



JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CASE NO 628 OF 2005

BETWEEN

MATHEWS MAHATA	CLAIMANT
AND	
MALAWI HOUSING CORPORATION	DEFENDANT

**CORAM: JUSTICE D.F. MWAUNGULU**

Tandwe, for the Claimant

Gondwe, for the Defendant

Mwanyongo, Official Court Interpreter

Mwaungulu J

## **JUDGMENT**

### *The issues*

These proceedings were before Justice Manyungwa who never lived long to deliver judgment over them. Following a hearing on proceedings after death, long absence or unavailability of a presiding judge, the parties, among options of a full trial before another judge or the new judge hearing some witnesses, opted for a successor judge to deliver judgment on the record and the papers. This option, especially, unlike in this case, where the case turns out on credibility of witnesses, has problems. The old practice, overlooked in this case and, I would say, by almost all courts of first instance, of a trial judge, shortly after testimony, to write (in red or green) some side notes on the record rating the credibility of a witness or aspects of critical testimony, despite its disuse, assists the succeeding trial or appeal judge. In this case, the controversy resolves by a combination of documentary and *viva voce* testimony received by the judge. In fact the judge who actually heard the matter, the succeeding judge and the appeal judge, if it comes to that, would have assessed that credibility primarily from the critical documents available in the course of the trial. Consequently, this case can proceed on, as the parties and the court agreed, the papers and evidence received by the judge hearing the actual case.

The judgment took longer to deliver. Justice Mr. Manyungwa, who heard many cases and delivered judgments on many others promptly, like me, absorbed too much work. When making me judge in charge, the Chief Justice, shortly after my secondment at the United Nations International Criminal Tribunal for Rwanda, entrusted me with the responsibility to deal with the situation where, following public complaints, judgments were accumulating and not delivered in time. In short, there was backlog and delay, two twin analytical concepts to solve, in this case judgment writing inundation. Backlog refers to quantity of cases (or judgments) in relation to time and output. If a judge has 60 cases and delivers 3 judgments per a month. The judge has a backlog of 20 months. Delay refers to how long it takes to complete a judgment, an individual judgment. For most cases a judgment should be written in under two days. Using these analytical tools and after consultation with individual judges, six months was the time within which to forestall the backlog. Solving delay was more complex because of resource constraints ranging from human to capital and judges who had to work on judgments could not be given new work without the risk of increasing the backlog. The exercise had an 80% success on the backlog. The downside, however, was that the principal registry's work could not be slowed down or stopped and, therefore, only three judges had to absorb the work of ten judges, with a bulk falling on me as the judge in charge. This explains why, a case commenced in 2005 (a seven year delay, concluded in 2012 has to have its judgment in 2016.

### *Background*

The claimant, a tenant of sometime of Malawi Housing Corporation, seized a chance, of a life time, under which Malawi Housing Corporation was selling houses to sitting tenants. Malawi Housing Corporation, under the statute creating it, acquires land for long leases and develops housing which it leases for accommodation or commerce. Malawi Housing Corporation resorted to selling units to tenants. Mr Mahata, a sitting tenant since 22 May 1989, on 14 April 1998 applied for and Malawi Housing Corporation accepted purchase of house No KS/385. For reasons appearing later, it is useful to reproduce the Malawi Housing Corporation letter to Mr Mahata which, veritably, is the agreement between Mr Mahata and Malawi Housing Corporation:

Reference is made to your application to purchase the house quoted above.

I am now pleased to offer the house to you for sale at the total price of K99,632.75 including incidental costs as indicated on the attached form 2.

This valuation is based on the condition of the house at the date of valuation and does not include a provision for maintenance costs i.e. the house is being sold on "as is basis">

This offer is valid for a period of ninety (90) days from the date shown above and is made subject to payment of an acceptance deposit in the sum of K12,232.75 within a period of thirty (30) days from the date of offer.

If you fail to pay the deposit within the stipulated period and fail to follow-up with the final balance within the 60 days following the payment of the deposit, the offer shall automatically be deemed cancelled without any reference to you. If, however, you shall still be interested in purchasing the property, the same shall be subject to a fresh valuation on payment of the relevant valuation fees.

