



**Cassam & another v Sachania & another (Civil Appeal 63 of 1981)  
[1982] KECA 1 (KLR) (2 December 1982) (Judgment)**

*Cassam v Sachania*[1982] eKLR

Neutral citation: [1982] KECA 1 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 63 OF 1981  
EJE LAW, KD POTTER & ARW HANCOX, JJA  
DECEMBER 2, 1982**

**BETWEEN**

**CASSAM ..... 1<sup>ST</sup> APPELLANT  
CASSAM ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SACHANIA ..... 1<sup>ST</sup> RESPONDENT  
SACHANIA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Potter JA** This is an appeal from a ruling of the High Court granting specific performance of an agreement for the sale of land on an interlocutory application under Order XII rule 6. By a written agreement of sale made on January 15, 1980 between the appellants as vendors and the respondents as purchasers, the appellants agreed to sell and the respondents agreed to buy an undivided one half share of a piece of land known as LR No 1/646 situated in Wood Avenue, Nairobi, together with the buildings thereon for Kshs 400,000. The provisions of the agreement material to this appeal are:

1. The purchase price shall be Kshs 400,000 to be paid to the Vendors by the Purchasers by Bank’s Draft made out to the Vendors in the following manner -
  - a) Two hundred thousand Kenya shillings (Kshs 200,000) on the execution of this Agreement.
  - b) Kenya Shillings two hundred thousand (Kshs 200,000) being the balance of the purchase price on the execution of the transfer of the one-half undivided share herein before described on or before January 31, 1980.
4. In the event of the Purchasers failing to pay as required in Clause 1 and 1(a) and 1(b) then this Agreement for Sale shall be null and void and deemed to have been cancelled and of no effect and the following provisions hereby agreed between the parties shall come into effect ...”



On January 15, 1980 the first appellant handed copies of the title deeds to the respondents' advocates to enable them to prepare the necessary transfer. The first payment of Kshs 200,000 had already been paid when the agreement was signed.

On January 29, 1980 the respondents' advocates wrote to the appellants' advocates at Mombasa a letter enclosing a draft conveyance for approval. In the final paragraph of the letter they said:

We also enclose our cheque for Kshs 200,000 being the balance of the purchase price. Please do not release this sum to your clients until we are able to confirm to you that the Conveyance herein in favour of our clients has been duly registered. Please confirm this.”

The appellants' advocates did not return the draft conveyance, but replied from Mombasa by letter dated January 31, 1980 as follows:

We refer to your letter of the January 29, 1980 in the above matter, enclosing therewith the draft of the transfer and your cheque in the name of our firm in the sum of Kshs 200,000. You also requested us in your letter to hold this amount and not to release it to our clients until the conveyance has been duly registered. Such a request is in breach of the Agreement for Sale which provides for completion by January 31, 1980 by payment of Kshs 200,000 by Bankers cheque in favour of the vendors against execution and delivery by them of the conveyance.

Your cheque is returned herewith. Your clients are in breach of the Agreement for Sale and in these circumstances, on the instructions of our clients and on their behalf, we hereby rescind the sale. We hereby require of your clients, immediate delivery of vacant possession of the premises subject of the sale and upon such delivery, our clients will repay to yours all sums so far paid towards purchase. Please notify your clients that they should comply with our clients' requirements by the close of business on the February 5, 1980. Henceforth, time is to be regarded as being of the essence.”

The first appellant also wrote a letter from Nairobi dated February 2, 1980 to the respondents' advocates, asserting that the respondents were in breach of the agreement of sale by their failure to pay the balance of the purchase price on or before January 31, 1980 and that in accordance with clause 4 the agreement was now null and void. By registered letter dated February 4, 1980 the respondents' advocates sent to the first appellant in Nairobi a banker's draft for Kshs 200,000.

