IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL (CIVIL DIVISION)

ACCRA – GHANA

CORAM: MARGARET WELBOURNE JA PRESIDING

P. BRIGHT MENSAH JA

J. ADJEI FRIMPONG JA

SUIT NO. H1/141/2017

28TH APRIL 2022

BETWEEN:

SUNBELTIC COMPANY LTD ... PLAINTIFF/APPELLANT

vs

1. **TEMA DEVELOPMENT CORP.**
2. **SETHI BROTHERS LTD**
3. **SETHI REALITY CO. … DEFENDANTS/RESPONDENTS**

JUDGMENT

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BRIGHT MENSAH JA

On record, the plaintiff/appellant herein on 13/07/2009, filed a suit in the registry of the High Court, Tema against the defendants/respondents jointly and severally, claiming the following reliefs:

1. A declaration that plaintiff is the lessee of plot No. IND/A/44/25 Tema described in paragraph 21 herein from 1st defendant.

2. A declaration and an order that any purported transfer of land ie plot No. IND/A/44/25, Tema aforementioned by the 1st defendant to the 2nd defendant is null and void and of no effect and a further order directed at 1st defendant to expunge the name of the 1st defendant as lessee of Plot No. IND/A/4425 Tema aforementioned from their records.

3. General damages for trespass and wrongfully terminating the occupancy or lease or offer of the plaintiff, in respect of the pilot aforementioned.

4. An order for perpetual injunction against the defendants, their agents, assigns, workmen etc from dealing in any way with the quite enjoyment of plot No. IND/A/44/25, Tema aforementioned and Cost.

See: ***pp 1-2 of the record of appeal [roa].***

Although the writ and the statement of claim were subsequently amended, the substance of the claim remained unaltered. See: ***p 81-83 [roa].*** The land, the subject matter of this suit referred to in paragraph 21 of the statement of claim was given as follows:

"21. Plaintiff avers that its land is an industrial plot situate at Tema heavy Industrial area, near Tema Steel Works and shares a boundary with 2nd defendant on one side and Imperial Nails on another side and a proposed road and Tema Steel Company Limited on another side and the plot is referred to as plot No. IND/A/44/25, Tema and measuring 6.31 acres."

Whereas the 1st defendant entered appearance and subsequently filed its defence, the 2nd and 3rd filed a joint statement of defence after entering an appearance.

Issues for trial:

At the close of the pleadings the plaintiff/appellant filed the following issues for trial:

1. Whether or not plaintiff is the owner or lessee of plot No.IND/A/44/25 Tema.
2. Whether or not in view of an earlier lease of plot No. IND/A/44/25 from the 1st defendant to the plaintiff, the 1st defendant can still assign the aforementioned plot to the 2nd defendant or any other person or party'
3. Whether or not the plaintiff is entitled to her claims endorsed on her writ of summons.
4. Any other issue(s) arising from the pleadings.

See: ***pp 19-20 [roa].***

<u>Additional issue filed by the 1st defendant:</u>

By leave of the lower court, the 1st defendant/respondent did file additional issue for consideration, that is to say:

Whether or not there was any earlier lease of plot No. IND/A/44/45

from the 1st defendant to the plaintiff.

Yet, the records show that the 2nd defendant/respondent also filed additional issues set out here below:

i) Whether or not the plaintiff's office(s) got burnt and if so what date and at what location.

ii) Whether or not the alleged allocation of Plot of No. IND/A/44/25 of 6.31 acres by 1st defendant to plaintiff per the letter dated 14/6/04 was made upon term(s) to be fulfilled by the plaintiff and if so what term(s)

iii) Whether or not the offer term(s), if any, were duly complied with.

iv) Whether or not the purported offer by the plaintiff to make the final payment on 7th July 2009 was within a stipulated dateline, if any.

See: ***p. 26 [roa].***

By the order of the lower court made 09/03/2010, all the issues including additional issues both defendants/respondents filed were adopted by the court for trial. See: ***p. 27 [roa].***

Judgment of the Tema High Court:

Now, per a judgment that appears ***on pp 220-231 [roa]*** the lower court after trial, found for the defendants/respondents but dismissed the claim of the plaintiff/appellant.

