



JUDICIARY

IN THE SUPREME COURT OF MALAWI

MSCA Civil Appeal No 07 of 2014

BETWEEN

DIANA Z. WINGA

APPELLANT

AND

MALAWI HOUSING

CORPORATION

RESPONDENT

CORAM: JUSTICE DR J M ANSAH, SC, JA

JUSTICE F E KAPANDA, SC, JA

JUSTICE D F MWAUNGULU, JA

Kalanda, Counsel for the Appellant Chayekha,

Counsel for the Respondent

Minikwa, Recording Officer



JUDGMENT

Dr Ansah, JA

Having read the judgment of Justice of Appeal Mwaungulu in advance, I agree with the reasons for the conclusion he draws. I too would dismiss the appeal.

Kapanda, JA

I have had the opportunity to read in advance the judgment my Lord Justice of Appeal Mwaungulu will deliver in this matter with which I agree. I respectfully adopt all his reasoning as mine and I also dismiss the appeal. I confirm judgment of the court below. I abide by the order for costs contend in the aforementioned judgment.

Mwaungulu JA

These proceedings and, therefore, this appeal, arise from well-meaning intentions and pursuits that collapsed during implementation. Malawi Housing Corporation, the respondent in this court and defendant in the court below, is a statutory corporation tainted or tinted, in recent years, with private interest, that acquires mostly long term leases and builds units, essentially housing, for resale or renting. Mrs. Winga, as wife, is administratrix for the estate of Mr Winga, the claimant in the court below. Mr Winga was the Deputy Manager for Malawi Housing Corporation. In the project, the gravamen of this action, Malawi Housing Corporation purported to sell and Mr Winga purported to buy house No MU/1/31 in the City of Mzuzu. The project degenerated into proceedings in the court below to determine who between them should have the land. Mtambo J in the Court below determined for Malawi Housing Corporation. That judgment should be affirmed, albeit for more or different reasons from those advanced in counsel's arguments in this court and the court below and the ones the lower court employed to arrive at the conclusion which it did.

Background

On 23 January 2004, Malawi Housing Corporation offered House No MU/1/31 for sale to Mr Winga at K 1, 260, 000.60. The house, according to the offer letter, was sold on 'as is basis.' Malawi Housing Corporation had a sitting tenant. The offer was valid for 30 days within which Mr Winga was to pay a deposit. The contract however clearly stipulated that the full and final payment must be made within one hundred eighty (180) days or six calendar months which ever was longer. The offer also stipulated that non-compliance with these times would result in cancellation of the transaction without the need on Malawi Housing Corporation to notify Mr. Winga. The offer further provided that, even if the lease was registered, the house would only be considered sold after payment of the full price. The contract provided that rent was until sale to be payable to Malawi Housing Corporation and Mr Winga was not to sublet the house. The offer further stipulated that failure to observe any term entitled Malawi Housing Corporation to cancel the sale. The contract had a further critical provision which reads as follows:

The sale shall be made subject to a lease to be drawn the terms of which are registered as application number 27/90 at Blantyre Land Registry and as application number 575/90 at Lilongwe Land Registry.

Immediately after receiving the offer, Mr Winga informed Malawi Housing Corporation that he will pay the deposit and price through a National Bank loan. Mr Winga was to obtain an undertaking from Malawi Housing Corporation that his salary, including death benefits, was to channel through the

bank. Malawi Housing Corporation and Mr Winga were to, for the National Bank to authorise the mortgage, execute a lease based for a National Bank of Malawi mortgage. Malawi Housing Corporation executed the lease and registered it under the Registered Land Act. Mr Winga paid stamp duty and registration fees.

On 9 March 2006, National Bank of Malawi declined the mortgage application. One year later, in or around March 2007, Mr Winga, having borrowed money from his brother-in-law, issued a cheque to Malawi Housing Corporation. Malawi Housing Corporation on 4 June 2007, rejecting and sending back the cheque, wrote:

We have for reference receipt your cheque number 000016 dated 20th April, 2007 in the sum of MK 1,260,000.00 in respect of the above subject and regret to return the same to you on following grounds: (1) That the offer for you to purchase the house expired more than three (3) years ago. (2) The sale of the house is now restricted to sitting tenants and any sale of this house would be a violation of the rights of the current tenant.

The action

On 19 September 2007, Mr Winga issued an originating summons seeking declarations that there was a valid and binding contract for the sale of the Property House Number MU/1/ 31; and, in the circumstances, the respondent could not withdraw the offer for the sale of the property. Mr Winga sought the orders compelling the respondent to accept the cheque for purchase money; compelling the respondent to deliver vacant possession; that the respondent pay the appellant rentals for the property at the monthly rental of K10,000.00 or at such other rental as the court may deem fit and just from 1st May 2007 until such time as the respondent will have delivered vacant possession of the property to the appellant and that the defendant pays costs.

