

"THE EQUITABLE REMEDY OF SPECIFIC PERFORMANCE OF CONTRACTS
OF SALE OF LAND IN KENYA"

A Dissertation submitted in partial fulfilment of the
Requirements for the L.L.B. Degree, University of Nairobi.

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by

Kagundu, P.M. Esq.

Nairobi

April, 1976

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ACKNOWLEDGEMENT

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I wish it were possible to express my gratitude more fully than through a formal acknowledgement, to my supervisor Mr. Peter Morton, a lecturer in the Faculty of Law, University of Nairobi. He read the manuscript and made several useful comments and suggestions which has made this paper to be produced in its present form.

I am especially grateful to Maria Nyawade for reducing my sometimes indecipherable hand to readable type, and more so to my brother, Dr. W. Waciira for all the burden he undertook in paying for the typing of this paper.

o As it is customary one should thank those who have been responsible for his education. I am very grateful to my mother, Mary Nyandia, for all the burden she has undertaken in paying for my education and for support, encouragement and understanding. She provided a cool atmosphere necessary for me in undertaking my University studies. Without her collaboration, this paper simply could not have been written.

All the mistakes and faults in this paper are mine.

Kagonda, P.M. Esq.

Nairobi

April, 1976

CONTENTS

	<u>Page</u>
Acknowledgement	i
Table of Statutes	
Table of Cases	
Preface	
<u>Part I</u>	
<u>Contracts for Sale of Land</u>	
1. General nature and justic basis	1
2. Specific performance and contracts of sale of land	1
3. Jurisdiction to grant specific performance	3
(a) High Court	3
(b) Subordinate Courts	5
(i) Resident Magistrates Courts	5
(ii) District Magistrates Courts	6
4. Enforcement of the Order for Specific performance	7
5. Contracts in which the Government is a party	99
(a) Government Proceedings Act	9
(i) Where sued	9
(ii) Where suing	11
(b) Land Control Act, 1967	12

	<u>Page</u>
<u>Part II</u>	
<u>Common Law Requirements and their effect</u>	
<u>on Specific performance of contracts of</u>	
<u>Sale of Land</u>	16
- Equity follows the law	16
1. Uncertainty	16
(a) Uncertainty of obligations	17
(b) Uncertainty as to the land	18
(c) Uncertainty as to Parties	20
2. Illegality and Severability	21
(a) Illegality	21
(b) Severability	23
3. Consideration	26
<u>PART III</u>	
<u>Effect of Common Law Requirement Continued</u>	34
4. Want of Good title	34
5. Misrepresentation and Mistake	36
(a) Misrepresentation as a bar	36
(b) Mistake	37
6. Effect of Anticipatory breach on specific performance	38
<u>PART IV</u>	
<u>The Effect of Non-Compliance with Statutory</u>	
<u>Requirements on Specific Performance of</u>	
<u>Contracts of Sale of Land</u>	44
Introduction	44

	<u>Page</u>
1. Registration	44
(a) Position under R.L.A.	46
(b) Position under I.T.P.A.	46
(c) Position under G.L.A.	47
(d) Position under R.T.A.	48
2. Writing and Part Performance	50
(a) Writing	50
(i) Position before 1968	51
(ii) Position since 1968	51
(b) Part Performance	54
3. Consent	55
Summary	65
Conclusion and Comment	65
Select Bibliography	68

Table of Statutes

	<u>Pages</u>
Agriculture Act (Cap. 318)	63
Chattels Transfer Act (Cap. 28)	50
Contract Decree (Zanzibar)	31
Government Lands Act (G.L.A.) (Cap. 280)	47, 61
Government Proceedings Act (G.P.A.) (Cap. 40)	9, 10, 13
Indian Contract Act, 1872	43
Indian Limitation Act 1877	10
Indian Transfer of Property Act, 1882 (I.T.P.A.)	46, 61
Judicature Act, 1967 (Cap. 8)	14
Land Acquisition Act 1968 (Cap. 295)	12
Land Alienation Decree (Zanzibar)	57
Land Control Act, 1967 (L.C.A.) (Cap. 302)	12, 56
Law of Contract Act, 1961 (Cap. 23)	14, 51
Law of Contract (Amendment) Act, 1968	51, 53, 54, 57, 62.
Magistrates Courts Act, 1967 (Cap. 10)	5, 6, 14
Registered Land Act, 1963 (Cap. 300)	45, 46, 51, 52, 61.
Registration of Titles Act (R.T.A.) (Cap. 281)	48, 49, 61.
Registration of Titles Ordinance (Uganda)	49
Sale of Goods Act, 1931 (Cap. 31)	30
Statute of Frauds 1677	51, 52, 54

Table of CasesA

Abdulahi Jiwaji v. Ramji Jethabhai (1951) EACA 17	30
Administration General v. Busaida (1958) EA 513	58
Al-Jah Noman Qadasi v. QAdasi (1963) EA 142	27
Attwood v. Lamount (1920) 3 K.B. 571	32

B

Barclay v. Russell	4
Bennett v. Bennett (1952) 1 KB 249	32
Bray v. Briggs (1872) 26 L.T. 817	
Bromley v. Jefferies (1700) 2 Vern 415	30

C

Chum bin Ali v. Ame bin Haji 8 Z.L.R. 44	19
Clarke v. Sondhi (1963) E.A. 107	49
Cooth v. Jackson (1801) 6 Ves. 12, 37	63
Cowper v. Cowper (Earl) (1734) 2 P.Wms 720,753	29

D

De la Bere v. Pearson Ltd. (1908) 1 KB 280	32
Devry v. Peek (1889) 14 App. Cas. 337	42

E

El Khidir Hag Omer v. Alla Maana Farah Massoud (1968) S.L.J.R. 152	60
Executrix of L. Gerber v. Jan Mohamed 6 K.L.R. 77	35

	<u>Page</u>
<u>F</u>	
Figueredo & Co. Ltd. v. Moorings Hotel (1960) EA 926	48
Ford v. Stuart (1852) 15 Beav. 493	32
<u>G</u>	
Gallie v. Lee (1969) 2 Ch. 17	42
Gathuthi Hotel v. Fazal Kahi (1957) EA 17	17
Goodinson v. Goodinson (1954) 2 QB 118	32
Grindel v. Bass (1920) 2 Ch. 493	63
Gunter v. Halsey (1739) Amb. 586	62
<u>H</u>	
Hamadi bin Athmani v. Bwana Haji 72 L.L.R. 109	57
Hardy v. Elphick (1973) The Times March 27	63
Hasham v. Zenab (1960) A.C. 316	38
<u>J</u>	
Jacques v. Lloyd D. George (1968) 2 All E.R. 187	30
James v. Smith (1891) 1 Ch. 384	62
JanMohamed Umerdin v. Hussein (1953) E.A.R.L. 41	9
Janson v. Driefontein Mines Ltd. (1902) A.C. 484	31
Jeffreys v. Jeffreys (1841) Cr. Ph. 138	33
<u>K</u>	
Kanji & Others v. Christie (1970) T. Digest	64
<u>L</u>	
Leroux v. Brown (1852) 12 C.B. 801 at p. 824	67
<u>M</u>	
Marks v. Lilley 1959 1 W.L.R. 749, 52	43