Grounds of appeal:

Being dissatisfied with, and aggrieved by the said judgment, the plaintiff/appellant has appealed to this court on the grounds that:

1. The judgment is against the weight of the evidence on record.

2. The learned trial judge after having made a finding of fact on page of the judgment by agreeing with learned Counsel for plaintiff that there had been an offer, acceptance, an intention to create legal relations and sufficient consideration between the parties, was in error when she again held that the plaintiff could not acquired [sic] any legal title and so are not owners or lessees of the plot described in paragraph 21 of their amended statement of claim.

3. The trial judge having made a finding of fact that Exhibit A was an agreement for a lease on the strength of Section 2(a) of the Conveyancing Act should have declared plaintiff as owner of the disputed land since in the same judgment he

agreed with Counsel for the plaintiff that there had been an offer, acceptance, an intention to create legal relations and sufficient consideration between the parties.

The trial judge was therefore in error when he declared the 3rd defendant as owners and lessee of the disputed land.

4. The trial judge was also wrong when she held that promissory estoppel could not avail the plaintiff by the conduct of the defendants because no evidence was led, when there was ample evidence led by the plaintiff to that effect and this occasioned a substantial miscarriage of justice to the plaintiff.

5. Additional grounds to be filed upon receipt of the record of proceedings.

The relief the plaintiff/appellant is seeking from this court is an order setting aside and or reversal of the judgment of the lower court entered 28/05/2015. In this appeal, the parties shall simply be referred to as the appellant and respondents respectively. The plaintiff is the appellant whilst the defendants are the respondents.

We need to state it on record that although the appellant's appeal was premised on 4 grounds as stated supra, by leave of this court granted on 06/07/2021, Counsel for appellant has now limited his arguments to the omnibus ground of appeal, namely that: "*The judgment is against the weight of evidence.*"

Facts of case:

Before proceeding further to address the merits or otherwise of this appeal it may be appropriate to chronicle the facts and the events leading to the institution of the suit.

Briefly stated, the appellant claimed that it applied for the land in dispute described as plot No. IND/A/44/25, Heavily Industrial Area, Tema from the 1st respondent in 1993. The 1st respondent offered the disputed land to the appellant upon payment of C315,500,000.00 [now Ghc315,500.] and C6,310,000.00 [Ghc6,310.00] respectively. By a letter of offer from the 1st respondent dated 14/06/2004 it gave conditions for the offer, prominent condition being that payment of those monies was to be made by 1st July 2004. However, the appellant made a part-payment of C80,000,000.00 [now Ghc8,000.00] on 6th July 2004 and claimed it made a subsequent payment of C100,000,000.00 [now Ghc10,000.00]. According to the appellant, regardless of the payments made to the 1st respondent, the 1st respondent purportedly withdrew the offer and wrongfully granted the disputed land to the 3rd respondent.

The 1st respondent's case is that when the appellant first applied for allocation of the disputed land and had filed its application but without waiting to be offered the plot the appellant rather entered by itself a portion of the industrial land and blatantly erected a concrete structure on it without authorization. The 1st respondent agrees that by a proposal letter of 14/06/2014 the appellant was requested to pay C315,500,000.00 as management fee and ground rent of C6,310,000,000.00 respectively. The appellant was to pay by 01/07/2004 failing which the reservation would be cancelled. The appellant failed to pay before the deadline and only paid C80,000,000.00. The appellant never paid anything again. Thus, the 1st respondent wrote a letter dated 14/05/2009 to the appellant formally withdrawing the reservation for the appellant's failure to settle the full fees 59 months after the proposal to them. The 1st respondent reiterates that the appellant never had interest in or right over the disputed land.