On the May 6, 1980 the respondents filed a plaint in the High Court claiming specific performance of the agreement of sale and other reliefs. Following the filing of a defence, the respondents applied by Notice of Motion under Order XII rule 6 for judgment on admissions of fact in the defence. The respondents were given judgment for specific performance of the agreement and costs. The motion included an application under Order VI rule 13 to strike out the defence, on which no order was made. We are not concerned with that application in this appeal.

In his Ruling, Simpson J (as he then was), observed that the facts material to the application for judgment were expressly or impliedly admitted in the defence and that the defendants relied on matters of law. Mr Lakha, who appeared for the appellants/defendants did not dissent from this observation. He put his case this way. The Judge's discretion to grant judgment on admissions of fact under the Order is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the plaintiff to judgment. It is far from being a plain case where one has to resort to the interpretation of documents. Once a case raises points of law it falls outside the ambit of the Order. It made no difference whether the points of law had been fully argued or not. In this case the defendants raised points of law which disentitled the plaintiffs to judgment under the Order. The points of law which Mr Lakha relied upon were:

Order XII rule 6 provides as follows:

6. Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled



to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.”

It is well established on the authorities that admissions of fact must be clear and sufficient before they will entitle a plaintiff to judgment. See *Ellis v Allen* [1914] 1 Ch D 904, *Technistudy Limited v Kelland* [1976] 3 All ER 632; *Rankine v Garton Sons & Co Ltd* [1979] 2 All ER 1185. The learned judge did not accept the submission that a point of law takes a case out of the ambit of Order XII rule 6. In his ruling he said:

Admissions have been made in the defence which, as I have held, having regard to the construction of the agreement for sale and the law in relation to time being of the essence of a contract, entitle the plaintiff to judgment.”

The learned judge referred to *Tiverton Estates Ltd v Wearwell Ltd* [1974] 1 All ER 209. In that case the vendors of a leasehold property having decided not to go ahead with the sale, the purchasers registered a caveat at the Land Registry alleging the existence of a contract of sale. The vendors commenced an action seeking, *inter alia*, an order vacating the caution and on an interlocutory motion, obtained an order vacating the caution. On appeal, the Court of Appeal held that the court had power on motion under Section 82(1) of the Land Registration Act 1925 to order that a caution be vacated when it was shown that the caution ought not to have been made. The power had been properly exercised since by failing to adduce any document sufficient to satisfy Section 40(1) of the Law of Property Act 1925, the purchasers had failed to make out a *prima facie* case that there was an enforceable contract.

At page 213 *et seq* Lord Denning MR said:

1. The procedural point Counsel for the purchasers took a procedural point. He argued that the court could not, or at any rate should not, use a motion so as summarily to vacate an entry before trial. He said that a party who relied on the absence of writing had to plead the Statute of Frauds; and that, on discovery, a memorandum might be found sufficient to satisfy the statute. The only way of dealing with the matter was, he said, by a trial and if need be a speedy trial.

I reject this procedural point. The entry of a caution casts a dark shadow on the property. It paralyses dealings in it. No one will buy the property under such a cloud. If a caution is entered when it ought not to be, the court can order the register to be rectified by vacating the entry: see Section 82(1)(a) and (b) of the Land Registration Act 1925; just as it can vacate a land charge under the Land Charges Act 1925; Section 10(8): see *Heywood v BDC Properties Ltd*. The party aggrieved is not confined to his remedy in damages under Section 56(3) of the Land Registration Act 1925. I know that the Rules of the Supreme Court do not prescribe any summary procedure such as Order 14 does for judgment or Order 86 for specific performance. But that is no obstacle. These courts are masters of their own procedure and can do what is right even though it is not contained in the rules. If it is drawn to the attention of the court, by affidavit or otherwise, that a caution has been entered when it ought not to be, then the court can order it to be vacated forthwith. In particular, if the cautioner does not adduce any writing sufficient to satisfy the Statute of Frauds (now Section 40 of the Law of Property Act 1925), the court can order the entry to be vacated. If the point depends on the correct interpretation of correspondence, then the court can decide the matter then and there without sending it for trial. There is no point in going formally to trial when the discussion at the trial would be merely a repetition of the discussion on the summary procedure. We have often decided cases under RSC Order 14 when the only point is one of construction, even though it is a difficult and arguable point. So also under RSC Order 86, in regard to which Russell LJ said in *Bigg v Boyd Gibbins Ltd*:

... if one has simply a short matter of construction, with a few documents, the learned judge on this summary application should simply decide what is in his judgment the true construction.”