Mr Winga's submissions

In the court below, the preliminary point taken by Mr Winga, relying on excerpts from Chitty on Contracts, 27th edition, was that Mr Winga's letter or actions after receiving the offer were not, in law or fact, acceptance of the offer. Rather, they were a counter offer, essentially varying Malawi Housing Corporation's offer. It was contended, on passages from Cheshire and Fifoot's Law of Contract, 14th Edition, that the effect of the counter offer was *pro tanto* a rejection of Malawi Housing Corporation's offer. By the same process, a new contract, on the terms in the new contract, became. It was argued, therefore, that Malawi Housing Corporation's conduct, in processing and registering the lease were accepting the counter offer. Citing Jessel, MR, in *Lysaught v Edward* (1876) Ch D 499,506 : *Re Birmingham*, [1958] All ER 397 ; Chatsika J in *Kamwana v Chimphonda* (1992) Civil Cause No 925 (HC) (PR) (unreported) ; Ndovie J in *Skipco (Malawi Ltd) v ADM ARC* (1995) Civil Cause No 2213 (HC) (PR) (unreported) ; Mwaungulu J in *Phiri v The Registered Trustees of Banja la M tsogolo* (1994) Civil Cause No 2339 (HC) (PR) (unreported) and Twea J in *Malawi Housing Corporation v ARCH Investments* (2003) Civil Cause No 534 (HC) (PR) (unreported), it was argued for Mr Winga that the contract, consequent on Malawi Housing Corporation conduct, after that moment, vested Mr Winga the equitable title to the land albeit the legal title remained with Malawi Housing Corporation. It was further contended for Mr Winga, relying on the decision of this court in *Attorney General v Mizere* (1999) Civil Appeal No 8 (MSCA) (unreported), Cheshire's Modern Real Property 10th Edition : and the decision of this court in *Simiyon v Kamtanyula* (1997) Civil Appeal No 38 (MSCA) (unreported) that the effect of execution or lease registration repositied the legal title to Mr Winga from which Malawi Housing Corporation could not resile and to which, under section 24 of the Registered Land Act, could not be defeated.

The defense

Malawi Housing Corporations stance was essentially that its offer to Mr Winga expired more than three years ago and that, since that expiry, there were new and vested interest to a new sitting tenant whose rights would be violated if, as Mr Winga urges, the court were to declare that there was a valid contract for the sale of land on which, upon conveyance or registration under the registered Land Act, title passed to Mr Winga.

Malawi Housing Corporation's submissions in the court below

Consequently, it was argued on behalf of Malawi Housing Corporation that on the facts, there was no contract. It was argued that the contract exists where there has been an offer, acceptance and passing of consideration between the parties. There must be, based on Chitty on Contract 26th Edition and *Storer v Manchester City Council* [1974] 1 WLR 1004, an intention to create a binding legal relationship.

On the part of Malawi Housing Corporation it was conceded that, after an offer, the offeree's actions could be acceptance or a counter offer. An acceptance, however, whether from conduct or writing, must base on clear intention to accept the offer. Consequently, acceptance, on the authority of *Magola v Haye* [1995] 2 MLR 601; and, *M kandawire v Wawanya* [1995] 15 MLR 274, is a rejection of the offer which, if rejected by the offeree, in this case Malawi Housing Corporation means that there was no contract.

It was further contended for Malawi Housing Corporation that, once there is a contract, failure of performance of its terms, if breach of a condition discharges the innocent party from the contract. *Gandulo v Kalonga* (2000) Civil Cause No 969 (HC) (PR) (unreported) was relied on. It was argued for Malawi Housing Corporation therefore, that failure to comply with a term of the contract is breach of the contract, which if not affirmed by conduct or otherwise, absolves both parties from rights and obligations under the contract. There will, therefore, be breach of a contract if a party never complied with stipulation as to time or payment of the price.

It was further argued for Malawi Housing Corporation that, on the facts, there could be no specific performance because of the doctrine of laches. Moreover, it was argued that one who seeks equity must do equity. Mr Winga, it was contended for Malawi Housing Corporation, did not do equity; he was in breach of contract in not paying the purchase price for the land, for a long time.

It was also conceded on behalf of Malawi Housing Corporation that, under section 24 of the Registered Land Act, registration of a person as proprietor of a lease vests in that person the lease hold interest. It was also conceded that a person with a provisional title has the same interest as the one registered as a proprietor. It was also conceded that, subject to certain considerations, under section 25 of the Registered Land Act, Mr Winga's title to the land could not be defeated. It was, however, contended for Malawi Housing Corporation that under section 26 of the registered Land Act registration of the title was subject to other unregistered interest to which the transferor held the land in as long as the new proprietor acquired the lease without valuable consideration. Overall, therefore, it was contended that the property was never transferred to Mr Winga.

Findings of the trial judge

The trial judge, despite Mr Winga's reliance on the case of *Kababa v Mapisa* (2000) Civil Misc. Cause No 3758 (HC) (PR) (unreported) and *M kandawire v Wawanya*, concluded that there was no contract between Malawi Housing Corporation and Mr Winga. The gist of his reasoning is at page 5 of the written judgment:

Having carefully considered the facts of this case, it is my conclusion that the defendants' offer was not accepted by the plaintiff within the time speculated or within a reasonable time and as such, there was no agreement between the parties. The preparation of the lease was not intended to create legal relations as it was purely for the purpose of assisting the plaintiff to secure loan funds. The facts do not point to any counteroffer and acceptance as claimed by the plaintiff.

Secondly, the trial judge found that registration of the lease under the Registered Land Act did not apply where, like here, the purchase price has not been paid by the purchaser. The judge said

In my view, sections 24 and 25 of the Registered Land Act were not intended to apply to a situation where the parties have agreed that the preparation of the lease is intended so solely for the purpose of enabling the plaintiff to secure loan funding and that ownership is transferred until and unless the purchase price is paid. It is also my finding that the reference in the Act to an owner having indefeasible rights refers to claims by the third parties and not claims between the contracting parties as is the case at hand. The provisions of section 24 (a) of the Registered Land Act do not state that the parties cannot contract out of them.