	<u>Page</u>
Mobi Goko v. Chege Kibaki (1967) E.A. 166	64
Moxey v. Bigwood (1862) 4 De G.F. & J. 351	42
<u>N</u>	
National & Grindlay Bank Ltd. v. Dharamshi (1966) EA 186	50
Noble v. A.G. for E. Africa Protectorate 5 K.L.R.	10
Nordenfelt v. Maxim Nordenfelt Guns and Ammunitions Co. Ltd. (1894) A.C. 535	29
<u>O</u>	
Odessa Tramways Co. v. Mendel (1878) 8 Ch. D. 235	32
<u>P</u>	
Paget v. Gee (1753) Amb. 807, 810	29
Pegler v. White (1864) 33 Beav. 403	41
Penn v. Lord Battimore (1750) 1 Ves. Sen. 444	4
Pickering v. Ilfracombe Rly Co. (1868) L.R. 3 C.P. 235	32
<u>R</u>	
Rann v. Hughes (1778) 7 Term. Rep. 350 n.	32
Rasool v. Parkar (1954) E.A. 34	35
Rashid bin Salim Mohamed v. Mohamed bin Said bin Albeid (1949) E16 EACA	55
Re Anstis, Chetwynd v. Morgan (1886) 31 Ch.D. 596	43
Red Grave v. Hurd (1881) 20 Ch.D.1	42
Richard Wainaina Njoroge v. Daniel Jomo - unreported	31
Robert v. Bump (1943) 2 D.L.R. 613	42
Roy v. Kleepler Wholesale Hardware Co. (1951) 3 D.L.R. 122	42

	<u>Page</u>
<u>S</u>	
Sabila Fadl v. Ahmed Abdalla (1956) S.L.J.R. 62, 63	64
Scamell & Nephew v. Ouston (1941) A.C. 251	30
Shariff bin Ali Mohamed v. Abdulmajid bin Mwijab 12 K.L.R.	7
Sinclair v. Brougham (1914) A.C. 398, 414, 415	29
Smith v. Hughes (1871) L.R. 6 Q.B. 597	42
Spurrier v. Fitzgerald (1801) 6 Ves. 548	62
St. John Shipping Corp. v. Joseph Rank (1957) 1 Q.B. 267	31
 <u>T</u>	
Tampin v. James (1880) 15 Ch. D. 215 (C.A.)	42
The Nile Import & Trading Co. v. Abdel Hadi & Shell Co. (Sudan) Ltd. (1968) S.L.J.R. 23	41
T.H. Patel v. R. Lawrenson & Matren (1957) E.A. 249	64
 <u>V</u>	
Veinbergen v. St. Edmonds Properties Ltd. (1953) 2 K.kB. 223	33
 <u>W.</u>	
Walsh v. Lousdale (1882) 21 Ch. D.9	50
Wilkinson v. Clements (1872) 8 Ch. App. 96	32
 <u>Z.</u>	
Zuhura binti Ali v. The Administrator General (Zanzibar) 32L.R.5	22

PREFACE

This paper is about the equitable remedy of specific performance of contracts of Sale of Land in Kenya. It focuses attention on those factors which affect the granting or refusing of the remedy of specific performance in contracts of Sale of Land. As such it is assumed that the reader is familiar with the general principles of the remedy of specific performance in general since most attention in this paper is restricted to contracts of sale of land. Certain aspects of the remedy of specific performance are omitted.

What are the formalities or requirements that must be satisfied by parties to a Contract for Sale of Land and what would be the effect of not meeting those requirements on the Contract both at law and in equity? To what extent do the courts in Kenya adhere to fulfilment or satisfaction of those requirements before they can enforce the contracts?

Broadly speaking the discussion is divided up into four parts all of which develop the discussion set out above, namely an examination of the factors which affect the granting or refusing of specific performance of contracts of Sale of Land, and the effect of such factors on the validity and hence the enforcement of such contracts. Part I attempts an examination of the General nature of Contracts of Sale of Land, their distinction from the other contracts of sale and why the

remedy of specific performance is almost invariably granted for such contracts. The part also deals with such matters as Jurisdiction to grant the remedy and the means of enforcing the order.

Parts II, III and IV collate some of the most important factors that affect specific performance. In each of these parts there is an examination of the legal issues which the Courts have dealt with when faced with the task of deciding on the enforceability of a contract entered into under certain conditions.

Kagundu, P.M.

Nairobi

April, 1976

PART ONE

CONTRACTS FOR SALE OF LAND

1. General Nature and Juristic Basis

A contract for the sale of land is like any other contract for sale and it is thus governed by the same rules which apply to any other contract.¹ A contract for the sale of land sounds self-explanatory and one finds no other meaningful definition than that it is a contract whereby the parties to it, namely, vendor and purchaser, agree to sell and purchase land, respectively. For the purposes of this paper such a sale of land will be taken to include an agreement to lease land or any other interests therein.

A contract for the sale of land however differs from the other contracts of sale in that there are statutory requirements that the parties to such a contract are required to satisfy before the contract can be regarded by the courts as valid and enforceable. These requirements or formalities plus many other conditions are examined in detail in the next parts of this paper.

2. Specific Performance and Contracts of Sale of Land.

A contract for the sale of land or grant of a lease is the main illustration of a contract in respect of which the equitable remedy of specific performance is almost

invariably decreed. In fact contracts for the sale of land are regarded as a class of contracts upon which the courts will decree specific performance if the necessary conditions are satisfied. This special feature of contracts of sale of land is due to a number of factors.

One of these factors is that performance will only be granted when the common law remedy of damages is inadequate to compensate a party who might really be in need of a certain piece of land. How and why is this remedy inadequate in contracts of sale of land and yet it is the chief remedy sought in actions for breach of the other contracts of sale?

in England

From an early date equity took the view that since the amount of land available was limited, and since estates of equal value might differ very considerably in their worth to the purchaser or lessee, contracts for the disposition of such interests in land were suitable for the remedy of specific performance.^{1a} Ordinarily damages are not to be regarded as an adequate substitute for the right either to acquire or dispose of an interest in land. Therefore the only way to do justice in remedying any breach of such a contract by the vendor or the purchaser is to secure performance of the contract in speci^e.

Specific date

... in England ...

3. Jurisdiction to grant specific Performance of Contracts of Sale of Land

Jurisdiction means the power of a court to deal with certain matters. This power varies from court to court depending on the hierachical placing of that court in a particular country's hierachy of courts.²

In Kenya a decree of specific performance on a contract for sale of land or any other contract of sale is granted by both the High Court and the subordinate courts.

(a) The High Court

The High Court in Kenya has unlimited jurisdiction in civil³ and criminal matters and as such the power to grant a decree for specific performance is part of its jurisdiction. It can therefore deal with disputes incontracts for sale of land of any value and its jurisdiction unlike that of the subordinate courts is not subject to any limitation.⁴

As regards its territorial jurisdiction, the High Court has jurisdiction throughout Kenya,⁵ but some doubt is expressed on the proposition that this jurisdiction can extend to lands outside Kenya. There is no reported Kenyan authority

in point but the English decision on this proposition would be of persuasive authority, if not of binding authority in Kenya if such a case occurred.⁶

In Penn v. Lord Baltimore⁷ the court in England decreed specific performance of an English agreement relating to the boundaries between Pennsylvania and Maryland. The lands were outside the territorial jurisdiction of the English court but the parties to the agreement were English subjects within the jurisdiction of the English court in England. The court in this case might be said to have been guided by the fact that land was of peculiar value to the purchaser and that specific performance was the only way of doing justice. Since the parties were within the jurisdiction of the English Court of England, the court decreed the relief of specific performance of the agreement on the basis of the equitable maxim that "Equity acts in personam."