The house will be considered sold only after the full purchase price is paid. Rent for the house shall, therefore, be still payable to the corporation and the house should not be sublet until the transaction is closed.

Mr Mahata accepted the offer. On 5 May 1998 he paid the deposit, leaving a balance of K 57, 400.00. On 4 June 1998, a month before the date for final payment, Mr Mahata applied to Malawi Housing Corporation for a title deed. According to him, his bankers agreed facilitating to cover the whole price. Malawi Housing Corporation worked on the lease. By 29<sup>th</sup> June 1998, Mr Mahata paid K72, 232.75, including the deposit, the balance was K27, 400. Mr. Mahata should have paid the price by 5 July 1998. On 13 July 1998 Malawi Housing Corporation prepared the lease and sent it to Mr Mahata to complete it. On 16 December 1998 Malawi Housing Corporation informed Mr Mahata that it registered the lease and Mr Mahata should contact his lawyers. From 5 July 1998 to 16 December 1998 Mr Mahata paid neither the balance nor the re-evaluation fee.

Mr Mahata contends that Malawi Housing Corporation, since December 1998, thwarted attempts to complete payment. According to Mr Mahata, he tried to paying the balance on money borrowed from his teachers association. Mr. Mahata tried in February and July 1999. The lands registrar did not issue a lease certificate till 13 December 2001. Malawi Housing in 2001 refused Mr Mahata's attempt to pay the balance. Mr Mahata in 2002 contacted Tembenu and Masumbu and Lawson & Co. Malawi Housing Corporation refused Lawson & Co. payment by cheque dated 8 August 2003. Malawi Housing Corporation wanted to sell the house to Mr Mahata on a new valuation.

On 28 May 2004 Malawi Housing Corporation wrote Mr Mahata a letter, to which Mr Mahata never replied. The letter was not tendered. Malawi Housing Corporation, however, refers to it in their letter of 20 December 2004 with which it enclosed a statutory declaration under section 51 of the Registered Land Act:

Our letter of 28<sup>th</sup> May 2004 on the above captioned matter refers.

You will recall that in the above mentioned letter you were offered the house herein for sale. One of the conditions of the

offer was that full and final amount payment for the property herein had to be made within 6 calendar months from 28<sup>th</sup> May, 2004. The letter further went on to state that noncompliance with this would mean that the transaction would be cancelled without notice. Pursuant to the offer letter we regret to advise that the transaction herein has been cancelled.

The last offer letter and previous offers clearly stipulated that rent is payable until after full purchase price has been made. We have noted that you have rent arrears amounting to K8, 000.00. This contravenes the Tenancy Agreement which stipulates that if rent or any part thereof shall remain unpaid for a period of 14 days the Corporation may at any time thereafter enter on the property and retake possession thereof without prejudice of its remedies for rent then accrued due to breach of covenant.

In view of the foregoing we regret to advise that the tenancy herein has been terminated and we hereby give you one month notice to vacate from the house herein. Failure to comply with this will compel us to instruct the Sheriff of Malawi to distrain your household items and to handover vacant possession to us."

Malawi Housing cancelled registration of the lease and closed the house, evicting Mr. Mahata. Mr Mahata never collected the goods from the house. Malawi Housing Corporation deregistered the lease

#### *The Action*

On 23 January 2005 Mr. Mahata issued an originating summons. He prays that this court order that (a) he is the lawful leaseholder of KS/385; (b) Malawi Housing Corporation or its assignee to surrender possession and ownership of KS/385 to him; (c) Malawi Housing Corporation, in the alternative, to pay him damages; (d) Malawi Housing Corporation to compensate Mr. Mahata for damages to household property; (e) damages for trespass to land and conversion; (f) costs of the action to him; and, (g) other reliefs as the court may determine. Mr. Mahata argues that, although under the first contract, the only contract, time was of essence, time ceased to be of the essence by waiver. Mr. Mahata argues that Malawi Housing Corporation waived the requirement of time of the essence when, after the date prescribed for payment, Malawi Housing Corporation sent him the lease agreement and proceeded to register the lease at the lands registry. Malawi Housing Corporation, according to Mr. Mahata, therefore, title having passed, could not evict him from the land or to register the lease Mr. Mahata, on a different emphasis, argues that Malawi Housing Corporation could not evict him for arrears of rent when it had in its possession purchase price of money which should have offset the arrears of rent.