Thirdly, the trial judge held that, on the facts, the equitable remedy of specific performance was untenable:

The order applied for being an equitable remedy is only granted at the discretion of the court and not as a matter of right. In granting the said order, the court considers whether the plaintiff has come with cleaner hands. Assuming that I had found the existence of the contract between the parties, which I have not, I would have had to look at the fact that the plaintiff did not pay the initial deposit, he did not pay the full purchase price on time and was only bent on relying on the technical provisions in the Registered Land Act to get the house which in all fairness he is not entitled to.

The Appeal

On the first aspect covered by grounds 1-5 and 7-8 in the grounds of appeal, one cannot but agree more with the appellant; there was a contract between Mr Winga and Malawi Housing Corporation; the appellant, correctly, points to the lease and to this court's statement in *The Attorney General v Mizere* (1999) Civil Appeal No 8 (MSCA) (unreported):

The completion of the contract is usually evidenced by transferring title to the property to the purchaser.

A fortiori a lease, on the face of it, is an agreement and evidence of an agreement. Lord Templeman, in defining a lease, said in *Prudential Assurance Company v London Residually Body* [1922] AC 386, 390:

[A] demise for years is a contract for exclusive possession and for some determinate period.

It is true for a lease, just as it is for land agreements, that the transaction is usually too prong: commencing with the agreement itself, ending with the conveyance. Concerning registered land, registration under the Land Registration Act is a further step in transferring legal title. Consequently, it is usually the case that where, like here, there is a lease or sell culminating in a conveyance or registration, as the case may be, there was an agreement prior. These distinct aspects are covered in the authoritative statement of J. G. Ridall, Introduction to Land Law 5th edition p 251:

[A] lease is an agreement between two parties and, as such, is subject (to the extent that these are relevant) to the principles of law relating to contracts...but a lease is more than a contract between two parties in that as an interest in land it is capable of binding a third party, i.e. a purchaser of a freehold from the lessor. A lease is thus a contract and it is also an interest in land.

There were, therefore, in this transaction two processes

The trial judge proceeded on that there was no contract because, according to him, Mr Winga had not paid the price. This is the source of the problem in which the lower court found itself. Failure to pay the price could only arise after a contract. The approach, therefore, should not have been as the lower court took it. The trial court should have investigated whether there was contract namely, whether there was an offer which was accepted where with an intention to create a legal relationship, consideration passed from the buyer to the seller and vice versa. On this score, the appellant is right that there was a contract.

Preliminarily there was a valid offer by Malawi Housing Corporation to sell a house to Mr Winga. There was consideration, Malawi Housing Corporation was going to lose the house and benefit from the price; Mr Winga was going to gain the house and lose the purchase price. Even if the house and money never passed immediately, the promise from both sides was consideration, the court never investigates adequacy of consideration. The offer further stipulated the time for payment of the deposit and full price and provided that the sale would complete after full payment. Additionally, the offer provided that Malawi Housing Corporation was to continue collecting rent from the sitting tenant. Malawi Housing Corporation, therefore never parted possession to Mr. Winga

The next question, therefore, was whether Mr Winga accepted the offer. There is no evidence of a letter accepting the offer. Acceptance, however, can be by conduct. Mr Winga in his witness statement and evidence on oath informed the court that he made it very clear that he was going to pay Malawi Housing Corporation through a National Bank loan. National Bank of Malawi wrote Mr Winga and Malawi Housing Corporation that it would require title deeds. Moreover, there is uncontroverted evidence that Mr Winga made some payments in the project. On registration of the lease Malawi Housing Corporation paid the sum. The interpretation of this conduct varies.

The trial judge never in fact interpreted this conduct content, as seen, that the refusal or neglect to pay the price in time meant that there was no contract at all. The appellant is right that this conduct constituted a counter offer, varying or replacing Malawi Housing Corporation's offer. The counter offer must, however, only, as we see shortly, have varied rather than replaced Malawi Housing Corporation's offer. If anything, therefore, Malawi Housing Corporation's conduct in preparing, registering the deeds and accepting registration fees amounted to acceptance substantially to sell the land at the agreed price. There was, therefore, a subsisting contract subject, as it must be, whether in this sale of land, like in other sales of land, time, as we see later, was of the essence of the contract on conveyance, on the part of the seller, and payment of the purchase price by the buyer.

It is significant that the trial court finds that Mr Winga never paid the deposit or the whole price on time. The trial court, therefore, proceeded on the assumption that there was a contract and that time was of the essence in the contract.

Time is not of essence

In United Scientific Holdings v Burnley Borough Council [1978] AC 904 the House of Lords, now the Supreme Court of the United Kingdom, at 937, 944 and 958 accepted these principles in Halsbury's Laws of England Volume 9 (1), 4th Edition paragraph (931):

The modern law, in the case of contracts of all types, may be summarised as follows. Time will not be considered to be of the essence unless:

- (i) the parties expressly stipulate that conditions as to time must be strictly complied with; or
- (ii) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be part of the essence; or
- (iii) a party who has been subject to unreasonable delay gives notice to the party in default making time of the essence.