Would the Kenya High Court grant such a decree of specific performance of a contract of sale of land in Uganda? On the one hand one may argue that on the authority of Penn v. Lord Baltimore such a decree would be granted. On the other hand one may argue that the order would not be granted due to some practical problems involved in the enforcement of such a decree.

Where such jurisdiction extends even to lands outside the High Court's jurisdiction, there is however the problem of inability of the court to enforce the remedy in *rem* because the lands are outside its territorial limits and as a matter of practical experience such decrees would be unenforceable. This could be founded on the equitable maxim that "equity does not act in vain".

(b) Subordinate⁸ Courts

The jurisdiction of the subordinate courts in Kenya in granting or refusing specific performance on contracts of sale of land is limited to the lands which fall within the *pecuniary* and territorial limits of that particular subordinate court's jurisdiction. This is laid down in the Magistrate's Court's Act.⁹

(i) Resident Magistrates Courts

As regards the pecuniary jurisdiction, a subordinate court of the Resident Magistrate has jurisdiction to hear and determine any action for specific performance of a contract for sale where neither the value of the land in question nor the rent (in case of a lease) payable in respect of it exceeds the sum of Shs. 3,000 or Shs. 6,000 where the

court is held by a senior resident magistrate.¹⁰ This pecuniary limit could be increased by the chief justice¹¹ to such sum not exceeding Shs. 10,000 as he may think fit.

The territorial jurisdiction of a Resident Magistrates Court in actions for specific performance is not limited to the Province in which the court is situated. Section 3(2) Magistrates Courts Act provides that "Resident Magistrates Courts shall have jurisdiction throughout Kenya". This means that a Resident Magistrates Court can hear and determine disputes arising out of contracts for sale of land from any part of Kenya provided that either of the parties is resident in the Province in which the court is situated, or carries on business there or if the land in dispute is situated in that province.

(ii) District Magistrates Courts

Section 10(1)(b) M.C.A. provides that a district magistrates court¹² shall have power and exercise jurisdiction and powers in proceedings of a civil nature (e.g. actions for specific performance) where the value of the subject matter in dispute does not exceed Shs. 1,000, or Shs. 2,000 where the court is constituted by a District Magistrate having power to hold a District Magistrate Court of 1st Class.

As regards its territorial jurisdiction Section 8(3) states that a District Magistrates Court shall have and exercise jurisdiction throughout the District in respect of which it is established. As such one can clearly see that no specific performance would be granted on lands outside the district in respect of which the court is established. The proviso to Section 8(3) however goes further in stating that the Chief Justice may extend the area of jurisdiction.

A classic illustration of the jurisdiction of subordinate courts in granting specific performance on contracts of sale of land is the case of Shariff Ali Bin Mohamed v. Abdulmajid bin Mwijab.¹³ In that case the court held that a subordinate court has jurisdiction in regard to suits relating to land and that it has power to make an order for specific performance in regard to property coming within the pecuniary limits of its jurisdiction.

The subordinate courts therefore deal with such matters relating to contracts for sale of land everyday and make decrees of specific performance in suitable cases.

4. Enforcement of the Order for Specific Performance

Failure to comply with an order for specific

performance is punishable by the court in the same way as failure to comply with an injunction. Such disobedience is regarded as wilful unless it is shown that it was merely casual, or accidental and unintentional. It is not sufficient by way of answer to an allegation that a court order has not been complied with, for the person concerned to say that he did his best.

The quality of non-compliance, which varies over enormous range, is however of the utmost importance to the court in deciding what penalty should be imposed. The penalty imposed in fact reflects faithfully the court's view of the conduct of the person to whom the order was addressed.

The primary remedies for non-compliance with an order for specific performance include the imposition of a fine, imprisonment or detention, and sequestration of property. Together with the imposition of a fine, the offending party may be ordered to pay costs and if it is thought fit, damages. These remedies are only given when the other party seeking enforcement has abandoned his right to rescind the contract and insisted on performance.

If it is the purchaser who has refused to comply with an order for specific performance, the vendor is entitled

to an order for rescission of the contract and forfeiture of the deposit¹⁴ paid on the contract by the purchaser.

5. Contracts in which the Government is a party

(a) Government Proceedings Act¹⁵

(i) Where being sued

The remedy of specific performance cannot be decreed against the government. The provisions of the Government Proceedings Act expressly provides a limitation to the courts' powers in granting specific performance. Section 16(1) states that:

"On any proceedings by or against the Government, the court shall...have power to make all such orders ...provided that where in any proceedings against the Government...the court shall not make an order for specific performance or for recovery of land or other property or for delivery of land or other property..."

This is undoubtedly a clear indication that the court has

no power to make an order for specific performance against the Government where the latter is a party to a contract. The Kenyan case of Hoble v. Attorney General for East Africa Protectorate¹⁶ illustrates the effect of that section.

In that case an action for specific performance was brought against the Government of Kenya. The plaintiff had entered into an agreement for the grant of a lease in 1904 with the then Governor of Kenya. He therefore wanted the specific performance of the lease. The defendant pleaded that the action was statute barred and that therefore no action could be maintained against the Government. He quoted Article 113 of the Indian Limitation Act 1877 which applied in the Protectorate at the time and which was in substance identical to section 16(1) of the Government Proceedings Act (which was not enacted at that time).

The Learned Judge Barth, J. held that the action being one for specific performance was barred by Article 113 of the I.L.A. 1877 which limited the liability of the Government in actions for specific performance founded on contracts of sale. This would be the position today under the G.P.A.

(ii) Where Suing

Can a court decree specific performance at the instance of the Government? This question is satisfactorily answered by the provisions of section 16(1) G.P.A. which states that:

"In any proceedings by...the Government, the court shall have power to make all such orders..."

This is a clear indication that the court can make an order for specific performance at the instance of the Government against a party to the contract though that party have no similar right to sue for specific performance.

This can be seen as a clear deviation from the rule of mutuality which is that the remedy of specific performance must be mutual, that is to say that, either party to the contract is entitled to sue for specific performance of the contract. In other words no party to a contract can obtain a decree of specific performance if such a decree cannot be decreed against him. It is a technical doctrine, but like many other technical doctrines, founded on common sense. One may argue that the rule of mutuality, being a general one, has been removed by the statute and thus it doesn't

apply to contracts in which the Government is a party.

In practice, however, cases concerning the liability of the Government in contracts for sale of land are very rare if not unheard of because since the enactment of the Land Acquisition Act¹⁷ the Government exercises its powers by compulsorily acquiring the land which may be ~~re~~quired. That being the case there is no necessity for the Government to enter into contracts of sale or purchase of land except where the Government is the vendor or the lessor.

(b) Land Control Act 1967

Where the Government is a party in a contract of sale of land, certain formalities which are necessary for the validity of such a contract are excluded and a decree of specific performance can be granted at the instance of the Government notwithstanding that the requirements or formalities are not satisfied.

