**IN THE COURT OF APPEAL**

**AT ELDORET**

**CORAM: OMOLO, ONYANGO OTIENO & OKWENGU, JJ.A.**

**CIVIL APPEAL NO. 185 OF 2007**

**BETWEEN**

**DAVID MOSE GEKARA……APPELLANT**

**AND**

**HEZRON NYACHAE……..RESPONDENT**

*(Appeal from the judgment and decree of the High Court of Kenya at Eldoret (Kaburu Bauni, J) dated 13th June, 2007*

**In**

**H.C.C.C. NO. 110 OF 2005)**

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**JUDGMENT OF ONYANGO OTIENO, J.A.**

As on 25th January, 2005, the appellant ***DAVID MOSE GEKARA,*** was one of the beneficiaries of a piece of land referred to as Kuinet (B) 9478 in Uasin Gishu District which was a part of a bigger piece of land belonging to Settlement Fund Trust and which was originally allocated by the same SFT to Soy Farmers Co. On 25th January, 2005, he entered into agreement with the respondent ***HEZRON NYACHAE*** (erroneously referred to in that agreement as ***Hesbon Nyachae***) the terms of which was that he sold that piece of land to the respondent. I produce the entire agreement.

***"LAND SALE AGREEMENT***

***KUINET/9478(B) PART OF IT***

***I DAVID MOSE GEKARA ID NO. 0379379 of the above quoted address have sold my shamba measuring between five (5) and six (6) acres to HESBON NYACHAE ID NO. 0766775 of BOX 9763 Eldoret whose number is referred to as KUINET (B) 9478 in UASIN GISHU District.***

***The cost of the same is Kenya Shillings Three Hundred and Seventy Thousand (Kshs.370,000) to be paid as follows:-***

- ***Kenya Shillings Two Hundred Thousand (Kshs.200,000) – 27th January, 2005***
- ***Kenya Shillings One Hundred Thousand (Kshs.100,000) – First week of March, 2005***
- ***Kenya Shillings Seventy Thousand (70,000) – soon after the above specified dates***

***SELLER***

***DAVID MOSE GEKARA***

***SIGN……..***

***BUYER***

***HESBON NYACHAE***

***SIGN……."***

As I have stated, that agreement was apparently entered into on 25th January, 2005. The respondent said in evidence and it was not disputed, that by that time he had already moved on to the subject land and was in possession of it having acquired possession in the year 2004. The appellant, to an extent confirmed that contention when he asserted in his plaint that the respondent "ploughed, planted and harvested maize on" his land for two consecutive years 2004 and 2005 without his consent and by the time that plaint was filed the respondent continued to do so. Be that as it may, the respondent paid Kshs.200,000 on 27th January, 2005 in strict compliance with the agreement, but when it came to the second payment of Khs.100,000 which was to be paid during the first week of March, 2005 he paid only 40,000 into the appellant's bank account and that was paid on 7th March, 2005 the last day of the first week of March 2005. On 9th May, 2005, the respondent paid Kshs.10,000/= and on 7th July, 2005, he paid Kshs.80,000 making a total of Kshs.330,000. Lastly on 14th September, 2005, the respondent paid Khs.40,000 into the appellant's account. The appellant said in court that on the respondent's failure to pay Kshs.100,000, being the instalment in time and specifically after he had paid only 40,000 he objected and told the respondent not to pay any more funds into his account, but that remained, if it was true, no more than an oral protest. It was never reduced into writing.

Further, before the last payment of Kshs.40,000 into his account by the respondent, the appellant in

an attempt to rescind the contract bought a bankers cheque for Kshs.330,000 in the respondent's name and took it to the respondent as a refund of the total amount paid but the respondent refused to accept it and later made the last payment of Kshs.40,000 we have alluded to herebefore. That amount made the total agreed price of Ksh.370,000. Over one month after the total payment was made, the appellant moved to the Chief Magistrate's court at Eldoret vide a plaint dated 24th October, 2005 and filed on 25th October, 2005, in which he sued the respondent on the same transaction. That suit was withdrawn vide a notice of withdrawal dated 28th October, 2005. It was apparently withdrawn *exparte* before it was served on to the respondent. Having withdrawn that suit, the appellant therafter moved to the High Court and filed a plaint dated 8th November, 2005 in which he sought judgment against the respondent for:-