In the case before us the learned judge has held that the reasoning in the *Tiverton Estates* case is applicable to applications under Order XII rule 6. I agree. In my view it is *prima facie* applicable to all interlocutory



proceedings. But summary determinations are for plain cases, both as regards the facts and the law. An issue between the parties to an interlocutory application should not be decided at that stage unless the material facts are capable of being adequately established and the law is capable of being fully argued without the benefit of a trial.

Mr Lakha's main point of law is that time was of the essence of the contract in respect of the payment of the balance of the purchase price. It appears to be common ground that the relevant law is that time may be made of the essence of a contract by express stipulation or by necessary implication in the terms of the contract, or in consequence of the circumstances surrounding the contract and of the nature of its subject matter.

As to the construction of the agreement for sale, the learned judge held that the provision of clause 4 took effect on the failure to execute the transfer on or before January 31, 1980, which was an obligation of the vendors as well as the purchasers. I agree that that is the proper construction to be put on clauses 1 and 4. By clause 1, the plaintiffs are required to pay (a) Kshs 200,000 on the execution of the agreement and (b) Kshs 200,000 on the execution of the transfer. Sub-clause (b) goes on to say - "on the execution of the transfer on or before January 31, 1980." The execution of the transfer is as much the duty of the vendor as of the purchaser. The failure of the vendor, or of the vendor and the purchaser, to execute the transfer on or before January 31, 1980 does not render the agreement null and void under the terms of clause 4. So if the transfer is not executed on or before that date, the agreement is still in force and the purchaser still has time in which to pay the balance of the purchase price.

It follows that the appellants had no right to rescind the contract, and that the respondents' payment to the appellants of Kshs 200,000 by banker's draft was a payment of the balance of the purchase price within the time and in the manner stipulated by clause 1 of the agreement.

As to Mr Lakha's submission that the learned judge failed to consider the appellants' alternative case, or failed to give reasons for rejecting it, that the surrounding circumstances of the agreement showed that time was of the essence in respect of the payment of the balance of the purchase price, I need only say that in the appellants' submissions on the pages of the record of appeal referred to us, I can find no argument of any weight or assistance in deciding the matter one way or the other, which was not an argument based on the construction to be put on the terms of the agreement.

I would dismiss this appeal with costs, and I would allow a certificate for two counsel.

**Hancox Ag JA.** By an oral agreement followed by a written agreement dated January 15, 1980 the appellants (the Vendors) agreed to sell to the respondents (the Purchasers) an undivided half share in the property at LR No 1/646 Wood Avenue Nairobi, together with the buildings described thereon, for a total price of Kshs 400,000, of which Kshs 200,000 was paid on January 15, 1980 by banker's draft (the method of payment specified in the agreement) dated December 27, 1979. No difficulty therefore arose regarding that instalment. The second and last Kshs 200,000 was, by clause 1 (b) of this agreement, to be paid, also by banker's draft:

On the execution of transfer of the one half undivided share herein before described on or before January 31, 1980."

However, the Purchasers' advocates, instead of sending a banker's draft, sent their cheque to the Vendors' advocates by their letter of January 29, 1980, adding this rider:

Please do not release this sum to your clients until we are able to confirm to you that the Conveyance herein in favour of our clients has been duly registered. Please confirm this"

The Vendor's advocates, Messrs Atkinson Cleasby & Satchu, seized on this in their letter of January 31 and alleging a dual breach of the Agreement, by reason (a) of the payment being by cheque and not banker's draft and (b) of the payment being made conditional, purported to rescind the Agreement and demanded delivery up of vacant possession of the premises forthwith. The substance of this was reiterated in the first Appellant's



own letter of February 2. Thereupon the purchasers' advocates sent a banker's draft for the balance direct to the Vendors.

