover property once balance is paid".*

Similar observations were also made in ***Phillips versus Silvester (1872)8 Cha. A.178*****,** a case Counsel for the Appellant cited; and in this case, the Court noted that;

> *"Even if there remains unpaid balance, the property in land passed to the purchaser when a deposit was made."*

The Appellant's Counsel also submitted that the facts of the instant case are distinguishable from those *of* ***Future Stars Investment (U) Ltd versus Nasuru Yusuf*** (*supra*), relied upon by the Respondent's Counsel**.**

For starters, I noted some conflict and disharmony in the arguments of Counsel for the Respondent. I observe that he at some point argued along the line of the grounds under determination (that there was no complete sale of the suit land to the Appellant and that the property in the suit land did not pass to the Appellant upon payment of the initial deposit) yet also

argued that the Respondent was entitled to rescind the said agreement on ground of fundamental breach.

In my considered opinion, the two arguments are mutually exclusive as former presupposes no contract at all, and the latter presupposes existence of a contract, because rescission or repudiation can only be exercised on a subsisting contract. *See* ***Paul Bwanika versus Mega Trust Investment Ltd HCCS 0635 of 2019,*** I note this because it is crucial at directing the end of the matter.

Both parties, especially Counsel for the Appellant, have cited authorities of the Supreme Court, which consider contracts of sale of land unique from other forms contracts. The said authorities noted that once a valid contract of sale of land is concluded and an initial deposit is paid by the purchaser, property in the land passes to the purchaser; and that the vendor's right at the time only lies in a claim for payment of the balance, and damages in case of breach: *See* ***Sharif Osman versus Hajji Haruna Mulangwa (supra), Sharif Osman versus Hajji Haruna Mulangwa*** *(supra).*

These being binding decisions, I have no space for deviating from them. What underlies these case is that there is a valid contract between the parties, which cannot be rescinded or repudiated. If I take this line of thinking, the case would literally fall in favour of the Appellant's argument.

On the other line, the said cases would be inapplicable; if no contract accrued between the parties and therefore, part of the Respondent's argument negating the grounds of appeal under consideration would be favoured. The end of the matter therefore depends on the line of thought

chosen. The Appellant's Counsel already picked the first line of thought advanced by the Supreme Court decisions.

As regards Counsel for the Respondent, it appears he falls in between the lines of thinking, which is conflictual. From the aforesaid observations, I expected each party to constructs his case either on this or that line.

That notwithstanding, the parties having submitted to the Court's superintendence, it is now up to it to choose an appropriate line of thinking, and lead the matter in accordance with it.

As I noted, the agreement between the parties herein made no mention of the time within which the Appellant was to effect payment of the whole purchase price. According to Section 92 of the Evidence Act Cap 6, where the terms of a contract are reduced into writing, no extrinsic evidence is generally admissible to contradict, vary, add to or subtract from those terms. This Section has been severally interpreted by the Courts, and applied as it is, say; ***Damodar Jamnadas & Others versus Noor Mohamed Valji [1961] E.A. 615; URA versus Stephen Mabosi (1996) V KALR 1; Twentsche Overseas Trading Co. Ltd versus Jamal Kanji [1960] E.A. 810***; and ***Fenekansi Semakula versus Ezekiel Mulondo [1985] HCB 29*****.**

The circumstances preceding the execution of the said agreement are undisputed. The Respondent had financial constraints and his property was to be foreclosed by his banker unless, he immediately paid the outstanding loan balance. The Appellant knew this. He also knew that the Respondent had mortgaged other properties to the said bank, which, together with the suit land, could have been foreclosed at any time he defaulted on the

demand notice. In fact, he testified that the said bank expected a deposit of Ushs.30,000,000/- from the Respondent in order to cure his default. On the date of execution of the said agreement, the Appellant only deposited Ushs.9,000,000/- on the Respondent's bank account; and part of the balance paid in a space of almost a year.

To the Respondent, time was of essence and so payment of the full purchase price had to be done on the day the of execution of the said agreement. His Counsel argued that the said agreement was rescinded or repudiated by the Respondent upon failure by the Appellant to pay the full purchase price on the day of execution of the agreement. This however, is a defeatist argument; because as I have observed, a valid sale of land contract cannot be repudiated by the vendor. It would rather look attractive if the Respondent simply asserts that no contract of sale of land accrued between him and the Appellant, the latter having failed to complete payment on the day of execution of the said agreement. Arguing as such would be suggesting that full payment of the purchase price was a condition precedent to the accrual of a contract between him and the Appellant.