#### *Mr Mahata's submissions*

Mr. Mahata, relying on the judgment of Maugham J in *Re Sandwell v Sandwell Park Colliery Co* [1929] 1Ch 227,282, submits that the general rule concerning performance of a contract is that completion must be on the date specified in the contract or within a reasonable time thereafter. He, relying on *Stickney v Keeble* [1915] AC 386, 401, submits three exceptions; where there is express stipulation, depending on the nature of the property and surrounding circumstances. He submits that, when it comes to contractual provisions, the court must look no further than identifying the intention of the parties from the contract itself and the circumstances around the contract. He, however, concedes that in

contracts for the sale of land, time is not of the essence. He relies on the following statement in *Harold Woods Brick Ltd v Ferris* (1953), 153 LT 241, 242:

[I]f, though in form the sale is a sale of land, it in reality is the sale of a business enterprise, then the equitable rule about time not being of essence of the contract will not apply, either in the Chancery Court or in courts of the Commonwealth.

He, based on the statement by Harman J in *Smith v Hamilton* [1951] Ch 174, 179, further submits that rarely is time of essence in sale of private houses:

[I]t would need very special circumstances to make time of the essence of the contract on a sale of an ordinary private dwelling house with vacant possession.

Mr. Mahata submits that, on the facts and rendition of the principle of waiver, Malawi Housing Corporation waived the requirement that time is of the essence. Mr. Mahata submits, on the strength of *Webb v Hughes* (1870), LR 10 Eq 281, 286; *Richards (Charles) Ltd v Oppenheim*; and *Peyman v Ranjani* [1985] Ch 457, that in a waiver, a party affirms the contract and cannot, therefore, resile from the contract. Mr. Mahata, based on *Mathews v Smallwood* [1910] 1 Ch 777, 786; *Kendall v Hamilton* [1879] 4 App Cas 504, 542); and *Norwest Holst v Harrison* [1985] ICR 668, 683), also argues that a buyer has no obligation to pay the price on the date fixed where the seller has changed the date and, if *Ferguson v Carrington* (1849) 9 B & C 59, is the authority to go by, that the buyer, is not liable to pay the price until the new date expires. On the consequences of the breach, Mr. Mahata submits that the innocent party may terminate the contract and, therefore, put an end to all primary obligations of both parties to remaining unperformed. He relies on (*Scandinavian Trading Tanker v Ecuatoriana* [1918] 2 AC 694, 703 Mr. Mahata further contends that, if there is fundamental breach of the contract, on repudiation, the innocent party is entitled to damages. He relies on (*Lombard North Control v Butterworth* [1987] QB 527, 546. Mr. Mahata further contends that the innocent party may have to wait until there is long delay or laches

### *Defence*

Malawi Housing Corporation naturally opposes the summons praying, generally, that Mr. Mahata is not entitled to the reliefs he seeks and that the action should be dismissed with costs. Consequently, Malawi Housing Corporation prays for declarations that (a) Malawi Housing Corporation was entitled to repudiate the contract for the defendant's failure to fulfill contractual obligations on time; and, (b) the closure of the house was lawful on account of rent arrears.

### *Malawi Housing Corporations submissions*

Malawi Housing Corporation, relying on *Parking v Thorid* (1852) 16 Beav 59, 65, submits that without the contrary intention, the contract must be performed on the exact date of the contract. Consequently, a part to a contract could treat the contract as repudiated if the other party never completed the contract on the fixed date, since time was of the essence of the contract. He relies on *United Scientific Holdings Limited v Burnley Borough Council* [1978] AC 904. Malawi Housing Corporation, however, submits that, in land matters time is not of essence unless parties expressly state that time is of essence, where the circumstances of the contract on subject matter indicate that time must be exactly complied with or where another party subsequently next time of essence. Malawi Housing Corporation relies on *Hurdson v Temple* (1860) 29 Beav 536; *Tilly v Thomas* (1867) LR Re Ch App 61; and, *Crompton v Burgley* [1892] 1Ch 313. Relying on *Scandinavian Trading Co. Ab v Feota Petroler* [1983] 2 AC 694.