Presumption that time is of the essence

The presumption is that time is of no essence. In *Rani v Rani* (1993 AIR 1742 = 1992 (3) Suppl.SCR 798 = 1993 (1) SCC 519 = 1993(1) JT 74 = 1992(3) SCALE 544 (on 18 December, 1992) Mohan, J said:

It is a well-accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language

If of the essence, time must be followed scrupulously

A contract can, however, expressly make time of the essence. Consequently, subject to the *de minimis* principle, parties must respect the time stipulated scrupulously. In the High Court of Justice in Northern Ireland in *Fitzpatrick and others v Sarcon (No 177) Limited* [2012] NIch 10 Deeny J said:

If time was of the essence even a very modest failure on the part of the developer to abide by it would be fatal to the enforceability of his contract. But because time is not of the essence the importance of the date does not disappear completely. It is the date on which the parties had agreed. It was a term of the contract.

In *Stickney v Keeble* [1915] AC 386, 415-417, Parker LJ said:

[I]n a contract for sale and purchase of real estate, the time fixed by the parties for completion has at law always been regarded as essential. In other words courts of law have always held the parties to their bargain in this respect, with the result that if the vendor is unable to make a title by the day fixed for completion, the purchaser can treat the contract as at an end and recover his deposit ...

Nature of contract and surrounding circumstances can make time of essence

The nature of a contract or surrounding circumstances can make time of essence. In the Supreme Court of India, Shah, J C, in *Gomathinayagam Pillai and Ors v Pallaniswami Nadar*, AIR 1967 SC 868, said:

It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the essence of the contract. Intention to make time of the essence, if expressed in writing, must be in language which is unmistakable: it may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract.

One reality attracts judicial comment. In *Williams v. Greatrex*, [1956] 3 All E.R. 705, 713, Morris, LJ said:

Of course, there may be contracts in cases where land is going to be used for the purpose of trade or commerce or where there is the element of fluctuation in value or where minerals may become worked out: in such contracts, as the authorities show, there may be indications that time is of the essence of the contract, even though it is not in so many words stated to be of the essence of the contract.

In the Supreme Court of India, the Constitution Bench, in *Rani v Rani* (1993) 1SCC 519 said:

Now in the case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades - particularly after 1973.

...Indeed, we are inclined to think that the rigor of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties - evolved in times when prices and values were stable and inflation was unknown - requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so. ..

There must be an intention to make time of the essence

It may be inadequate to just mention that certain actions, by the buyer or seller, be performed within a certain time. Parties must intend that time was of the essence (*Gomathinayagam Pillai and Ors v Pallaniswami Nadar*). "Mere incorporation in the written agreement," said Shah, JC, in *Rani v Rani* "of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence." Additionally, inclusion of words 'time is of essence,' or like words, may be insufficient. In *Hind Construction Contractors v. State of Maharashtra* [1979 (2) SCC 70: 1979 (2) SCR 114, the Supreme Court of India said:

It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental; for instance, if the contract were to include clause providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clause would be construed as rendering ineffective the express provision relating to the time being of the essence of contract.

Was time of the essence in this contract?

The contract, much like in *Brickles v Snell* [1916] 2 SC 599, provided that the offer shall automatically be deemed cancelled without any reference to you. In *Perry v. Sherlock* (14 Victorian L.R. 49), it was held that a provision enabling a vendor to rescind "without notice," made time of essence. Blackburn J in *Bettini v Gye* (1876) 1QB 183, 187 said:

Parties may think some matter, apparently of very little importance, essential: and if they sufficiently express an intention to make the real fulfilment of such a thing a condition precedent, it will be.

In *Hoad v Swan* (1920) 28 Commonwealth LR 258, 263, the Isaacs J said

Where parties have made such a stipulation as clause 21 ("Time shall be the essence of the contract") without qualifying it, then it cannot be said, as it was said by Lord Blackburn himself in *Mersey Steel & Iron Co. v*

Naylor, Bennson & Co., that the breach does "not go to the root of the essence of the contract." The quest is instantly satisfied, and where that is so the vendor even if the failure is the trivial one, is entitled as the Privy Council said in *Brickles v Snell*, to stand upon "the letter of his bond".

In *Brickles v Snell* cited in *Hoad v Swan* above, the purchaser under an agreement in the sale of land in Montreal which made time is of the essence was in default a day after the date fixed for completion. The vendor cancelled the agreement. Lord Atkins said:

From them it is clear that all parties concerned were anxious to carry out the sale of and that the delay was due mainly, if not entirely, to the sudden and unexpected illness of Mr. Grant. It is quite true that he might on Wednesday, the 13th, had written the letter he desired to say to the vendors solicitors accompanying the deed, and not have postponed matters till next day. And it may well be he would have done so if he had apprehended his illness. If that be a fault it is certainly a trivial one; but, even so, the vendor is still entitled to stand upon "the letter of his bond".

If time was of the essence, Mr Winga's delay was consequential. It amounts to breach of a fundamental term of the contract and, therefore, repudiation of the contract. Equity here follows the law and, unless there was waiver, upon Malawi Housing acceptance of the repudiation, parties were freed of their obligations under the contract.