When the matter came before Simpson J (as he then was) by Notice of Motion seeking judgment for specific performance and damages in favour of the plaintiffs under Order XII rule 6, Order VI rule 13 and "Inherent Jurisdiction", he did not strike out the defence (though he expressed some criticism of it) under the second limb of the application, but gave a ruling in favour of the purchasers on the admissions of fact in the defence. He held that they were such as to entitle the purchasers to judgment in law. In a sentence, he decided that time was not of the essence of the contract so far as the second payment was concerned, and that the Vendors' decision was invalid.

Mr Lakha, for the Vendors, said that the discretion conferred by Order XII rule 6 should only be exercised in plain and obvious cases, as the necessity to resort to construction of the documents or words said to comprise the admission showed that it cannot be a plain and obvious case and that in any event the Judge had held that the matters of law pleaded in the defence had raised triable issues. This was an "excessive use of summary powers". It followed that the case should have gone for trial.

In *Technistudy v Kelland* [1976] 3 All ER 632 at p 634, a case under Order XXVII rule 3 of the Rules of the supreme Court, the Court of Appeal held that there was no clear admission that the last 50% was due under the agreement, a lump sum contract, and that there was a clear dispute on the facts as to whether there had been substantial completion by the contractor, in particular because the Scott schedule produced, upon which the admissions depended, had been shown to be wrong. That case was clearly different, so it was held, from a summary judgment case where the court had to concentrate on whether there were triable issues: the only similarity between the two was that they were both interlocutory appeals. So I do not regard that as a case where there had been admissions of fact within the rule.

The general rule is that stipulations as to time are not generally of the essence of the contract unless:

- a) They were made so by express terms;
- b) It appeared from the nature of the contract, or the surrounding circumstances that such was the intention of the parties.

See *Halsbury's Laws of England* 4th Edition Vol 9 page 338 and *Hudson v Temple* (1860) 54 All ER at 738. As the learned Judge said, time was not expressly made of the essence of the contract nor as I read that portion of his judgment, did he feel, despite Mr Nowrojee's seven point argument to the contrary, that the circumstances, the contract, or the subject matter, showed that that was the intention of the parties. Accordingly, having reached a conclusion on those matters, and the facts being admitted, the Judge, applying Lord Denning's dictum in *Tiverton Estates v Wearwell* [1974] 1 AER at p 213, in effect said that there was no need to go through the "futility" (as Law JA said in the course of this appeal) of a trial as there was nothing left to be decided. That course seems to me to fit exactly the term of Order XII rule 6.

Any party may ... apply to the Court for such judgment or order as upon such admission he may be entitled to ..."

That means such judgment as he is entitled to in law. In *Ellis v Allen* [1914] 1 Ch 904 the lessee's solicitors made a "telling admission" that their client had mistakenly omitted to seek the lessors' approval to a subletting. The Judge held that the Defendant having made this admission had no possible defence to an action for forfeiture and breach. He said:

It (the rule, namely the former Order 32 rule 6 now Order 27 rule RSC) applies whenever there is a clear admission of facts in the face of which it is impossible for the party making it succeed ... I cannot conceive of any circumstance, which the defendant Allen could rely on as a defence to the action, having regard to this admission made in the letter ..."



*Barnard v Wieland* (1882) 30 WR 947, 35 Digest p 644, though slightly more complicated as to the facts, was to the like effect. There the defendants sought to refer to the deeds of mortgage in question but denied they had the purport or effect for which the plaintiff contended. When the deeds were produced to the court, and it was seen that they had the meaning and effect which the plaintiff had alleged, it was held that the defendants' admission as to the deeds themselves (though they had denied the effect of their contents) entitled the plaintiff to judgment.