Malawi Housing Corporation, therefore, contends that we are in a situation where the agreement for the sale of land required Mr. Mahata complete the contract on 4 July 1998. Time, therefore, according to Malawi Housing Corporation was to the essence and Mr. Mahata was supposed to complete the agreement by that date. Mr. Mahata according to Malawi Housing Corporation never completed the agreement and was therefore in breach of the contract. Consequently, Malawi Housing Corporation was entitled to terminate the tenancy. Malawi Housing Corporation contends that it is unfair to Malawi Housing Corporation that Mr. Mahata should pay in 2003 the price of the land as in 1998.

### *Resolution*

All Mr Mahata's claims depend on determining rights accrued him, on the facts, under the contract of sale of land with Malawi Housing Corporation. The determination hinges on considering whether time was of the essence. Mr Mahata and Malawi Housing Corporation agree that time was of the essence. The determination, however, hovers on the general law of contract. In my judgment, on the facts, the ultimate remains the same irrespective of the position on time being of essence for this contract. The first consideration, therefore, is whether time is of essence in the contract under consideration.

### *Time is not of essence*

Time is not of essence in a contract generally and for sale of land in particular. Consequently, where time is not stipulated, expressly or impliedly, in a contract, the contract is open ended as to time when the contract must be performed. Where a contract, therefore, indicates a time when it or its terms are to be performed, unless it clearly states that time is of essence, the contract can be performed at any other time. 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) 4<sup>th</sup> 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 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*

In fact, the presumption is that time is of no essence. Consequently, unless from the surrounding circumstances of the contract and the contract itself, it is plain that time is of essence, the contract must state so expressly and with clarity and alacrity. 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 essence. Consequently, subject to the *de minimis* principle, parties must abide by the time stipulated to the letter. 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 recover his deposit...

*Nature of contract and surrounding circumstances can make time of essence*

The nature of a contract or circumstances surrounding can make time of essence. In the Supreme Court of India, Judge J.C. Shah 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.

Given volatility markets, there is a shift concerning realty. 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) 1 SCC 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*

The inference time is of essence is not made from just mentioning that certain actions, by the buyer or seller, be performed within a certain time. The parties must intend that time is of essence. In *Gomathinayagam Pillai and Ors v Pallaniswami Nadar* 1967 AIR 868, 1967 SCR (1) 227 2 September, 1966), the Supreme Court of Appeal of India, construing section 55 of the Contract Act, said:

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.

#### *Inclusion of a penalty not conclusive*

The inference that time is of essence is not made merely from that parties imposed penalties for default. "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."

#### *Inclusion of the clause 'time is of the essence' may not be conclusive*



Additionally, inclusion of words 'time is of essence' or like words is not conclusive. 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. The emphasis portion of the aforesaid statement of law is based on *Lamprell v. Billericay Union* [(1849) 2 Exch 283, 308]; *Webb v. Hughes* [(1870) LR 10 Eq 281] and *Charles Rickards Ltd. v. Oppenheim* [[1950] 1 K.B. 616].

*Was time was of essence in this contract*

Three aspects suppose and support the view, agreed by both parties, that time was of the essence. The contract stipulated a date for payment of the price (not delivery of title). This was a sale of land for commercial purposes. More importantly, 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. Where time is of essence, failure to complete on time is breach of a contract if it is done on time. Time is never of essence in a contract of sale of land. Consequently, where parties, for whatever reason, agree to complete certain actions or omission on a date set, equity follows the law and subject to waiver, the act cannot, without breaching the contract, be done thereafter. Blackburn J in *Bettini v Gye* (1876) 1 QBD 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. The Privy Council reversing the decision of the Supreme Court of Canada held that the vendor was able and willing to convey at the date fixed for completion and that the purchaser being in default the purchaser was not entitled to specific performance. Lord Atkins said