No waiver on the date of payment

There was no waiver of the date of the payment of the price. Malawi Housing Corporation delivery of the lease after the expiry date, if anything, was an affirmation of the contract. It was neither waiver of the price nor the date of payment. To constitute a waiver of the date of payment, the act must relate to payment, since the seller has to pay either voluntarily or by an order of the court. There, however, have not been held to be waiver of time to pay for if there is demonstration that the seller extended payment time, it is not that the provision making time of the essence is waived. In *Holland v Wildshire* (1954) 90 Commonwealth LR 409, 415 Dickson CJ said "if time is an essential condition, to extend it does not waive the effect of the stipulation as a condition".

In *Tropical Traders Ltd v Goonan* (1963- 64) 37 AUST LJR 497 the final installment was supposed to be on 6th January 1963. The vendor told the purchaser that it would not rescind before 14 January. The contract expressly provided time of the essence. The court held that the announcement of an intention to refrain from electing either way until the installment was paid was not a waiver. Assuming, therefore, that time was of the essence, Mr Winga, purporting to pay the price three years later, was, without waiver, in breach of contract

Time was not of essence in this contract

Here time was not of essence. The letter states time for paying the price. This, standing alone, is insufficient for concluding that time was of essence. The contract, the stipulation as to time read against other provisions, suggests otherwise. Moreover, the contract further suggests that the property would be considered sold only after payment of the purchase price. This, in my view, is inconsistent with the suggestion that time was of essence as to payment or conveyance

Date set is not just a target date

Edmund-Davies LJ in *Raineri v Miles* [1980] 2 All ER 145, 155, said:

The fact that time had not been declared to be of the essence did not mean that the express date for completion could be supplanted by the courts treating it as a mere target date and in effect enabling the defaulting party to insert into the contractual provision some such words as "or within a reasonable time."

Where a contract actually stipulates time for performance of a contract, failure to abide with time is a breach of a contract. In *K. Narendra v Riviera Apartments (P) Ltd* on 24 May, 1999 the court said

[I]t does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time-limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Would it be reasonable to say that because time is not made the essence of the contract, the time-limit (s) specified in the agreement have no relevance and can be ignored with impunity?

It is the function of equity to ameliorate, in appropriate circumstances, the consequences of a certain legal result. Concerning real property, where time was stipulated or where, time was not stipulated, the action must be done in a reasonable time, equity will intervene. Lord Cairns in *Tilley v. Thomas* (1867) L. R. 3 Ch. 61 expressed the equity principles as follows:

The construction is, and must be, in equity the same as in a Court of law. A Court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps towards completion, if it can do justice between the parties, and if (as Lord Justice Turner said in *Roberts v. Bern*; (1853) 3 De G. M. & G. 284), there is nothing in the 'express stipulations between the parties, the nature of the property, or the surrounding circumstances,' which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract.

Equity must, as it usually does, follow the law. Equitable remedies must, therefore, not ignore remedies available by law. In *Stickney v Keeble* [1915] AC 386 said Lord Parmoor at pages 415,416:

This is really all that is meant by and involved in the maxim that in equity the time fixed for completion is not of the essence of the contract, but this maxim never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties, when, for example, the parties, for reasons best known to

themselves, had stipulated that the time fixed should be essential, or where there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a non-essential term of the contract.

In *Raineri v Miles & Anor* [1980] 2 All ER 145 Lord Edmund-Davies said:

The former courts of equity did not rewrite contracts, nor did they hold that a man who had broken his word had kept it. No case has been cited to Your Lordships where they denied all relief to the petitioner who proved that the respondent had delayed in the due performance of his contract. But what they did in proper circumstances was to ameliorate the asperities of the common law. They differed from the common law courts in the granting of remedies and not in the recognition of rights, and, so far from altering the substantive common law they followed it and applied it in their own courts when they thought it right to do so.

Rescission after fundamental breach

Courts, therefore, equity notwithstanding, would refuse equitable relief where, a party is guilty of breach of a fundamental term of a contract. In such circumstances, the innocent party, after accepting the repudiation, may rescind the contract (Lord Wilberforce in *v Agnew* [1980] AC 367; [1979] All ER 88). In *Fitzpatrick and Others v Sarcon (No 177) Limited* Girvan LJ [2012] NICA 58, [2014] NI 35, giving the judgment of the Northern Ireland Court of Appeals and acknowledging what the House of Lords said in *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 at 944), said:

If a developer fails to complete a contract in accordance with the terms of the contract it is a breach of contract and he is liable in damages. Whether or not the breach enables the developer to treat the contract as at an end requires a consideration of the principles of repudiation of contract and whether time is of the essence of the contract. The rules relating to time being of the essence are simply a particular application of the law of repudiation ...When time is of the essence of the contract it is a condition which goes to the root of the contract irrespective of the magnitude of the breach.

A buyer's breach of a contractual term as to time or payment entitles the seller to damages where the seller affirms the contract or, as an innocent party repudiates the contract.