Judgment was against weight of evidence:

The settled position of the law is that where an appellant complains that a judgment is against the weight of evidence he is implying that there were certain pieces of evidence on the record which if the trial court applied properly could have changed the decision in his favour, or that there are certain pieces of evidence that had been wrongly applied against him. The onus is on such an appellant to clearly and properly demonstrate to the appellate court the lapses in the judgment being appealed against. See: ***Djin v Musah Baako [2007-2008] SCGLR 686.***

The omnibus ground of appeal that the judgment is against the weight of evidence throws up the entire case for consideration and determination by the appellate court. The principle was reiterated in ***Owusu-Domena v Amoah [2015-2016] SCGLR 790*** in which case, the apex court stated that the sole ground of appeal that the judgment is against the weight of evidence throws up the case for a fresh consideration of all the facts and law by the appellate court. The court ruled:

> *"The decision of Tuakwa v Bosom has erroneously been cited as laying down the law that when an appeal is based on the ground that the judgment is against the weight of evidence then, only matters of fact may be addressed upon. Sometimes, a decision on facts depends on what the law is on the point or issue. And even the process of finding out whether a party has discharged the burden of persuasion or producing evidence is a matter of law."*

Guided by the principles stated supra, we express the view that the appellant carries the burden to demonstrate that either that the learned trial judge took into account extra judicial matters, rather than dwelling on the established evidence led on record and in consequence came a wrong conclusion; or that the judge failed to apply the law correctly

to the facts/evidence or generally, the judgment is fraught with lapses that should not be allowed to stand.

Arguments of Counsel for the appellant:

In arguing the omnibus ground of appeal that the judgment was against the weight of evidence, learned Counsel for the appellant articulated the point that the 1st respondent by **Exhibit A, last para.** reserved the right to cancel the reservation of the land, the subject matter of the dispute to the appellant and to re-allocate it to any other applicant on the waiting list. The deadline for the payment of the sums of money ie C315,500,000.00 [management fee] and C6,310,000.00 [ground rent] respectively, contained in the offer letter, Exhibit A was 01/07/2004. Since the appellant made the first payment of C80.000,000.00 on 6th July 2004 a week after the deadline of 1st July, 2004 but which payment 1st respondent accepted, it clearly waived its right to cancel or withdraw the offer, Counsel submitted further. In support, he relied on the dictum of Wood JSC in ***S.S.B Bank Ltd v CBAM Inc [2007-2008] 2 SCGLR 894 @ 905*** wherein she espoused as follows:

> *"It is trite learning that a waiver or forbearance may either be oral*
>
> *or written and may be inferred from the conduct of the party*
>
> *affected by the breach complained of."*

Counsel next argued that the 1st respondent with the full knowledge that the appellant had not sought prior approval before putting up structures on the disputed land rather than ordering its removal the respondent however requested appellant to remove just a portion of it, as per **Exhibit C.** Counsel equally made reference to an answer to a question under cross-examination given by the 3rd respondent that sought to confirm that the appellant had some structures on the disputed land; a letter the 1st respondent wrote to the Minister of Works & Housing in connection with the appellant's occupancy of the

disputed land and canvassed the point that throughout the 59 months that the appellant continued to occupy the disputed land, the 1st respondent never made any demand on it to pay the outstanding sum or forfeit the reservation.

Furthermore, it was the case of the appellant that the 1st respondent subsequent withdrawal of the proposal to sell the land to it smacked of absolute arbitrariness contrary to **Articles 23 & 296 of the 1992 Constitution.** In support of this legal proposition Counsel relied on these cases as ***Awuni v West Africa Examinations Council [2003-2004] SCGLR 471; TDC & Musah v Atta Baffour [2005-2006] SCGLR 121; Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] KB 223.***

Counsel also referred us to oft-quoted case, ***Ghana Cable Co. Ltd v Barclays Bank (Gh) Ltd [2010] SCGLR 108 Holding 1*** that settles the principle that it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he had allowed or encouraged another to assume to his detriment.