***"(i) A declaration that the contract between the plaintiff and defendant is null and void.***

***(ii) An order of permanent injunction against the defendant, his agents, and any other person acting on his behalf restraining them from entering, occupying, ploughing, alienating or in any other way dealing with the plaintiff's portion on parcel No. Kuinet (B)/SFT 9478.***

***(iii) An order of eviction from parcel No. Kuinet B/SFT/9478.***

***(iv) General damages for breach of contract***

***(v) mense (sic) profits of Khss.60,000/-***

***(vi) Costs and interest***

***(vii) Any other or further relief this Honourable Court deems fit to grant."***

The main reasons for seeking the judgment as above were, first that the respondent was in breach of the agreement entered into by the parties on 25th January, 2005 in that the respondent failed to pay the second instalment of Kshs.100,000/- within the time stipulated in the agreement as he paid only Kshs.40,000/= within the first week of the month of March instead of the agreed Kshs.100,000/- and secondly, that the respondent was in further breach of the same agreement in that he entered the suit land without the permission of the appellant and committed acts of waste by making bricks, cutting down the appellant's trees and fencing it. And also connected to that is that the respondent ploughed the same land, planted and harvested maize from the land without the appellants consent and or permission.

In response, the respondent admitted entering into a land sale agreement in respect of the suit property but maintained that he honoured the terms of the agreement in that he paid the full amount that was the agreed price namely Kshs.370,000 under the contract. His stand was that under the circumstances, the sale agreement was not null and void. He further asserted that he could not be evicted as he had entered the suit land long before the suit was filed and was already in possession of the subject land.

The above are the matters that went before *Bauni J.* for hearing. At the hearing, the appellant gave evidence and called no witness, and the respondent also gave evidence and did not call any witness. At the close of the case and submissions by the two learned counsel then representing the parties, the learned Judge, in a lengthy judgment, dismissed the appellant's case with costs to the respondent. In doing so, the learned Judge stated *inter alia* the following:-

***"True the payment of 2nd instalment was late. However this did not void the contract as there was no condition that any late payment will head to the contract being void. In any case***

***defendant continued to pay and that amount was paid soon thereafter. Though the plaintiff said he telephoned the defendant told him to deposit the money that was no evidence to support that. The agreement was a written one. He should have wrote (sic) to him stopping any further payment. This he did not do and it is clear he condoned the delay and accepted late payment.***

***The nature of the matter and the surrounding circumstances did not show that time was to be considered of essence. As I said claim after the defendant got lost with the second instalments (sic) the plaintiff took no steps to enforce agreement. He did not give any notice to the defendant making time of essence. This he should have done in writing. All what he did was to make a bankers cheque in September, 2005. By then the defendants (sic) stated that he had completed all the payments of Shs.370,000. The defendant therefore cannot be faulted. He fulfilled his part of the agreement. As such I make a finding that he did not breach the contract and as such I decline to declare the contract between the two as null and void. It is a valid agreement to date."***

Having made that finding the learned Judge dismissed all the prayers urged by the appellant.

The appellant felt aggrieved, hence this appeal premised on eight grounds of appeal, which are in a summary, that the learned Judge failed to address and determine all issues before him; that the extent of the validity of the subject agreement was not considered and the remedies of the parties to the agreement were not addressed; that the learned Judge failed to consider whether the agreement could be a subject of specific performance; that the learned Judge's finding that the respondent did not breach the agreement was contrary to the evidence that was adduced at the hearing of the case; that the learned Judge erred in finding that the nature and circumstances of the matter did not show that time was of essence; that the learned Judge erred in failing to find that the agreement was null and void and incapable of specific performance but only valid for purposes of refusal of the paid consideration; that the learned Judge failed to analyse the evidence on record and particularly the evidence given in cross-examination; and that the learned Judge failed to consider the submissions of the parties and that led to a miscarriage of justice.

*Mr. Samba* the learned counsel for the appellant and *Mr. Mwangi*, the learned counsel for the respondent both addressed us at length on the issues raised in the memorandum of appeal, *Mr. Samba* urging us to allow the appeal while *Mr. Mwangi* seeking the dismissal of the appeal.