The duty to give notice that time has become of essence

Since time was not of essence, it was incumbent on either, if desirable, to give notice that time was of essence (*Stickney v Keeble* [1950] AC 386, *United Scientific Holdings v Burnley Borough Council* [1978] AC 904 at 946, *British and Commonwealth Holdings Ltd v Quadrex* [1989] 1QB 842 at 857 and *Belzadi v Shaftesbury Hotels Ltd* [1992] Ch1). In *Fitzpatrick and Others v Sarcon (No 177) Limited* Girvan LJ said:

We accept as correct the argument put forward by the Appellant that before a party could treat as repudiated a contract which was not subject to a time of the essence provision service of a notice making time of the

essence was an essential step to be taken. There is clear authority for the requirement on a party to serve such a notice. See, for example, *Stickney v Keeble* [1950] AC 386, *United Scientific Holdings v Burnley Borough Council* [1978] AC 904 at 946, *British and Commonwealth Holdings Ltd v Quadrex* [1989] 1 QB 842 at 857 and *Belzadi v Shaftesbury Hotels Ltd* [1992] Ch 1 at 24. Such a notice must post-date the contractual completion date and must specify a reasonable time thereafter within which the contractual obligation of the party in default is to be completed.

Since time was not of essence, parties were supposed, after notice on one another, to perform their part of the contract within a reasonable time and if they did not, Malawi Housing Corporation was entitled to sue for breach of contract and recover damages or Mr Winga was entitled to sue for specific performance and recover any damages in addition or in lieu of specific performance. There are, however, impediments in law and in equity to Mr Winga's claims for specific performance and a claim for damages for breach of contract or in lieu of specific performance.

Laches

Mr Winga, time being of no essence, could, in the absence of laches, only request specific performance after giving notice to Malawi Housing Corporation that time had become of essence and that Malawi Housing Corporation should complete the contract in stipulated time. Malawi Housing Corporation, however, prepared and registered the lease. Mr Winga was guilty of laches. He never paid the balance on the due date. He purported to pay three years after the agreement.

Mr Winga never did equity

Even if Mr Winga had given such notice to Malawi Housing Corporation, specific performance was unavailable to him. Mr Winga here seeks equitable relief from consequences of his own breach. One who seeks equity must do equity (*Chappell v The Times* [1975] 2 All ER 233, 240 c-g, C.A.; Snell on Equity, 32nd Ed., Chap. 5). Given Malawi Housing Corporation builds units for resale and lease, the agreed price is what, at the time agreed, suffices building a similar house for resale or leasing at equivalent rentals. Mr. Winga, contrary to the contract, neglected to pay the price for over three years.

Unnecessary to give notice where there has been long delay in paying the price

Where, therefore, the buyer takes a long time to pay the price to the seller, the buyer is in fundamental breach of the contract because the price is the cardinal consideration from the buyer to the seller on which a contract of sale premises. In law a long delay in delivering the price or refusal to deliver the price is a fundamental breach of a contract *per se*. The innocent party is, without any notice to the other party, entitled, as a matter of right, unless the innocent party affirms the breach, to accept the wrongdoer's repudiation of the contract and rescind the contract.

Buyer's failure to pay on time or refusal or neglect to pay part or full price is fundamental breach of a contract

This case is much like one before the Supreme Court of Belize, *Acosta v Martinez and another* (Claim No. 258 of 2009). The important facts and legal result are in this statement by Madam Justice Hafiz:

The question is whether Mr. Costa by his evidence proved that he has rights to the property. The court's assessment of the evidence is that the purchase price was \$60,000.00 and Mr. Acosta had failed to pay to Mr. Martinez the balance of the purchase price of \$30,000. Mr. Acosta at paragraph 10 of his witness statement admitted that he did not pay the balance of the purchase price. He stated that: In the month of May 2008, Michael Martinez visited me and requested that I paid him the remaining balance for the said property. However, I did not pay him any monies and indicated to him that I would only pay him the balance of purchase price when he gives him the original certificate of title for the said property and signs the transfer of title. Further, I do not find the evidence of Mr. Acosta credible that he did not receive the 'Notice Pay or Vacate Property' which gave a date and time for the balance of the purchase price to be paid and failing which the property would be sold to another. Since Mr. Acosta did not comply with the notice by failing to pay the balance of the purchase price, Mr. Martinez sold the property to Mr. Sosa. It is clear that Mr. Martinez treated the contract between Mr. Acosta and himself at an end because of the failure to pay the balance of the purchase price. In legal terms, what Mr Martinez did was to rescind the sale for repudiation by the Purchaser. Mr Acosta.

The effect of Malawi Housing Corporation's acceptance of the repudiation is far reaching as can be seen in *Johnson v Agnew* [1980] AC 367; [1979] All ER 883; parties are discharged from further performance of the contract. Most certainly, the innocent party is entitled to damages. It is quite clear that breach of a stipulation as to time, especially in times of inflation and escalating property prices, is a breach of a condition or a fundamental breach of the contract, as opposed to a breach of a warranty, and the innocent party is entitled to repudiate the contract and, after notifying the other party of the repudiation, sue for damages. In *Fitzpatrick and others v Sarcon (No 177) Limited* Deeny J said:

But because time is not of the essence the importance of the date does not disappear completely. It is the date on which the parties had agreed. It was a term of the contract. It was clearly not a warranty in my view but a condition or an innominate term; per Diplock L.J. in *Hong Kong Fir Shipping Company v Kawasaki Kisen Kaisha* [1962] 26.

When accepting the repudiation, apart from everything else, the seller can, where the buyer is in possession, recover the land. Conversely, when in possession of the land, the seller can retain the land and sue for damages for breach of a contract. As long, as Mr. Winga was a tenant and Malawi Housing Corporation the landlord and owner, Malawi Housing Corporation could hold on to the land to reinforce payment of the purchase price.