These facts are all admitted. There is no controversy or dispute about them. 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 13<sup>th</sup>, 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, as Mr Mahata and Malawi Housing Corporation agree that time was of the essence, Mr Mahata'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, contrary to what Mr Mahata contends, no waiver of the date of the payment of the price from the actions Mr. Mahata reckons as constituting waiver. 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. The seller has to accept a tardy payment or defer payment. These, 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 6<sup>th</sup> 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. This case is clearly distinguishable. The Malawi Housing Corporation refused the payment of the balance. This, they were entitled to do if, as Mr. Mahata and Malawi Housing Corporation, accept that time was of essence. There was in this case no waiver of the requirement that, on selling the date of payment, time was of the essence. Where time is of the essence, equity does not apply. The parties, therefore, proceed based on the common law, in this case on the principles of the repudiation after the innocent party accepts the repudiation.

#### *Time was not of essence in this contract*

On the authorities cited, however, 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. The contract actually suggests that, the price not paid on time, Malawi Housing Corporation would, with no time stipulated, still sell on a new valuation when Mr. Mahata pays for subsequent valuation. 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. Notwithstanding *Perry v. Sherlock* (14 Victorian L.R. 49), where it was held that a provision enabling a vendor to rescind "without notice," made time of essence, time, for the reasons expressed, was not of the essence

#### *Date set is not just a target date*

A court should not, parties having fixed a date by agreement, determine it of no consequence and project that the contract can be performed any time, even if it be reasonable, later. I agree with Edmund-Davies LJ when he says in *Raineri v Miles* [1980] 2 All ER 145, 155:

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. The time stipulated is a condition in the contract; it is not, just a target. In *Gomathinayagam Pillai* case [1967 (1) SCR 227: 1967 AIR (SC) 868] the Supreme Court of India said:

Their Lordships will add to the statement just quoted these observations. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time-limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time-limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay as its foundation. 'Prima facie, equity treats the importance of such time-limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a court of law the contract has not been literally performed by the plaintiff as regards the time-limit specified.'

In *K. Narendra v Riviera Apartments (P) Ltd* on 24 May, 1999 the court said

It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence

of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it 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?

In *Rani v Kamal Rani* (1993) 1 SCC 519, the court said:

....it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract, the Court may infer that it is to be performed in a reasonable time if the conditions are (evident?): (1) from the express terms of the contract; (2) from the nature of the property; and (3) from the surrounding circumstances, for example, the object of making the contract.

In other words, the court should look at all the relevant circumstances including the time-limit(s) specified in the agreement and determine whether its discretion to grant specific performance should be exercised.

The principles, as I understand them, however, are that where there has been stipulation as to time, including where time has been made of essence, equity intervenes and will give relief in order to do justice to the parties and the case. It is the function of equity to ameliorate, in appropriate circumstances, the consequences of a certain legal result. In relation to real property, where time was stipulated or where, time 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. Berry* (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 never obfuscates rights. In a land sale, therefore, equity identifies the (legal) right and obviates consequences pursuing justice and fairness. Where, therefore, a contract stipulates time when an activity must occur and the contract never stipulates time, the action should occur within a reasonable time, failure to abide is foremost breach of contract. The innocent party, depending on the nature of the breach, is entitled to damages or rescission of a contract. Equity must, as it usually does, follow the law. Equitable remedies must, therefore, not ignore remedies available by law. It is because of this that Lord Cairns qualifies the remedy. 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 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 in the second sense postulated by 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. There is no general concept of time being of the essence of a contract as a whole, the question being whether time is of the essence of a particular obligation. It is quite possible to have time stipulations which are conditions and others which are not.

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. Damages are the difference between the contract and selling price. Where price falls, the seller will be unable to sell the land at the agreed price. It is, therefore, unjust to allow the buyer to breach the contract and enabled to buy other land cheaply and with change in hand. If the seller is ready and willing to complete the bargain, the buyer will only pay if the damages are the equivalent of what the land actually costs, the increased value. Conversely, if the price of the property soars, a buyer may delay paying benefiting from delayed payment. Assuming the seller wants to replace the land immediately, the contract price will be unable to buy equivalent land. Consequently, the law of contract, on breach, puts damages as difference between the market and contract prices.