Now, I already noted the general rule that written terms of the contract cannot be contradicted, varied, added to or subtracted from by extrinsic evidence. This is not to say that there are no exceptions to the rule. The exceptions exist.

According to Section 92(c) of the Evidence Act, one of them is where oral evidence is admitted as proof for "*the existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract…*" According to the **Black's Law**

Dictionary, 8th Edn., at p.887, a condition precedent is "*an act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises.*" In the persuasive authority of **Gas Marketing Limited versus *ARCO British Limited and Others 1998] 2 Lloyd's Rep, 209***, the House of Lords observed thus:

> *"If the provision in an agreement is of fundamental importance then the result either of a failure to perform it (if it is promissory) or of the event not happening or the act not being done (if it is a contingent condition or a condition precedent or a condition subsequent) may be that the contract either never comes into being or terminates. That may be so, whether the parties expressly say so or not…."the very existence of the mutual obligations is dependent on the performance of the condition." For completeness I would substitute "performance or fulfilment of the condition" for "performance of the condition 2.*

From the above authorities, the difference between a condition precedent and condition subsequent is that; whereas a contract exits and is terminated upon failure of existence or occurrence of a condition as regards a condition subsequent, a contract never comes into being as regards a condition precedent. Should we then say that there was a separate oral agreement between the parties that the full payment of purchase price by the Respondent on the day of execution of the said agreement was a condition precedent?

The answer to the question depends on the evidence. DW1 testified that when the Appellant made the initial deposit, he informed him that he was going to exchange his dollars, and that he undertook to pay the balance

immediately. That a few days later, his bank called to inform him of his default to his surprise because he believed the Appellant had deposited the balance. That he then got in touch with DW2 whom he informed that the Appellant had defaulted and that the bank was about to sell his property. DW2 corroborated DW1's testimony by testifying that the Appellant informed them that he was going to get more money in a few hours and deposit it onto the Respondent's account. He added during cross-examination that "*the plaintiff (Appellant) was to pay the money that very day*" and that "*the plaintiff was to pay the money as the balance as the bank does not demand its money*."

For the Appellant, his evidence was that the money he was meant to pay was to service the Respondent's loan of up to Ushs.30,000,000/- That he entered into the agreement with the Respondent after consulting his bank's official, a one Margaret, who advised him to pay but did not make mention of any deadline within which full payment was to be done. During cross-examination, he insisted that the agreement never gave him a deadline within which to pay.

I understand the Appellant's insistence that the said agreement did not give him a deadline within which to pay because it is silent. It is however, another case rely on the bank's official failure to disclose a time limit within which to pay because the bank is not a party to the agreement at hand.

I notice that DW1's evidence that the Appellant promised to return and make full payment upon exchange of his dollars was undisputed. Credence is given to this evidence by DW2, whose evidence with regard to the same was also undisputed. According to ***Uganda Revenue Authority versus Stephen Mabosi SCCA NO.26 of 1995***, an omission or neglect to

challenge the evidence-in-chief on a material or essential point by cross-examination constitutes an admission of such evidence. In this case, I find that the Appellant admitted to orally agreeing to pay Ushs.30,000,000/- on the day of execution of the said agreement.

The question now is whether Court should consider the said oral agreement as constituting a condition precedent, which can be added to the terms of the written agreement? I believe that the observations of my learned brother Justice Mubiru S., in **Future Stars Investment (U) Ltd versus Nasuru Yusuf (supra),** are relevant at the moment. He observed that:

> *"Where what is required of Court is not simply to construe express terms of a contract but rather insert into the contract a term which the parties have not expressed, it is not enough for the Court to say that the suggested term is a reasonable one the presence of which would make the contract a better or fairer one; it must be able to say that the insertion of the term is necessary to give business efficacy to the contract and that if its absence had been pointed out at the time both parties, assuming them to have been reasonable men, they would have agreed without hesitation to its insertion (see* ***Liverpool City Council versus Irwin, [1977] AC 239****). In order to imply a term into a contract, it is necessary to say not merely that it would be a businesslike arrangement to make but that any other arrangement would be so un-businesslike that sensible people could not be supposed to have entered into it (see* **Brown and Davis Ltd v. Galbraith, [1972] 1 WLR 997***). It should be an inference which the business realities of the situation really make necessary to make*

> *sense of the dealings between the parties so that they can be implemented in a sensible manner…*