Furthermore, Counsel argued that once the appellant had effected part payment of the sale price of land in dispute, it had equitable interest in the land and that the only recourse open to the 1st response was to ask for recovery of the outstanding balance plus interest at the prevailing bank rate and not to unilaterally revoke the contract and sell it to the 2nd and 3rd respondents. In support, he referred us to the dictum of Baffoe-Bonnie JSC in ***Muriel Abrefi Oduro v Isaac Kwame Acheampong [unreported], Civ. App. No. J4/32/2015, dated 06/12/2017*** in which case, His Lordship is credited with the following:

> *"…… [T]he principle in law has been always been that*
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> *where a plot of land is sold or leased unconditionally and the*
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> *buyer or lessee makes part payment of the purchase price, the*
>
> *right course of action open to the seller or lessor is to sue for*

recovery of the unpaid balance possibly with interest. He cannot ask for cancellation of the agreement or the return of the land. and he definitely cannot purport to sell to another person without being caught by the nemo dat quod non habet rule."

He thus invited this court to allow the appeal and give judgment to the appellant.

Arguments of Counsel for the 1st respondent:

Learned Counsel reiterated that there was no valid contract of sale of the disputed plot between the appellant and the 1st respondent. Counsel argued the appellant was unable to prove the existence of a lease of the disputed plot from the 1st respondent to warrant the declaration that they own and lessee of the disputed land. She relied on ***Yaa Kwesi v Arhin Davis [2007-2008] SCGLR 580*** to argue that where a party has sued for a declaration of title to land and damages for trespass, etc. he assumed the burden of proof of title to the disputed land by the preponderance of probabilities.

Counsel continued that failure of the appellant to prove that they were issued with documents of title to the disputed land relied upon making them lessees was fatal to their claim for declaration of ownership of the disputed land. It was her case that the payment of Ghc8,000.00 to the 1st respondent out of Ghc32,181.00 total fees indicated an intention by the appellant to rely on the proposal to reserve the disputed land. However, the record bore sufficient testimony that the appellant did not intend to fully pay the exigible fees.

Even though Counsel acknowledged that the 1st respondent accepted the initial payment of Ghc8000.00, she nevertheless contended that even if the acceptance of payment after the deadline amounted to waiver, preservation of the status quo meant that the appellant was still expected to complete payment of the outstanding balance within a reasonable

time. She contended further that part-payment constituted a guarantee of payment of the outstanding balance. In support of this view, Counsel referred us to da Rocha and Lodoh's **Ghana Land Law and Conveyancing p. 378** wherein the learned authors relying on the English cases of **Philip v Lamdin [1949] 1 All ER 770** and **Raieri v Miles [1979] All ER 763** and advocated that even though time is not of the essence for the sale of land, failure to complete on the contractual date is a breach of the contract. *The contractual duty of the parties is not merely to complete on that date but also within a reasonable time.* [emphasis ours].

Counsel thus submitted that the principle also applied to a contract for lease of land as in the instant case. The acceptance of a payment of C80,000,000.00 that constituted 24% of the total amount due a week after the deadline only meant that the appellant was to pay the outstanding balance within a reasonable time. Therefore, the appellant's attempt to pay after 59 months cannot be said to be a reasonable time.

In response to the allegation of arbitrariness on the part of the 1st respondent to have withdrawn the proposal to the appellant, Counsel argued that decision could not be said of being arbitrary. Therefore, those cases learned Counsel for the appellant cited were non-applicable to the instant case. Counsel insisted that upon the appellant's failure to pay the balance within a reasonable time after the initial payment, the 1st respondent reserved the right to allocate the disputed land to an applicant more willing and able to fulfil all its terms of allocation.

Arguments of Counsel for the 2nd and 3rd respondents:

Counsel's submissions were virtually in support of arguments learned Counsel for the 1st respondent had canvassed. It was his case that there was no issue of covenant or contrary intention appearing to exist in the instant case. To Counsel, therefore, waiver never applied. In support, he relied on S. 32 of the Conveyance Act.

Counsel next reiterated that even if the acceptance by the 1st respondent of the appellant's payment of C80,000,000. after the deadline amounted to a waiver, the 1st respondent nevertheless retained the right to forfeiture. Thus, the appellant was still expected to and should have completed payment of the outstanding balance within a reasonable time. Counsel added that part payment could only constitute evidence of guarantee of part payment of the outstanding balance.