A good illustration of this is found in the Land Control Act¹⁸ where a contract for the sale of land is void for all purposes unless it has been approved or consented to by the Land Control Board. Section 6(3) (b) provides that:

"This section does not apply to a transaction to which the Government is a party."

This is in substance similar to s. 16(1) G.P.A., and therefore no suit for specific performance can be maintained against the Government if no consent has been given but such an action can be brought by the Government even if no consent has been given.

The effects of statutes on specific performance of contracts of sale of land are dealt with in the following parts of this paper.

FOOTNOTES TO PART I

- 1 See ^a any standard text book on the law of contract such as Cheshire and Fifoot Law of Contract 8th Ed.
- 1a See Clark "Some Problems in Specific Performance" (1917), 31 Havard Law Review 271; see also (1919) H.L.R. 64; (1901) I.C.L.R.
- 2 See the Magistrates Courts Act 1967. Sections
- 3 See Section Judicature Act 1967.
- 4 See 3 supra.
- 5 "Unlimited jurisdiction"
- 6 Section 2 Law of Contract Act 1961 (Cap. 23) provides that the common law of England relating to contract as modified by the doctrines of equity shall extend and apply in Kenya.
- 7 (1750) 1 Ves. Sen 444 followed in Barclay v. Russell
- 8 These include a District Magistrates Court of 1st Class, a Resident Magistrates Court and a ~~Senior~~ Resident magistrates court.
- 9 Number 17 of 1967 Kenya Act.
- 10 See section 5 Magistrates Courts Act, 1967.
- 11 See Proviso to Section 5 Magistrates Courts Act, 1967.
- 12 Either 3rd Class or 2nd Class.

- 13 12 K.L.R. before Thomas, J.
- 14 See Janmohamed Umerdin v. Hussein Amarshi and others
(1953) E.A.L.R. 41.
- 15 Cap. 40 1962 Laws of Kenya.
- 16 5 K.L.R. before Hamilton, C.J. (East Africa).
- 17 Cap. 295 Laws of Kenya, Kenya Acts No. 47 of 1968.
- 18 Cap. 302 1967, Kenya Acts No. 34 of 1967.

PART TWOEFFECT OF COMMON LAW REQUIREMENTS ON SPECIFIC PERFORMANCE OF
CONTRACTS OF SALE OF LANDEquity follow the Law

The granting or refusing of the equitable remedy of specific performance on contracts of sale of land is determined by the validity of the contract. At common law a contract becomes valid as a result of many factors which must exist or be satisfied. A contract valid at law is enforceable in equity since "equity follows the law".¹⁹ A contract not valid at law will therefore not be enforced in equity.²⁰

1. Uncertainty

In contracts for sale of land specific performance will not be granted unless there is in accordance with the law of contract a concluded contract which is complete and certain in its terms.²¹ Upon its proper construction a contract to sell or to lease land must contain such terms as will enable the court to determine what is the real intention of the parties. This can only be done with ease if the terms of the contract

are clear and certain. If this is not so there cannot be a valid contract at law and hence specific performance would be refused.

(a) Uncertainty of obligations

This occurs where the terms of the contract are so vague that the obligations of the parties are not properly ascertainable. As a rule the terms of the contract must be certain and unambiguous so that when a decree of specific performance is granted, the party against whom it is decreed will know exactly what he is expected to perform. In Gathuthi Hotel v. Fazal Halis²² where there was an action for specific performance of an agreement to grant a lease Briggs J.A. in dismissing the action said that looking at the words of the contract it could not be seen whether the respondent undertook to transfer the benefit of the tenancy as contended by the appellant. The agreement was so vague and uncertain in its terms as to be unenforceable.

What were the terms?

The price is a material term in every contract of sale and unless the price is ascertained by the contract or a machinery²³ is provided for its ascertainment, the contract is incomplete and cannot be enforced in specie.

The price for the land to be sold must be ascertained or ascertainable otherwise the contract would then not be one of sale. It is not necessary that the price should be paid at the time of the suit but that it should be certain as to what amount is payable as the price for the sale of the land. Thus where a vendor agrees to sell to a purchaser for a sum less by so much than any other purchaser will give, the price is neither ascertained nor ascertainable, and there is no contract capable of enforcement.²⁴

(b) Uncertainty of the Land

This arises where the land is not sufficiently identified. Such uncertainty may arise either where the land was not finally determined at the date of the contract but was left to be ascertained thereafter, or where the land, although determined at the date of the contract was not described sufficiently for identification.

(i) Misdescription

If the land agreed to be sold or leased is incorrectly described in the contract the vendor cannot easily fulfil his promise to transfer the land which he contracted to sell²⁵ or lease. This would be the case, for example, when

there is an inaccurate measurement or locality²⁶ of the land.

In Chum bin Ali Hassan v. Ame bin Haji Shabulla and Another²⁷ the appellant sued the respondents for specific performance of a contract to sell them his shamba which adjoined theirs. The shamba was described as containing 40 large coconut trees, 24 small coconut trees, 15 mango trees and one orange tree. Specific performance of the contract was refused on the ground of misdescription of the property²⁸ since it was found out that the land in fact contained 110 large coconut trees and that the numbers of the other trees differed also.

Since the purchaser being the party not in default cannot be subjected to a decree for specific performance, can he, if for some reason does not wish to complete, be allowed to rep^udiate on account of some trivial mistake in acreage, which in one way affects the value or utility of the property?²⁹

The courts adopt a flexible approach. If the circumstances are such that justice will be done by compelling completion, notwithstanding the error,³⁰ compensation is given to the purchaser by allowing him an abatement of the purchase price. If on the other hand the misdescription is so

serious such that the decree ^{of} specific performance would be in effect to force the purchaser to take something wholly *different* from what he intended, the only way to do justice would be to refuse to grant specific performance to the vendor or permit the purchaser to rescind or in effect to re write the contract.³¹

(c) Uncertainty as to parties

Uncertainty of this nature arises where the parties to the contract are not sufficiently identified such that a party is not sure or certain as to who he is contracting with. Such lack of identification is a bar to performance wherever the law acquires a written memorandum or contract³² unless the description or reference is such as to enable the parties to be identified.

The uncertainty in identification of the parties usually comes in agency where an agent contracts for a principal. In such situations a party dealing with the agent may not know the identity of the principal if no such disclosure is made by the agent.³³ The principal can then not sue for specific performance though the contract was made on his behalf.

In conclusion it¹⁵ submitted that indefiniteness or uncertainty in the terms of a contract is material in so far as it leads to the conclusion that there is no valid contract at law or in so far as it leads courts of equity in their discretion to refuse specific performance due to difficulties which may be caused in relation to its enforcement or due to the possibility of hardship to the defendant.

2. Illegality and Severability

(a) Illegality

In contracts for sale of land a contract is illegal where the subject matter of the agreement is illegal or where the consideration or any part of it is illegal. In such cases the court refuses to enforce the performance of the contract. A valid and enforceable contract must be legal and in line with the public policy. Any contract which is unenforceable or void at law though illegal is unenforceable in equity³⁴ also and hence no order for specific performance can be decreed.