If the Respondent did not deposit Ushs.30,000,000/- on his account with the bank, the suit land, together with the Respondent's other mortgaged property, risked being foreclosed. In addition to this risk, the defaulted sum would have continued to attract more interest, causing the Respondent to pay much more than he ought to have paid. In order to avert these risks, he had to deposit the said amount immediately. The Appellant was fully aware of the Respondent's dilemma, having stated in paragraph 6(d) of his plaint and testified that the viability of the transaction with the Respondent, according bank advise, was dependent upon him depositing Ushs.30,000,000/- on the Respondent's account. Certainly, the bank's expectation was that the money was to be deposited within a very short time, if the proposed transaction was to be viable. Until this was done, it arguably had the power to foreclose the suit land; and in that event, I doubt whether the Appellant would have any remedy against it.

Would the suit land be immune from the said power if the Appellant paid the Ushs.30,000,000/- in bits for about a year? Certainly, not! The bank could not have waited for all that long. All it wanted was its monies and immediately, or else it was to foreclose the suit land and other Respondent's mortgaged property. The Respondent sensed the risk of the Appellant's failure, a reason why he chose to borrow money from elsewhere to make up for the disappointment.

With this in mind, I can now speak with confidence that if it was pointed out at the time of execution of the written agreement that the deposit of

Ushs.30,000,000/- on the Respondent's account that very day was a condition to existence of a contract, both parties would have replied with an obvious, Oh yes! To say otherwise would be to deny the whole arrangement between them, plus the bank, a business efficacy.

In view of the previously mentioned observations, I find that the oral agreement between the parties constituted a condition precedent to the attachment of any obligation under the written agreement. It is pertinent that this is added to the terms of the written agreement between the parties by way of implication.

The Appellant did not dispute failing to comply with the said condition precedent. Consequently, I find that no contract came into being as between the Appellant and the Respondent. This then means that there was no sale of the suit land to the Appellant, and thus no property passed to him upon payment of the initial deposit out of the total purchase price.

My finding above is similar to that reached by the trial Magistrate except that for the wrong reasons. As such, I only fault her to such extent. Consequently, I find the aforementioned grounds in the negative.

Grounds 3, & 4

3. The learned trial Magistrate erred in law and fact by wrongly exercising her discretion when she failed to order for specific performance of the parties' contract of sale of land dated 17th September, 2012 against the Respondent.

4. The learned trial learned Magistrate erred in law and fact when she failed to hold that the Respondent's remedy for breach of contract of sale lay in a claim for damages.

I have found in ground 1(c) and 2 above that the trial Magistrate reached the right conclusion, but on wrong reasons. It follows that whether or not to grant the order for specific performance would automatically flow from that conclusion. Since the conclusion on the aforesaid grounds was in the negative, that of ground three should have been in the negative as well. Accordingly, I find nothing to fault in the trial Magistrate's conclusion. As such, ground 3 is found in the negative.

As regards grounds 4, I observe that they are based on the assumption of existence of a valid contract between the parties herein. I have however, found that there was no contract. As such, conception that any of the parties breached the same, and that any remedy of damages accrued to the Respondent is erroneous.

Consequently, I find ground no merit in ground 4.

Ground 5 & 6

5. The learned trial Magistrate erred in law and fact when she held that the Appellant was in breach of contract.

6. The learned trial Magistrate erred in law and fact when she held that the Appellant was in breach of contract with a counterclaim in the suit.

First, there was no contract between the parties herein. Two, there was no counterclaim by the Respondent against the Appellant. As such, the finding

that the Appellant was in breach of a contract is unfounded. Consequently, the aforesaid grounds are found in the affirmative.

The appeal having failed on most of the vital grounds, I am constrained to uphold the substance of the orders of the trial Court as stated above. Accordingly, the following orders are hereby issued:

1. That the Respondent shall refund to the Appellant Ushs.30,000,000/- (*Thirty Million Shillings*) being the amount deposited onto his account.

2. The costs of this appeal and trial proceedings are awarded to the Respondent.

I so order.

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Henry I. Kawesa

JUDGE

29/04/2021

29/04/2021

Innocent Wanambugwe for the Appellant.

Appellant absent.

Martin Mututa; holding brief for Annet Lyabi for the respondent.

We are ready to receive the judgment.

Respondent present.

Court:

Judgment delivered to the parties.

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Henry I. Kawesa

JUDGE

29/04/2021.