Registration of land does not affect rights of a seller as such

Grounds 5-6 require considering the Registered Land Act. Malawi Housing Corporation, because of section 5 (1) of the Land Act, sold Mr. Winga leasehold. Malawi Housing Corporation's leasehold by virtue of section 30 of the Lands Act, section 4 of the Registered Land Act and government notice No G.N. 51/1976 became registered land. Section 3 of the Registered Land Act preserves the general law touching such agreements. Consequently, where, like here, the buyer has not paid the purchase price, the vendor's rights, for realty, depends on the general law, the general law on a contract for the sale of land. The seller of land, however, both before the conveyance but after the contract and after the conveyance has vendor's lien to enforce payment. Indeed, after the certificate of registration, Mr Winga's rights as purchaser for valuable consideration can only be defeated in accordance with the Act. Section 25 of the Registered Land Act provides:

The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall be rights not liable to be defeated except as provided in this Act and the Land Act and shall be held by the proprietor, free from all other interests and claims whatsoever...

Under section 24 (1) (b), however, registration of the lease is subject to agreements with, in this case, Malawi Housing:

Subject to this Act...the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, subject to all implied and expressed agreements, liabilities and incidents of the lease.

Section 27 of the Registered Land Act creates overriding interests, of which the relevant one for this case is 'the rights of a person in actual occupation of land or in receipt of the rents and profits thereof:'

Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register ... the rights of a person in actual occupation of land or in receipt of the rents and profits thereof save where inquiry is made of such person and the rights are not disclosed ... Provided that the Registrar may direct registration of any of the liabilities, rights and interests hereinbefore defined in such manner as he thinks fit.

There are two aspects to this quotation: (a) rights of a person in actual occupation of land or (b) rights of a person in receipt of the rents and profits. In either case the Registered Land Act is not protecting actual occupation or receipt of rents and profits. The Registered Land Act protects the rights and interests of those in actual occupation or receiving rents or profits. In *Spiricor of St. Lucia Limited v The Attorney General of St. Lucia et al* (Civil Appeal No. 3 of 1996), Byron CJ at page 10 said:

[It] is not the actual occupation which gives rise to the right or determines its existence. Actual occupation merely operates as the

trigger, as it were, for the treatment of the right as an overriding interest. Nor does the additional quality of the right as an overriding interest alter the nature or the quality of the right itself. If it is an equitable right it remains an equitable right.

The question, therefore, entails determining what rights or interests in land subsisted with Mr Winga, as occupier of the land, and Malawi Housing Corporation, as receiver of rents and profits at the time of the registration of Mr Winga as collector of rents. In *Abbey National Building Societies v Cann and another* (1990) 1 All E.R. 1085 at 1098 Lord Justice Jauncy, after quoting provisions similar to ours in the Land Registration Act 1925 there, said:

It is to be noted that these provisions neither alter the scope or character nor define the nature of the rights to which they apply. Rights of a limited nature remain so limited albeit a registered disposition may be subject thereto. In these circumstances I consider that the first matter to be examined in this appeal is the nature of rights possessed by the parties

Malawi Housing Corporations right of lien

It is true that with the registration certificate under the Registered Land Act, the legal title subsisted in Mr Winga. As long as, however, Mr Winga never paid the full price, Malawi Housing Corporation was entitled to lien on the land to enforce the payment of the price. That interest, according to Section 27 of the Registered Land Act, was an overriding interest after registration under the Registered Land Act. As seen, Mr Winga was never in occupation of House No MU/1/31. Malawi Housing Corporation, however, was in possession of the house, as against Mr. Winga and receiving rents and, based on this, the registration of the lease is subject to their interests.

The vendor's lien bases on the legal title. Consequently, where the vendor whether or not still in possession of the land and the buyer has not paid the full price, the seller can retain possession of the land or refuse conveyance to enforce payment of the purchase price. After conveyance, however, where the buyer never paid the price, the buyer, not the seller, has the legal title. The vendor's lien on the land bases on equity; equity creates a charge on the property for the seller to enforce the purchase price. The lien subsists whether or not the seller surrendered possession (*Winter v. Lord Anson*, (1827) 3 Rus. 488; 6 L. J. Ch. 7; *Lackreth v. Symmons*, (1808) 15 Ves. 328, 336). Agreement may waive the lien (*Winter v. Lord Anson*, (1827) 3 Rus. at p. 492; 6 L. J. Ch. 7; *Bond v. Kent*, (1892) 2 Vern. 281; *Capper v. Spottiswoode*, (1829) Tam. 21; *Re Brentwood Brick Co.*, (1876) 4 Ch. D. 562; 46 L. J. Ch. 554; *Sec Re Albert Ass Co.*, (1870) 11 Eq 164, 178; 40 L. J. Ch. 166.)

The lien, however, preserves when expressly provided for (*Austen v. Halsey*, (1801) 6 Ves. 475, 483; and *Elliot v. Edwards*, (1802) 3 B. & P. 181. In *Austen v. Halsey*, Eldon, LC, said (page 483):

Upon the next question, whether supposing, the legacies are not charged upon the real estate, this purchased estate may by circuitry be made answerable to the legacies, *Pollexfen v Moore* is the only case cited: but without that authority while the estate is in the hands of the vendee: I expect the case, where upon the contract that lien by implication was not

intended to be reserved. (*Nairn v Prowse*, 6 ves 752. *Mackreth v Symons*, 15 ves 329). That is in equity very like a charge.