An example of such a contract is a contract for sale of land for the running of brothels. This is illegal and contrary to public policy as its effect would be to corrupt public morals. As such it would not be enforced

either at law or inequity. It should, however, be noted that such a contract is unenforceable so long as the intent to break the law, by committing the illegal act, is mutual, otherwise the innocent party would maintain an action for misrepresentation or mistake.³⁵

A contract for the sale of land may also be unenforceable or void or voidable at law because a statute requires it to be so regarded.³⁶ A good example of this is where a statute requires certain conditions to be fulfilled before a valid contract is completed and then provides that failure to satisfy those conditions renders the contract void³⁷ or voidable or unenforceable.³⁸ A statute may also prohibit the performance of certain acts and provide that any contract entered^{re} into for performance of such an act will be void for all purposes.³⁹

Another aspect of illegality in contracts for sale of land is where a person agrees to sell land on the consideration of immoral cohabitation with the other party. Such a contract made for or in consideration of illicit cohabitation is illegal and unenforceable.⁴⁰ A good illustration of this is the case of Zuhura binti Ali v. The Administrator General⁴¹ where an Indian gave a shamba to an African woman together with documents of title and promised to give a registered conveyance of the property. He died before doing so and it

was clear that the only consideration for this promise was previous cohabitation between the two. In defence to an action for specific performance of the promise brought by the woman, the administrator general, administering the estate of the deceased argued that the consideration was immoral and that therefore the contract was illegal.⁴²

Tomlinson, C.J., made a clear distinction between future and past cohabitation and said that the latter was good consideration.⁴³ He therefore decreed specific performance of the contract. The promise was to be regarded as an undertaking to compensate the woman for past services voluntarily rendered to the promisor and it was thus not based on an immoral consideration and was enforceable.

The consequences of illegality on contracts of sale of land, like in any other contract, are generally to make the contract void and unenforceable and any money paid or any property transferred under the contract is not recoverable.⁴⁴

(b) Severability

Severability occurs where a contract contains distinct promises some of which are legal and others illegal. It therefore goes along with illegality,⁴⁵ that

is to say that, severability usually occurs where there is illegality in a contract.

The general rule as regards the severability of contracts in general is that a contract cannot be performed in part.⁴⁶ It must be wholly performed or not at all, and a part of a contract may be of such a nature as to vitiate the whole, so that no part performance of the contract would be possible.

In some cases the agreement may contain two inseparable parts. The first part may be typical of the kind of matter of which specific performance is decreed whereas the second part of the agreement may be clearly of the kind of which specific performance is not granted. In such cases since it is impossible to separate the enforceable part from the unenforceable, the remedy of specific performance would be refused.

There is however an exception or apparent exception to the above rule where the contract is divisible, that is to say, where on its true construction there is not one contract containing two or more parts, but two or more separate agreements. In such a case the remedy of specific performance will lie in appropriate circumstances for the

breach of one separate agreement.⁴⁷

This commonly happens where a contract contains several distinct promises, some of which are legal and others illegal. The court in such cases enforces the legal promises if it can sever them from those that are illegal.⁴⁸ An illustration of this can be seen in an earlier quoted example, namely if a party to a contract for the sale of land contracts and makes two distinct promises, one to purchase some land from the other party, and secondly to construct some brothels on the land, the court can sever the second promise and then enforce the first one whose validity does not depend on the validity of the second promise. In other words though both promises arise from the same subject matter (land), they are severable from each other and as such the legal one can be enforced by specific performance.

It is submitted that a contract cannot be severed if it contains promises to do acts which are criminal, or contra bonos mores, or simply of such an illegal nature that they render the whole contract invalid.⁴⁹ How can this submission be reconciled with what has been said in the illustration given above? One can on the one hand argue that since the second promise is not wholly dependent on the

first one and has a distinct^{or} separate consideration it is severable and hence enforceable.

In conclusion it should therefore be noted that a contract for sale of land is suitable for severance if the distinct or separate illegal clause or words can be removed from the contract so as to leave it substantially the same agreement,⁵⁰ but where two clauses are inseparably connected such that the illegal clauses have the effect of tainting the whole contract with illegality, then the remedy of specific performance would be refused.⁵¹

3. Consideration

Consideration in this context can be defined as the price for which the promise of a party to a contract for sale of land is bought. For example, the consideration of a vendor's promise to execute a conveyance of land is the money that the purchaser will give to the vendor, and vice versa. This consideration must be valuable.⁵²

In a contract for sale of land absence of valuable consideration can act as a bar to specific performance and such a contract cannot be enforced unless each person has promised or has actually given something which can be valued

in money, in return for the promise he asks the court to enforce.⁵³ Thus a person seeking to enforce a contract for sale of land must prove to the court that there is a contract to which he is a party and that he has himself given or that he is willing and able to give valuable consideration.

In Al-Jah Noman Mohamed Qadasi v. Ganem Ahmed Mugahid Qadasi⁵⁴ the appellant and the respondent had bought a bakery. There was an agreement that each of them should run the bakery for a turn of 6 months. The appellant filed a suit that the respondent had failed to hand the business to him after his turn had expired. He wanted specific performance but was met with the defence that he had not given any valuable consideration for the agreement and that therefore the latter was nudum pactum.⁵⁵ Sir Trevor Gould Ag. V.P. in reversing the judgement of the High Court said that the agreement contained reciprocal promises and these promises had value in the eyes of the law for each party had an interest with financial implications in having the business continuously operated in order that customers would be retained and the goodwill thereby maintained. There was accordingly consideration sufficient to support the agreement.

Valuable consideration is thus a necessity to the validity of a contract not under seal and it has been

correctly said that "a bargain without a consideration is a contradiction in terms and cannot exist."⁵⁶

Consideration must be lawful, that is to say that, illegal or immoral consideration will act as a bar to specific performance of a contract for which it is given. This issue was pursued by Tomlinson, C.J. in Zuhura binti Ali v. Administrator General⁵⁷ where the consideration given for a contract of sale of land was cohabitation.⁵⁸ A contract made with illegal or immoral consideration would amount merely to nudum poctum, ex quo non oritur actio.⁵⁹

FOOTNOTES TO PART II

19 Jurisdiction in equity is exercised upon this principle. It means that equity heats the common law as laying the foundation of all jurisprudence, and it does not depart from the legal principles unnecessarily; see Sinclair v. Brougham (1914) A.C. 398, per Lord Haldane L.C. at pp. 414, 415; 35 Digest 167, 8. On matters coming before it which depend solely on legal rights - as in legal claims arising out of a contract - equity applies the rules of law as the appropriate system; in such cases the rules of law are in fact binding in equity. And when equity has to regulate the equitable interests which it has itself created, it acts, so far as possible, on the analogy of the legal rules applicable to the corresponding legal interests, and only depart from this analogy in exceptional cases; see Cocoper v. Cowper (Earl) (1734), 2 p. Wms. 720 per JEKYLL, M.R., at pp. 753. Where a contract is void at law a court of equity will not attempt to enforce it by specific performance. In such cases it is the duty of equity to follow the law; see Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co., (1894) A.C. 535, 563.

N.B. This maxim is of course not universally true, or there would never have been occasion for the development of a separate code of equitable principles; see Paget

v. Gee (1753), Amb. 807, per Lord Hardwicke, at pp. 810; 20 Digest 237, 49, where he said that "when the court finds the rules of law right, it will follow them; but then it will likewise go beyond them."