The seller, property prices soaring, may cancel the sale for the windfall. The buyer would, on a lower contract price, be unable to acquire such land. The seller must be compelled either to give up the property or pay its current value in damages. That is the just thing. The legal remedy in damages and equitable remedy of specific performance invoke to produce a just outcome for buyer and seller. Where the buyer on sale of land fails to pay the price, the vendor, holding to property, after repudiating the contract, may, as long as the vendor was ready and willing to convey the property, sue for damages for breach of a contract and recover the difference between the contract and purchase price. The buyer, as long as the buyer has paid or is willing to pay the purchase price, can sue for damages for breach of contract for non delivery or request specific performance of the contract and damages flowing for non performance of a contract (*Hadley v. Baxendale* (1854) 9 Ex 341, at 354, 156 E.R. 145, 151; *Stolzenberg v. McWilliams*, (1914) 10 Tas. L.R. 74; *Diamond v. CampbellJones*, [1961] 1 Ch. 22. 61 *Berry v. Mahoney*, [1933] Victorian L.R. 314, 322-323). Mr. Mahata's case falls in the latter category. It is necessary, therefore, to apply the law, as discussed to the facts of this case.

#### *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] Ch 1). 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] 1QB 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 Mahata 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 Mahata's claims for specific performance and a claim for damages for breach of contract or in lieu of specific performance.

#### *Laches*

Mr Mahata, 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 the lease which, after Mr. Mahata completed, Malawi Housing Corporation registered at the lands registry. Mr Mahata was guilty of laches. He never paid the balance on the due date. He purported to pay around December 1998, five months after the due date. He never paid for revaluation as required by the contract in 1999 and 2000 when Malawi Housing Corporation was trying to register the sale of the lease. He never sought revaluation when in 2001 the land was registered. He never after 2004 paid the revalued price, insisting that he will pay the balance on the 1998 price.

#### *Mr Mahata never did equity*

Even if Mr Mahata had given such notice to Malawi Housing Corporation, specific performance was unavailable to him. Mr Mahata 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*, 32<sup>nd</sup> Ed., Chap. 5). Mr. Mahata left Malawi Housing Corporation in the invidious position where the agreed price was not paid in full at the time agreed. 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. Consequently, the contract stipulated clearly that if the full price is not paid by that date, valuation should fix price anew. Mr. Mahata, therefore, could not tender the balance of the price to satisfy the contract. Mr Mahata was supposed to pay the balance of the new price based on valuation. Mr Mahata should have notified Malawi Housing that time was of essence and paid for revaluation. Cross-examined, Mr Mahata admitted he never requested or paid for valuation. Obviously, Mr Mahata is not ready and willing to pay the purchase price on the new evaluation as agreed in the contract. He wants to pay the balance on the original price. The buyer here never behaved equitably. There can be no specific performance of the contract. Mr. Mahata, contrary to the contract, neglects and refuses to pay the price after valuation.

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

The doctrine of laches in equity has the same effect under the common law so much so that a long delay in complying with contractual obligation, such as payment of the price between a buyer and seller of the land is fundamental breach pro tanto. 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. While in equity, where time is not of the essence, for shorter duration, the equitable remedy of specific performance would not be granted a party unless there is notice activating a situation where time is not of the essence to where time is

of essence, where there is a fundamental breach of contract, giving such a notice is not necessary. In equity laches has the effect of it being a defence to an order for specific performance. A long delay, laches, makes it inequitable to grant specific performance on the ground that one who comes to equity must do equity. It could, as well be based on the principle that equity follows the law. 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 entitled, as a matter of right and without notice, unless the innocent party affirms the breach, to accept the repudiation of the contract by the wrongful party and rescind the contract without any notice to the other party.

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

When Mr. Mahata neglected to pay the price on time under the earlier agreement and the subsequent revalued price, thereby Mr Mahata breaching the contract, Malawi Housing Corporation was entitled, after accepting the breach, to treat Mr Mahata as repudiating the contract, rescind or affirm the contract. The action by Malawi Housing to send the lease and having it registered was not, as Mr. Mahata contends, a waiver of the requirement that time is of essence because, in my judgment, time was never of the essence. The contract, as affirmed, provided that, if the full price was not paid by a date set, the price would base on a revaluation. Accepting the balance would have been understood, though it is not, affirming the previous price and, therefore, Malawi Housing Corporation properly rejected the balance price intended by Nr. Nkhata. The contract, seen differently, provided that there would be a new price. Mr. Mahata was to pay the new price. In this regard, when not paying for evaluation or failing to pay the revalued price, Mr Mahata was in breach of the contract and repudiated it. Malawi Housing Corporation accepted the repudiation and, repudiating it, offered the same house to Mr Mahata at a new price, terminating the tenancy, evicting Mr Mahata and bringing in another tenant.