Analysis and opinion of the court:

It cannot be over-emphasized that the mainstay of this appeal is whether the 1st respondent having accepted payment of C80,000,000.00 a week after deadline for which the appellant was to make good the conditions of the offer of the plot in dispute made to the appellant, the 1st respondent could cancel the offer and re-allocate the land to the 3rd respondent.

We have critically evaluated the facts and the evidence led on record and we roundly agree with the conclusion the lower court reached as sound. The judgment is supported by the evidence and cannot, therefore, be impeached.

The learned trial judge in her judgment on pp 8-9 as appearing on ***[pp 227-228 roa],*** held that although while a delay in payment does not necessarily abrogate a contract, payment must be done within a reasonable time. The learned trial judge considered that five (5) years after the initial payment out a large sum of money cannot be held to be a reasonable time. Although the appellant claimed they made a further payment of C100,000.000.00 Counsel for the appellant conceded in his written submissions that the appellant was unable to satisfactorily prove it. Thus, apart from the initial payment of C800,000,000.00, it is obvious the appellant made no further payment. The vexed question, therefore, is whether it constituted a reasonable time the attempt by the appellant to pay again in 5 years later after the 1st respondent had decided to withdraw the offer,.

In addressing the issue, the predominant question that necessarily arises is what is a reasonable time?

A reasonable time is not a term of art. In its literal sense, a reasonable time depends on the facts of the case. It is a question of fact the court has to determine. In making that determination, the court takes into account, the nature of the contract and on all the circumstances of the case; it looks at the contracting parties' intent, and the circumstances underpinning the contract formation, to be able to determine what the parties meant by reasonable time. Put differently, the court has to analyze the factual circumstances that has to be exercised with reference to the facts that existed at the time of the contract. The US Texas Court of Appeals in ***DaimlerChrysler Motors Co., LLC v. Manuel*, [2012]** summarized the fact-intensive nature of what is a reasonable time by stating that, "[w]hat is a reasonable time depends upon the facts and circumstances as they existed at the time the contract was formed."

We need to state that what is "a reasonable time" normally arises in contract law. In practice, most contract documents stipulate a time frame within which the contract has to be performed. Where the contract is oral and there is a dispute as to when the contract was to be performed or where the documented contract does not contain a completion clause, the issue arises as to what is a reasonable time within which a contracting party is to perform his part of the contract.

Ordinarily, time is always of essence of any valid contract in the circumstances where: (a) time was stipulated as an essential element as distinctly spelt out in the agreement; or (b) the circumstances clearly indicated that time was of material consequence, or (c) where the nature of the land, notably a grocery shop, made time an inseparable element. Wherever these 3 categories did not apply, equity would treat the circumstances as generating a time necessary where it did not occasion substantial injustice thereby, or

would allow for reasonable notice to extend the time requirement. See: ***Atta & anr v Aduy [1987-88] 1 GLR 233 SC***.

As a general rule, where a contract did not expressly stipulate that time was of the essence, equity would imply time to be of essence where: (a) the nature of the contract warranted it; (b) the contract was made conditional upon some act being done either by a fixed date or within a reasonable time; and (c) after one party had delayed unreasonably. See: ***Agyei-Acheampong v Donkor [1980] GLR 108*.**

At the risk of sounding repetitive, in the instant case the letter of offer to the appellant gave the dateline for payment of the management fees and ground rent as 06/07/2004. Amazingly, although the appellant paid about 24% of the total fees/amount a week after the stipulated dateline, the 1st respondent accepted the late payment. Yet, the appellant never made any attempt to pay the rest until about 5 years when the 1st respondent considering the default of the appellant to make good the payment decided to withdraw the offer and to re-allocate the plot to other applicants on the waiting list.

We do acknowledge that after the payment of the C80,000,000.00 there was no evidence on record to show when the appellant was to make the next payment or to pay off the outstanding balance. Yet, we think that there was an inordinate delay by the appellant to pay off the outstanding balance. It is common ground that land as stated in Exhibit A, is situate and lying at Tema Heavy Industrial Area. We take judicial notice of the fact that a land lying in such a heavy industrial area is highly competitive. It is not, with respect, an ordinary piece of land. Any serious applicant or an investor cannot pay a paltry sum which is about 24% of the total offer sum and go to sleep only to wake from his slumber 5 years later and to expect that the land will be lying fallow waiting for him. That was clearly unacceptable.