In *Elliot v. Edwards*, Lord Alvenley, where parties, like happened between Malawi Housing Corporation and Mr Winga, agreed there would be no sale without payment, said:

"Suppose a man, having purchased an estate, assigned it before the purchase money has been paid, a court of equity will compel the assignee to pay that money, provided he knew at the time of the assignment that it had not been paid. Here Johnes obtained an assignment in consideration of an undertaking to pay for the lease and fixtures; that consideration money has not been paid. Johnes and Pierce for themselves and their assigns covenant for the payment of that money: and there is a proviso that Johnes shall not assign, until that money has been paid, without the consent of Emblin and Pierce. Does not that create an equitable incumbrance? I think that a court of equity would hold it so, though I do not [184] know that it would be binding at law. Now what is the nature of the Plaintiff's deposit? Is it not made upon the condition that the purchase shall be completed free from all reasonable objections? Is it quite clear that a court of equity would not compel a specific performance of the agreement for the purchase of these premises.

In *Rome v Young*, (1838) 3 Y & C, 199, The Lord Chief Baron said:

That being the case, if the party chose to exercise his equitable lien, he could come to this court and ask for the order to sale, but he could obtain no other order; and, therefore, I do not see how I can make any other order, merely because the creditors' suit happens to be this court.

In *Smith v Evans* (1860) 28 Beav 59, 64 - 65, Sir Romilly, MR, said:

I proceed, therefore, to consider, in the first place, this question of unpaid purchase-money, which, in my opinion, depends entirely on the character of the transaction in January 1857. It must, in my opinion, [65] depend upon the object and the purpose for which those deeds were executed by the Plaintiff. If he executed them as *escrows*, and gave them to his solicitor for the purpose of being exchanged for the purchase- money, that is, for the purpose of being delivered up to Howlett on payment of the sum of £380, then I am of opinion that the disobedience of his direction, and the delivering of them up without receiving the purchase-money, would not deprive the Plaintiff of his lien on the land for the amount of that unpaid purchase-money, at least as against persons cognizant of the real transaction . . .

Malawi Housing Corporation had legal title flowing from M r. Winga's breach and repudiation of the contract

Apart from equitable lien, Malawi Housing Corporation had legal rights from that Mr Winga never paid the full price on time. This repudiation created rights for Malawi Housing Corporation as recipient of rentals under section 27 of the registered Land Act. Malawi Housing Corporation, after completing the agreement by registration, was entitled to sue for the balance of the price and any damages ensued. Equally, if still in possession, Malawi Housing Corporation could retain the house and sue for damages. More importantly, even if out of possession, Malawi Housing Corporation could repossess the premises or offer them for sale. Not having delivered possession of the house to Malawi Housing and rescinding the contract, however, Malawi Housing Corporation rights and interests in the land as receiver of rent under section 27 of the Registered Land Act are thereby preserved.

Disposal

On the facts in this case, time was not of the essence for Malawi Housing Corporation, the seller, or Mr. Winga, the buyer of the property. Neither, after 8 July 1998, gave notice to another to make time the essence of the contract. Mr. Winga, in due course, could not give Malawi Housing Corporation notice to complete; Malawi Housing Corporation completed the contract by issuing and registering the lease. Unfortunately, Mr. Winga never completed the contract. Mr. Winga never paid the price until three years later. Malawi Housing Corporation, therefore, was right to reject payment of the price. At the point where Mr. Winga declined or delayed in paying the new price, both parties were absolved of contractual obligations. Acceptance of Mr Winga's repudiation of the contract absolved Malawi Housing from delivering possession to Mr Winga who had not paid the price for the land. Mr. Winga had no title to the land because of breach of contract for failure to pay the price. There was, therefore, no obligation, after Malawi Housing Corporation accepted the repudiation, for Malawi Housing Corporation to complete the contract of sale of land by handing over possession. Moreover, Malawi Housing Corporation being in possession, irrespective of who had the legal title, could still exercise the right to lien to hold on to the land to enforce payment of the price. The registration of the lease under the Registered Land Act was subject to the rights and interests of Malawi Housing Corporation as receiver of rent. Those rights included the rights of Malawi Housing Corporations equitable lien and right of rescission of the contract of sale on Mr Winga repudiating the contract.

It must follow, from this analysis that, on the repudiation of the contract by Mr Winga and acceptance by Malawi Housing Corporation in refusing the price and offering the house for sale to the sitting tenant, this court declares that there was a valid and binding contract for the sale of the House Number MU/1/31 and that that Malawi Housing Corporation could not withdraw the offer for sale when it in fact accepted it by conduct. This court, however, cannot compel the respondent to accept the cheque for purchase money, to deliver vacant possession and pay rentals on the property for the proper ty. Mr Winga was in fundamental breach of contract in not paying the price in the time stipulated by the contract or within a reasonable time. The breach was a repudiation of a contract and, accepted by Malawi Housing Corporation, absolved parties from further obligations in the contract. The registration of the lease was subject to these rights. There was evidence to support the lower court's conclusions.

The appeal, is therefore, dismissed with costs

Made this 26th Day of April 2016

Dr J M Ansah, SC
JUSTICE OF APPEAL

F E Kapan

JUSTICE OF APPEAL

D.F. Mwaungulu

JUSTICE OF APPEAL