That part of the second instalment was paid later than the date specified in the agreement is certain; that the date for completion of the payment was left open by the clause that stated that the third instalment was to be paid "soon after the above specified dates", is also not in dispute. It is also not in dispute that by the time the appellant was buying bankers cheque for Khs.330,000/= and taking it to the respondent in an attempt to rescind the contract on account of the late payment of second instalment, the whole agreed sale price had been paid with the last Ksh.40,000/= having been paid into his bank account. There is also clear evidence that it was the appellant who gave the respondent his bank account into which the respondent was depositing the subject payments and all payments including the first payment of Kshs.200,000/= was paid by the respondent to the appellant through the same bank account. Under these circumstances, it is safe to hold and I do hold that the appellant knew or ought to have known that despite the second payment being made late, the following payments of Khss.10,000/- and Khs.80,000 were made to him through that same account. Indeed that is the knowledge that led him into his alleged telephone protest to the respondent. Yet despite all these, he never attempted to rescind the contract in writing such that by the time he was now running to court, either to Chief Magistrate's court in respect of the matter that was withdrawn, or to the High Court in respect of the suit the subject of this appeal, he had the total agreed purchase price with him in his account. Thus he was seeking to rescind the contract in respect of which proceeds he had already. Under that scenario, the issue that

was paused by the learned Judge was sound and proper and is in our view, the crux of this matter. That issue is whether or not time was of essence in respect of the agreement. If time was of essence then the contract was breached and if not then there was no breach of contract as the learned Judge did find.

The Principles set out by this Court differently constituted in the case of ***SAGOO VS. DOURADO (1983) KLR 366*** to which the trial court was referred are appropriate to the circumstances of this case and I make no apologies in referring to the same principles. It was held there as follows:-

***"In contracts of all types, time will not be considered to be of essence unless:-***

(i) ***The parties expressly stipulate that conditions as to time must be strictly complied.***

(ii) ***The nature of the subject matter of the contract or the surrounding circumstances show that time should be considered of the essence, and/or***

(iii) ***A party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence."***

That is the law. In another case which was also referred to by the learned counsel in their submission to the trial court, a similar trail can be deciphered and that is the case of ***NJAMUNYA VS. NYAGA (1983) KLR 282*** where it was emphasized that in case where it is not stipulated in the contract that time is of essence, the notice must be given to the defaulting party and that notice is what will make time to be of essence. It is also clearly stated there that the notice must also give a defaulting party a reasonable time within which to rectify the default.

In this case, as rightly pointed out by the learned Judge, there was no stipulation in the agreement that time was of essence. No notice was given to the respondent in writing about the alleged default, and when an attempt was made to return part of the money paid, the whole amount had already been fully paid and the balance was lying in the appellant's bank account. The bankers cheque which was being returned to the respondent was dated 8th October, 2005. The amount of Kshs.40.000/= being the balance of the entire sale price was paid into the appellant's account as I have stated on 14th September, 2005 so that by the time an attempt was being made to rescind the contract the full contract price had been fully paid. Further, the conduct of the appellant in accepting payment which he had directed to be made through his bank and, in failing to rescind the contract in writing, all go to show that indeed time was not of essence. Further on that, if time was indeed of essence, I doubt whether the last payment could be left to be made on any date described as *"soon after the above specified date,."* when in fact even the payment date of second instalment was also not specified – only to be made within the first week of March, 2005. Lastly, the appellant alleged that he told the respondent that he wanted to use the money to buy another piece of land but there is no proof of that at all. It was not in the agreement and he never said which land he wanted to buy with the proceed when and where he was to buy it and from whom he was to buy it. That was rightly rejected.

In my own analysis and evaluation of the facts that were before the trial court as a first appellate court and on my consideration of the law, I cannot fault the learned Judge in both his analysis of the evidence and conclusion. There was no breach of the contract and thus there was no reason for granting injunction against a person who in fact had long gone on to the subject land and had cultivated it and made bricks in it. Courts cannot injunct what has taken place. Further as the respondent had not breached the contract, he was rightly on the land and whether he stays there in future is another matter altogether as Settlement Fund trustee were the registered owners of the land and titles had not been issued to the appellant. And lastly, as the respondent had not breached the contract, the issue of mesne

profits cannot come up for consideration.

In short, this appeal lacks merit. As Okwengu, J.A. also agrees, it is dismissed with costs to the respondent.

This judgment was delivered pursuant to ***Rule 32(3)*** of this Court's Rules.

***DATED and DELIVERED at ELDORET this 19th day of September, 2012.***

***J.W. ONYANGO OTIENO***

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***JUDGE OF APPEAL***

**JUDGMENT OF OKWENGU, JA.**

I have read in draft the judgment of ***Onyango Otieno, J.A.*** and I do agree with it in its entirety. I have nothing useful to add.

***Dated and delivered at Eldoret this 19th day of September, 2012***.

***H. M. OKWENGU***

*……*

***JUDGE OF APPEAL***