So in this case, once the Judge had determined the only real issue of law arising on the admitted facts in favour of the purchasers, judgment for them in my opinion inevitably followed. It is not sufficient to flourish an issue of law before the Court and say that it cannot be decided there and then, and until the trial. *Rankine v Garton* [1979] 3 All ER 1185 was different in that not only was there no admission of an essential ingredient of the tort of negligence, but an express refusal to make such an admission.

Was the learned judge therefore right in holding time was not of the essence? *Raineri v Miles* [1979] 3 All ER 145, cited by Mr Khanna for the Purchasers at the end of his argument, though not in his list, was a similar case in the sense that the Law Society's Special Conditions did not provide that time was to be of the essence of the contract, nor did the surrounding circumstances so render it. In the instant case the judge held that the provisions of Clause 4 of the Agreement did not take effect on or before January 31, 1980 but on failure to pay on the execution of a transfer, not necessarily before that date: *Barclay v Messenger* [1874] LJ Equity 43 p 449, was different.

In that case there was nothing else whatever to be done by the defendants under the contract. Here either it was upon the Vendors to execute the transfer on payment or tender of the amount due (which occurred on February 4 and not before) if Section 55(1)(d) of the Indian Transfer of Property Act is applied or if Mr Lakha's view is adopted, it was the obligation of the Vendors as well as the Purchasers, as the learned judge said. Either way it cannot in my opinion be contended that time was of the essence as regards the second payment. Indeed I read the clause, if anything, as imposing an obligation on the Vendors to execute a transfer by January 31.

Moreover the issue as to whether time is of the essence necessarily presupposed that there was a stipulation as to time of payment. I doubt if sub-clause 1(b) contains any such stipulation. Like the first payment, it was tied to an event, namely the execution of a document. So to hold would be to say that there is an ellipsis in the sub-clause, requiring the insertion of words such as:

On or before the January 31, 1980 and ...”

in the second line, so that the whole sub-clause would then read:

b) Two hundred thousand Kenya shillings (Kshs 200,000) being the balance of the purchase price on or before the January 31, 1980 and on the execution of the transfer of the one-half undivided share herein before described on or before January 31, 1980.”

Accordingly, while agreeing that time was not of the essence in this case, I doubt if there was a stipulation as to time of payment at all. As the Purchasers' advocates stated in their letter of March 26, 1980 the balance of Kshs 200,000 was to be paid against execution by the Vendors of a Conveyance in their clients' favour.

For these reasons, I too would dismiss this appeal. I concur in the order proposed by Potter JA.

**Law JA.** I have had the advantage of reading in draft the judgment prepared by Potter JA with which I agree. In particular I agree with his holding, on the main ground of appeal, that time was not of the essence of the contract in respect of payment of the balance of the purchase price, so as to justify repudiation of the agreement of sale by the appellants. The obligation as to payment of the balance of the purchase price was to pay that balance by banker's draft on or before January 31, 1980 “on the execution of the transfer”. The appellants have never executed the transfer, and it was not open to them to declare the agreement null and void on the ground that payment of the balance of the purchase price was not made by banker's draft until February 4, 1980. Time



was not specifically made of the essence in the agreement, nor did it become of the essence in this respect until it was made of the essence by the respondents' advocates' letter of March 26, 1980, calling upon the appellants to perform their obligation to execute a transfer within twenty one days. This was reasonable stipulation, with which the appellants chose not to comply, see *Woods v Mackenzie Hill Ltd* [1975] 2 All ER 170 and *Raineri v Miles* [1979] 3 All ER 145. I agree that this appeal fails, and must be dismissed. As Hancox Ag JA also agrees, it is so ordered, on the terms proposed by Potter JA.

**Dated and delivered at Nairobi this 2nd day of December, 1982.**

**E.J E LAW**

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**JUDGE OF APPEAL**

**K.D POTTER**

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**JUDGE OF APPEAL**

**A.R.W HANCOX**

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**A.g JUDGE OF APPEAL**

**I certify that this is a true copy of the original**

**DEPUTY REGISTRAR**