- 20 See Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co., (1894) A.C. 535, 563.
- 21 Scammell & Nephew Ltd. v. Ouston (1941) A.C. 251; Jacques v. Lloyd D. George (1968) 2 All E.R. 187. (1957) E.A. 17.
- 23 See Section 10(1) Sale of Goods Act 1931 (Cap. 31).
- 24 Bromley v. Jefferies (1700) 2 Vern 415: 40 Digest 492, 401.
- 25 See Abdulahi Jiwaji v. Ranji Jethabhai (1951) E.A.C.A. 17 see also Chum bin Hassan v. Ame bin Haji Shabuka & Another 8 Z.L.R. 44.
- 26 See Abdulahi's case (supra) where the plaintiff knew quite well the locality where the respondent was seeking a plot and knew equally well that his plot was not within that locality.
- 27 See 19 supra.
- 28 Sir John Gray, C.J. said that the misrepresentation was a term of the contract and that therefore the contract could be avoided.

- 29 See Abdulahi Jiwaji v. Ranji Jethabhai (1951) E.A.C.A. 17
- 30 Slight differences in the description of the land will not bar specific performance unless they can fairly be said to make the land different in substance from that contracted to be sold.
- 31 See the doctrine of rectification in any standard textbook on law of contract, e.g. Cheshire and Fifoot 8th Ed. page
- 32 See section 2(3) Law of Contract (Amendment) Act 1968.
- 33 See AGENCY in Halsburys Laws of England 4th Ed. pp. 701.
- 34 Equity follows the law
- 35 See Part III intra page
- 36 See St. John Shipping Corporation v. Joseph Rank (1951) 1 Q.B. 267.
- 37 See Section 6(1) Land Control Act, 1967 (Cap. 302).
- 38 See 26 supra. see also sections 38(1) R.L.A.; 107 I.T.P.A.; 100 G.L.A. and sections 32 and 40 R.T.A.
- 39 See the most recent case of Richard Wainaina Njoroge v. Daniel Jomo Munyua No. 187 of 1974.
- 40 For being contrary to Public policy. see Janson v. Driefontein Mines Ltd. (1902) A.C. 484.
- 41 3 Z.L.R. 5
- 42 The final judge did not distinguish between past and future cohabitation and as such he held that the consideration was illegal.
- 43 Section 25(2) contract Decree of Zanzibar provided that such past cohabitation was good consideration if it

was not criminal.

- 44 See the General Contract law in any standard contract textbook; sec. 25 supra.
- 45 See Pickering v. Ilfracombe Rail Co. (1868) L.R. 3C.P. 235; Attwood v. Lamount (1920) 3 K.B. 571; Marsh (1953) 69 L.Q.R. 111, and (1948) 64 L.Q.R. 230, 347.
- 46 This general rule was laid down by Romilly M.L. in Ford v. Stuart (1852) 15 Beav. 493 at p. 501. "No matter is more fully settled in this court than that a contract cannot be specifically performed in part; it must be wholly performed, or not at all, and a part of a contract may be of such a nature as to vitiate the whole."
- 47 Wilkinson v. Cleimants (1872) 8 Ch. App. 96; Odessa Tramways Co. v. Mendel (1878) 8 Ch. D 235.
- 48 See 40 supra.
- 49 Bennett v. Bennett (1952) 1 K.B. 249; Goodinson v. Goodinson (1954) 2 Q.B. 118.
- 50 See 43 supra.
- 51 See 43 supra.
- 52 Rann v. Hughes (1778) 7 Term. Rep. 350n; De la Bere Pearson, Ltd. (1908) 1 K.B. 280.

- 53 Jeffreys v. Jeffreys (1841) Cr. & Ph. 138. Equity will not specifically enforce an agreement which is merely voluntary, even if it is contained in a deed.
- 54 (1963) E.A. 142.
- 55 a bare promise, nude promise, i.e. without consideration.
- 56 See Veinbergen v. St. Edmunds Proprties Ltd. (1933) 2 K.B. 223.
- 57 See 35 supra.
- 58 See page
- 59 An action does not arise from a bare promise, or naked promise or nude promise. There must be consideration if the agreement is not under seal. See Vanbergen v. St. Edmund's Properties Ltd. (1933) 2 K.B. 223.

PART THREECOMMON LAW REQUIREMENTS CONTINUED4. Want of Good Title

For there to be an enforceable contract of sale of land the vendor must have a good title,⁶⁰ i.e. a title which will enable him to sell the land without the necessity of making special conditions of sale restrictive of the purchaser's rights.

A vendor cannot succeed in an action for specific performance if he fails to show a clear title. This is a logical consequence of a system of private conveyancing, and it ties in with the principle that the court will not enforce upon the purchaser a doubtful title which involves litigation.⁶¹

A vendor is said to be lacking a good title to the land in three ways. Firstly where the vendor through some material error in description,⁶² fails in effect to convey to the purchaser the property he intended to buy. Secondly where the vendor's land which he has contracted to sell is burdened with restrictive covenants, a fact which may not be implied or expressed in the contract. In such a case

the court cannot enforce the contract in specie.

In Executive of L. Gerber v. Jan Mohamed Hansraj⁶³

there was an agreement for a lease. The sublessor failed to notify the sub lessee of the unusual or onerous covenant in the head lease. Specific performance was ~~refused~~ refused on the ground that the sub lessor had no title to the sort of lease he had agreed to grant. The vendor's title was of such a nature as would cause great hardship to the purchaser as to ~~vendor~~ specific performance unjust and highly unreasonable.

Thirdly, a vendor will not be granted specific performance unless he is in a position or can be in a position to give a title in accordance with the contract at the date fixed for completion.⁶⁴ This usually occurs when the vendor while in the process of purchasing land from another person contracts to sell the same land to a purchaser even before he has obtained its title. Here specific performance will be decreed only if the defect in the title has been removed before the purchaser has finally repudiated the contract, that is, before the date of completion of the contract.⁶⁵

In Rasool v. Parkar⁶⁶ the appellant who had hoped that he would get a title to some premises, contracted

not was the covenant?

to sell the premises to the respondent before he had a clear good title. On the respondent's default to complete the purchase, the appellant brought an action for specific performance of the contract. It was held that the action was not maintainable since the appellant had no title. The court further noted that the contract from which the appellant hoped to get a title had been rescinded and as such he even was not in a position or could not be in a position to give a title to the premises.

5. Misrepresentation and Mistake

(a) Misrepresentation as a bar

In actions for specific performance the broad rule is that misrepresentation whether wilful (^{fraudulent} ~~handullant~~) or innocent, is a bar to the enforcement by the party responsible for the misrepresentation, of the contract induced thereby.⁶⁷ If however, the defendant consents specific performance with compensation in respect of the matter which is the subject of the misrepresentation is decreed.

The misrepresentation must be an inducing cause of the contract.⁶⁸ "A misrepresentation goes for nothing

unless it is a proximate and immediate cause of the transaction. It is not enough that it may have remotely or indirectly contributed to the transaction - or may have supplied a motive to the other party to enter into it. The representation must be the very ground on which the transaction has taken place."⁶⁹

It is not material that the maker of the misrepresentation believed it to be true⁷⁰, since it would be inequitable to allow a party to enforce performance of a contract obtained by a representation for which he is responsible and which he now admits to be incorrect.