This case is much like one before the Supreme Court of Belize, *Acosta v Martinez and another* (Claim No. 285 of f 2009. The important facts and legal result are in this statement by Madam Justice Hafiz:

The question is whether Mr. Acosta 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 paid 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. In Barnsley's Conveyancing Practice Law and Practice, 4<sup>th</sup> ed, Butterworths, 1996, the learned author, M Thompson, says at page 629:

It is now clearly established ... that a vendor rescinding for fundamental breach by the purchaser can recover damages consequent thereon. It goes without saying that he is entitled to recover possession of the land if the purchaser has been allowed into occupation, and presumably he can charge him with an occupation rent.

In *King v King* (1853) 1 My & K 442 the vendor, who owned two portions of land, sold the other part to the buyer with the option to buy the other. The vendor, unable to establish title on the land, could not deliver the full title to the buyer who was in occupation of both portions of land. When the purchaser failed to pay the purchase price, the vendor, seeking to claim possession of the land, wrote the buyer as follows: "I, John Edward King, do hereby give you notice that I hereby require you to abandon the said agreement and to deliver the same up to me and to permit me to enter into possession of the hereditaments and premises in the said agreement comprised, and to account ... for the rents and profits of the said hereditaments and premises ..." The buyer objected to delivery of possession, notwithstanding that the price was not paid because of doubtful title. Leach, MR, ordering possession, said:

"This is a very special case. The Defendants have been in receipt of the rent and profit of the premises under the contract for nearly 8 years, and not have been paid one shilling of the purchase money, refuse either to abandon the contract or to take such title as the Plaintiff can make... they now state their reason to be, that they were at that time ready to perform their contract, provided the Plaintiff would make to them a good and

marketable title, although they well knew, from the examination of the abstract and the negotiations which had taken place between them on the subject, that the Plaintiff had it not in his power to give such title; thus returning most unjustly from the Plaintiff in possession of the state which they had agreed to purchase, and the price which they had agreed to pay. Against this injustice the Plaintiff had no remedy but to file the present bill; and, as the court cannot permit the Defendant to make so inequitable a use of the contract, the agreement must be delivered up to be cancelled. The Defendant must account for the rents and profits ...”

In *Clark v Wallis* (1866) 35Beav 460, where the seller was in possession and never paid the purchase price, without reciting the full facts, this is what Lord Romilly, MR, said:

“All I can do is this: - I will order the contract to be rescinded and the Defendant to deliver a possession of the estate to the Plaintiff then take an account of the rents received by the Defendant, and taxed the Plaintiff costs occasioned by the non completion of the purchase and his subsequent costs. The Plaintiff must be at liberty to return the amount out of the £115 paid to him on account of the purchase money. If that be insufficient, the Defendant must pay the deficiency.

The tenet of the contract was, as I understand it, that Mr. Mahata, as long as the sale never occurred, was to remain a tenant of Malawi Housing Corporation. Malawi Housing Corporation, by the agreement, never delivered the unit to Mr. Mahata for purposes of the sale. The agreement gainsays all that stipulation. Mr. Mahata was only a tenant. He was never owner. As long, as Mr. Mahata 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*

Malawi Housing Corporation, because of section 5 (1) of the Land Act, sold Mr. Mahata 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 vendors 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 Mahata’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, but subject—Cap. 57:01

(a) to the leases, charges and other encumbrances, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 27 not to require noting on the register:

Provided that—

(i) nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee, or as a family representative;

(ii) the registration of any person under this Act shall not confer on him any right to any minerals or to any mineral oils as defined in the Mining Act and the Mining Regulation (Oil) Act respectively unless the same are expressly referred to in the register.