We think that given the nature of the land, where it is situate and the use for which the appellant applied, equity would treat the circumstances as time was of essence in this case. We do, therefore, agree with the lower court's finding that the appellant was in breach of the implied condition to pay within a reasonable time even if the 1st respondent impliedly waived the period as stated in **Exhibit A** for payment by accepting the late payment. Per **Exhibit A**, giving notice was not a condition for withdrawing the proposal and the 1st respondent was vested with the power to terminate the offer to the appellant. See: ***Social Security Bank v CBAM Services Inc. [2007-2008] SCGLR 894 @ 905***.

It has been submitted that once the appellant made a part-payment of the offer money the only course open to the 1st respondent was to sue for recovery of the balance of the outstanding money and not unilaterally withdraw the offer and re-allocate the disputed land to the 2nd and 3rd respondents, on the principle of *nemo dat quod non habet*. Much as we agree with the legal reasoning we think, nevertheless, that the case, ***Muriel Abrefi Oduro v Isaac Kwame Acheampong [supra]*** is distinguishable from our present case. In our case, the contract was of a commercial nature and therefore, time was of essence. The offer was conditional in that, payment for management fees and the ground rent was to be made within a reasonable time. The land in question is not an ordinary land but was of commercial nature, situate and lying at a heavy industrial area. So, the case stated supra, is inapplicable to our present case.

Quite interestingly, learned Counsel for the appellant in his reply filed with this on 05/08/2021 in response to the submissions by learned Counsel for the 1st respondent has also argued that although the appellant did not endorse its writ of summons with the relief of specific performance, it is nevertheless entitled to an order of specific performance given the facts and the evidence led on record. Whilst acknowledging that it was legally sublime in the past that a party cannot on appeal advocate for an order of specific performance when he did not specifically pray for it on his originating processes,

Counsel regardless argues that such was not a sacrosanct rule of procedure, such that its non-compliance should disable the court from decreeing specific performance. In his view, the court has the power or jurisdiction to decree specific performance in the instant case based on the evidence led on record. In support of the legal proposition, Counsel referred us to the dictum of Appau JSC in ***Ebenezer Kwaku & 2 ors v Mankralo Tetteh Otibu IV [unreported], Civ. App. No. J4/53/2021, 7th July 2021.***

Our simple reaction to the above arguments canvassed supra is that specific performance is an equitable remedy. Being an equitable remedy, it is at the discretion of the court and the court will only grant it under these circumstances: (a) where the party claiming for an order specific performance has performed his part of the contract; or (b) where damages may not be adequate; in other words, where no other remedy puts the plaintiff in the same position as though the contract was performed. The opposite is equally true and it will not be granted if damages will be adequate; where there is want of mutuality; where performance requires the court's supervision; if it will be pointless to grant it when the contract cannot be enforced in its entirety; if the order will cause severe hardship to the defendant. In other words, the court will only exercise its discretion to grant specific performance only if it was appropriate to do so in the circumstance. See: ***Gorman & Gorman v Ansong [2012] 1 SCGLR 174*.**

In our instant case, the appellant defaulted for 5 years to pay the offer money and was therefore in breach of the condition of the offer. Specific performance cannot avail a party that is in breach of a contract he claims to take advantage of. The remedy of award of damages will be sufficient rather than specific performance if the appellant proved damages.

In consequence, this appeal fails and it is hereby dismissed in its entirety.

Each respondents' costs assessed at Gh¢10,000.

SGD

P. BRIGHT MENSAH

(JUSTICE OF THE APPEAL)

SGD

I agree **MARGARET WELBOURNE**

(JUSTICE OF THE APPEAL)

SGD

I also agree **RICHARD ADJEI FRIMPONG**

(JUSTICE OF THE APPEAL)

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