(b) Mistake

Where a person has entered a contract under a misapprehension the mistaken party may, in proper circumstances, obtain relief from his contractual obligations.⁷¹ One of the reliefs afforded by equity is refusal of specific performance.

Specific performance is a discretionary remedy and is not awarded as of right. The court will not usually award specific performance where the defendant entered the

contract under some material misapprehension and it would be unduly harsh to force the defendant to comply specifically with the terms of the contract, or the mistake was caused by the misrepresentation of the Plaintiff,⁷² or the Plaintiff knew of the defendant's mistake.⁷³ If none of these three conditions is satisfied, mistake is no defence to an action for specific performance.

Where the court has ordered rectification of the contract on the ground of mistake, it can order specific performance of the contract as rectified.⁷⁴

Where specific performance is refused, the defendant may remain liable in damages for breach of contract.⁷⁵ But where rescission is granted together with refusal of specific performance there is no liability for the breach.

6. Effect of Anticipatory Breach on Specific Performance.

Can an anticipatory breach of a contract for sale of land be treated as a breach of contract entitling one to sue at once for specific performance or can a party to a contract maintain an action for specific performance if the other party has renounced the contract before the time of performance has come? This was the issue in Hasham v. Zenab.⁷⁶

In that case the appellant had agreed to sell certain premises to the respondent. The contract provided for a date of completion six months after the date of contract. As a result of the repudiation of the contract by the appellant proceedings for specific performance were instituted before six months had expired. The appellant contended that no cause of action had arisen at the time when the proceedings were instituted. In considering the authorities governing the doctrine of anticipatory breach of contract,⁷⁷ the court came to the conclusion that although the repudiation of a contract by one party before the time of performance has arrived is, perhaps, not an actual breach of the contract, it may be treated by the other party, if he thinks fit, as an immediate breach of the contract giving him the right to bring an action for specific performance or for damages. Since the injured party had not accepted the repudiation the contract subsisted for all purposes, and the repudiation was a breach for which an action for specific performance was maintainable. Specific performance of the contract was decreed.

In the English case of Hochster v. De la Tour⁷⁸ where the doctrine was first considered, it was said that an action will lie for such a breach before the time for the

fulfilment of the agreement. Renunciation by one of the parties before the time of performance has come does not of itself put an end to the contract, but it discharges the other if he so chooses, and entitles him at once to sue for the breach. That other party must be willing to show an existing contract, that is to say that, he was willing and anxious to fulfil his obligations and that the other party is in default.

It is submitted that in such cases of anticipatory breach specific performance is granted on the strength of the equitable maxim that "equity looks on that as done which ought to be done".⁷⁹ From the time of entering into the contract the purchaser has an equitable interest in the land which prevails over the vendor's legal rights. As such in equity from the time of entering into the contract for sale the purchaser is regarded in the eyes of equity as the owner of the land and he can maintain an action for specific performance if the vendor breaches the contract which at law may not have been completed.

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FOOTNOTES TO PART III

- 60 Has been referred to as a "good sale holding marketable title", by Spry in Equitable Remedies.
- 61 Pegler v. White (1864) 33 Beav. 403.
- 62 See Misdescription page
- 63 6 K.L.R. 77.
- 64 See 59 *infra*.
- 65 In such contracts for sale of land the time fixed by the parties for completion has at law been regarded as essential i.e., 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 good title, by the day fixed for completion, the court cannot grant him specific performance and the purchaser can treat the contract as at an end and recover his deposit with interest and the costs of investigating the title.
- 66 (1954) E.A.C.A. 34.
- 67 See 19 *supra*.
- 68 The Nile Import and Trading Oil Co. v. Abdel Hadi Abdel Magreed el ejabani and the Shell Co. (Sudan) Ltd. (1968) S.L.J.R. 23.

- 69 Kerr on Fraud and Mistake page 74.
- 70 Redgrave v. Hurd (1881) 20 Ch.D.1 see also Devry v. Peek (1889) 14 App. cas. 337.
- 71 This does not mean that a man can be careless in entering into a contract, and then avoid liability simply by alleging or even proving that he did so under a mistake, for to allow this would open the door to perjury and fraud. see Tamplin v. James (1880) 15 Ch.D.215 C.A. If, however, he can establish that he made a bonafide mistake and that he had a reasonable ground for the mistake, it may well be thought inequitable to grant specific performance. see Moxey v. Bigwood (1862) 26 L.T. 817.
- 72 See Gallie v. Lee (1969) 2 Ch. 17; per Russell and Salmon, J.J.
- 73 Smith v. Hughes (1871) L.R. 6 Q.B. 597.
- 74
- 75 Grist v. Bailey (1966) 2 All E.R. 875.
- 76 (1960) A.C. 316; 2 W.L.R. 374; 104 sol. jo. 125, P.C.
- 77 There was no express decision in any English Case, but the view that the Plaintiff was entitled to an order for specific performance accorded with the decisions in the Canadian Cases of Roberty v. Buccub (1943) 2 D.L.R. 613 and Roy v. Kloepler Wholesale Hardware and Automotive Co. Ltd. (1951) 3 D.L.R. 122 affirmed in (1952) 1 D.L.R. 158 and by the supreme court of Canada

in (1952) 2 S.C.R. (Can.) 465. There was nothing in the Indian Contract Act (applicable in Kenya by then) to compel acceptance of the contrary view. Marks v. Lilley (1959) 1 W.L.R. 749, 752; (1959) 2 All E.R. 647 considered.

78 (1853) 2 E. & B. 678.

79 "or which ought to be done". That which ought to be done is only treated as done in favour of some person entitled to enforce the contract as against the person liable to perform it. see Re Anstis, Chetwynd v. Morgan, Morgan v. Chetwynd (1886), 31 Ch. D. 596, C.A., per LINDLEY, L.J. at p. 605, Re Plumpere's Manage Settlement, Undehill v. Plumptyre, (1910) 1 Ch. 609, 619. The leading examples of the application of the maxim are in cases where land has been directed to be turned into money, and vice versa; and where a contract remains executory on one side but has been executed on the other.

PART FOUR

4. THE EFFECT OF NON COMPLIANCE WITH STATUTORY REQUIREMENTS
ON SPECIFIC PERFORMANCE ON CONTRACTS OF SALE OF LAND

Introduction

A contract for the sale of land becomes enforceable as a result of many factors.⁸⁰ Some of these factors are the statutory requirements or formalities which must be satisfied before such a contract can be enforced by the equitable remedy of specific performance. Some of these requirements include registration of the instruments conveying the land, written note or memorandum (or part performance) and the consent of the Land Control Board.

1. REGISTRATION

Before any land can be validly conveyed or disposed of, any document purporting to convey or dispose of such land must be registered in accordance with a particular registration statute. All registration statutes⁸¹ therefore have provisions compelling parties to contracts for sale of land to register such transactions and failure to comply with such provisions

have the effect of making the contract either void or unenforceable. Generally non-registration of sales of land or leases is a clear bar to specific performance.⁸²

Position under Registered Land Act⁸³

Section 38(1) R.L.A. provides for the registration of land and leases and states that no land, lease or charge shall be capable of being disposed of except in accordance with the Act and that any attempt to do so otherwise shall be ineffectual to create, extinguish, transfer, vary or effect any estate, right or interest in land. This means that no contract for sale of land or lease of land would be effective or enforceable unless and until the requirements of this Act which are necessary for such disposal are satisfied. This is a clear bar to specific performance to such contracts.