Under section 24 (1) (b), however, registration of the lease was 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 are '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 Mahata, as occupier of the land, and Malawi Housing Corporation, as receiver of rents and profits at the time of the registration of Mr Mahata as collector of rents. In

*Abbey National Building Society 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 Mahata. As long as, however, Mr Mahata 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 Mahata was in occupation of KS/385 by virtue of the lease, not as owner of the lease. It is his occupation of the premises that triggers Section 27 of the Registered Land Act. That is why the agreement pinned Mr Mahata to the tenancy until the full price was paid.

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) Tambl. 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 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 Mahata, 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. Johns 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 happen 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 Mr. Mahata's breach and repudiation of the contract*

Apart from equitable lien, Malawi Housing Corporation had legal rights from that Mr Mahata never paid the full price; the full price was not, as Mr Mahata contends, the balance of the contract price in the contract. The contract clearly provided that if Mr Mahata did not pay the full price by the date in the agreement, the contract came to an end or, if it did not, the price was, after Mr Mahata paid the fees, after revaluation of the property. Mr Mahata's refusal or failure to pay according to the new price was repudiation of the contract. 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. 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. Mahata, the buyer of the property. Neither, after 8 July 1998, gave notice to another to make time the essence of the contract. Mr. Mahata, 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. Mahata never completed the contract. Verily, Mr. Mahata paid part of the price. Mr. Mahata, however, was not supposed to pay the balance of the price in the earlier contract. The contract plainly provided that Mr. Mahata would, after paying the valuation fee, pay the new price at the date of valuation. Mr. Mahata neither paid for the valuation nor obtained a new price. Malawi Housing Corporation, therefore, was right, to avoid affirming the old price, to reject payment of the balance based on the price in the contract. Malawi Housing Corporation, properly under the agreement, revalued the property and made an offer to sell to Mr. Mahata. This action, given Mr. Mahata's repudiation of the contract in not paying the balance at the time agreed in the contract and in 2001, was notice by Malawi Housing Corporation's of acceptance of Mr Mahata's repudiation of the contract. At the point where Mr. Mahata declined or delayed in paying the new price, both parties were absolved of contractual obligations. Acceptance of Mr Mahata's repudiation of the contract absolved Malawi Housing from delivering possession to Mr Mahata who had not paid the price for the land. Mr. Mahata 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 Mahata repudiating the contract.

It must follow, from this analysis that, on the repudiation of the contract by Mr Mahata and acceptance by Malawi Housing Corporation in refusing the balance of the price and offering the house for sale (to Mr Mahata), this court cannot declare that Mr Mahata is the lawful leasehold of house No KS/385. It cannot, based on this, order that Malawi Housing Corporation or its assignee surrender possession and ownership of House No KS/385 to Mr Mahata. This court, by the same breath, cannot award damages to Mr Mahata on this pretext. If there is anyone entitled to damages in this case, it must be Malawi Housing Corporation. Malawi Housing Corporation, however, never claimed damages for breach of contract. As I understand it, on locking the house and subsequently, Malawi Housing Corporation requested and Mr Mahata never acted on the request to remove household effects. I, therefore, find it difficult on these facts to award damages for detinue or conversion as prayed. Equally, there are similar difficulties in thinking that Malawi Housing Corporation is liable to Mr Mahata for trespass to the land in evicting him. All along from the date of the contract of the same, Malawi Housing Corporation and Mr Mahata proceeded on the basis that Mr Mahata was in possession of KS/ 385 as a tenant and, therefore, the relationship between them was that of landlord and tenant. Mr Mahata was supposed to pay and Malawi Housing supposed to receive rent. Mr Mahata concedes that he ceased to pay rent after sometime because he thought, rather curiously, that he was then owner of KS/385 because he had the lease agreement registered at the land registry. It sounds rather odd that Mr Mahata thought this way. Malawi Housing Corporation is, therefore, right in seeking a declaration, which I readily grant, that Mr Mahata repudiated the contract.

I, therefore, dismiss the claimant's action with costs to the defendant

Made this <sup>th</sup> day of December 2015

**D.F. Mwaungulu**  
**JUDGE**

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