Specific performance may nevertheless be granted because the unregistered instrument operates as a contract inter parties and thus supports an action for specific performance.⁸⁴ This is clearly illustrated by Section 38(2). R.L.A. which provides that nothing in Section 38(1) shall be construed as preventing any unregistered instrument from operating as a contract. This issue has been one of great

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 controversy⁸⁵ but the controversy is neatly summed up in S. 38 R.L.A. read in conjunction with the Law of Contract (Amendment) Act 1968 and states that no interest in re~~m~~ can be given except by a duly registered instrument, but on unregistered instrument can act as a contract in personam. A contract in personam relating to land must be in writing or accompanied by delivery of possession.

Position under I.T.P.A. 1882⁸⁶

The Transfer of Property Act provides that sales can only be by registered instruments and that non registration would render the contract void. Section 107 requires that all leases from year to year or from a term exceeding one year and leases requiring a yearly rental should be registered. On the face of this Section it would seem that non-registration of such leases would have the effect of making such a lease void and unenforceable. In that way specific performance would not be available.

A question arises as to whether contracts for leases have to be registered. One would argue that this would not be necessary so long as the lease itself is registered. The Act is silent on this but one would on the other hand argue that S. 107 covers even contracts for leases.

It so happens, however, that in some cases although there may be no registration of the transaction, conditions may exist in such a contract which are recognised in equity as taking the case out of the statute. For example, when the lessee has in part performance of the contract taken possession of the land or any part thereof or being already in possession, continues in possession in part performance of the lease and has done some other act in furtherance of the lease.⁸⁷ In such instances specific performance would be decreed just as if the statutory requirement had been complied with.

Position under Government Lands Act⁸⁸

Section 99 G.L.A. states that "all transactions entered into affecting Government land shall be registered". Section 100 goes further to say that;

"no evidence shall be receivable in any civil suit of sale, lease...of land...unless such sale or lease...is effected by an instrument in writing and such instrument has been registered."

This shows that unless an instrument purporting to dispose of land is registered, such a disposition would be

unenforceable since no evidence of such a disposition would be received to prove it. This is a clear bar to specific performance of such a contract.

Position under Registration of Titles Act⁸⁹

Section 32 states that no instrument until registered shall be effectual to pass any land or any interest therein. Section 20 expressly provides that non compliance with the requirements of this Act will make a contract null and void. Registration is therefore necessary for the validity of the transaction of sale and also the granting of specific performance of such a transaction.

Can such an instrument, though not registered, act as a contract inter parties? The answer worked out by the courts is that though an unregistered instrument may not create any interest or estate valid against third parties, it nevertheless operates inter parties as a contract and may support an action for specific performance.⁹⁰

In 1960 the Court of Appeal considered in Figueredo & Co. Ltd. v. Moonings Hotel⁹¹ the effect of registration of leases on specific performance. In this case the landlord

sought to enforce the lease so that he could recover arrears of rent but he was met with the defence that the lease was unregistered. It was contended for the lessee that as under the provisions of the Uganda Registration of Titles Ordinance⁹² an unregistered lease was ineffectual to create any estate or interest in land and that therefore the lease was unenforceable. The court held that an unregistered document operates as a contract inter parties and can confer on the position of the intending lessee a right to enforce the contract specifically.

In 1963 the same court considered a Kenyan case relating to Sections 32 and 40 R.T.A. This was in the case of Clarke v. Sondhi⁹³ where there was an unregistered lease for 3 years. The court following Moorings Hotel case (supra) held that the unregistered lease operated as a contract specifically enforceable by the lessee and that the proviso to Section 40 R.T.A. "provided that no lease shall be valid unless registered" did not exclude the use of unregistered lease to show the terms of a contract between the parties.

In parallel legislation relating to Chattel transfers the Judicial Committee of the Privy Council has

arrived at a similar conclusion. In National and Grindlays Bank Ltd. v. Dharamshi Vallabhji,⁹⁴ the Privy Council held that an instrument registrable under the Chattels Transfer Act,⁹⁵ but neither attested nor registered in accordance with the Act was nevertheless valid inter parties.

On what grounds does such an unregistered instrument operate as a contract ^{inter} ~~either~~ parties? The Court of Appeal in arriving at that decision did not give a straightforward reason for doing so, but one may point out from the decision of the Court that the Court wholly relied on the principle in Walsh v. Lousdale⁹⁶ and came to the conclusion that an agreement for a lease, though not executed is as good as a lease, and because the equitable rights of the lessee prevail over the legal rights of the lessor, equity comes to the aid of the lessee by providing him with a means of enforcing the contract.

2. WRITING AND PART PERFORMANCE

(a) Writing

In order that an action may be maintained for specific performance of a contract for sale of land, there

must be a written note or memorandum of the contract, signed by the defendant or by his duly authorised agent.⁹⁷

Position before 1968

Up to January 1961 the Indian Contract Act, 1872 applied in Kenya and this Act did not require writing for contracts relating to land. Under this Act an oral agreement for sale of land could be specifically enforced.

*Statute of Frauds
1677 - not
of gen. appl. in K.*

On January 1961, the law of Contract Act⁹⁸ became operative and abolished the Indian Contract Act. It applied the English Common Law to contracts.⁹⁹ The Act went on to provide that the statute of frauds 1677¹⁰⁰ should not apply in Kenya. Writing was therefore not required and an oral contract was enforceable.

In 1963 the R.L.A.¹⁰¹ introduced provisions which were subsequently applied to the whole of Kenya in 1968 by the Law of Contract (Amendment) Act 1968¹⁰²

Position since 1968

With the commencement of the Law of Contract (Amendment) Act¹⁰³ writing was made a requirement in all

contracts for any disposition of land. This Act repealed Section 38(2) R.L.A. Section 2(3) of the Act provides that:

"No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing..."

This section amends Section 3(3) of the Contract Act¹⁰⁴ and it reintroduces the substance of Section 4 of the statute of frauds 1677 which is identical almost word for word with it. From 1968 writing is necessary in all contracts relating to land. Absence of writing in such contracts bars specific performance of the contract since the contract is unenforceable. There are however exceptions to this rule and these are discussed later in this paper.

What needs to be written in such contracts?

The memorandum or note mentioned in Section 2(3) must contain all the material terms of the contract, such as the names or adequate identification of the parties, the description of the land, the nature of the consideration, etc.¹⁰⁵

What is the effect of non compliance with this requirement on the contract? The effect of Section 2(3) is not to render void contracts which do not comply therewith

but to make a note or memorandum in writing indispensable evidence in proceedings to enforce them. Failure to satisfy the requirements of Section 2(3) does not therefore affect the validity but the enforceability of the contract. As such the contract exists between the parties but cannot be enforced by either party against the other unless and until it is put into writing.¹⁰⁶

If in a suit for specific performance the absence of writing is not set up the court will order specific performance despite the absence of any written note or memorandum duly signed.¹⁰⁷ By not pleading the statutory defence of lack of writing, the defendant is deemed to renounced the benefit of it,¹⁰⁸ and once he has done this, he cannot afterwards by amendment revive the objection.¹⁰⁹ But even if the defendant admits the contract he may at the same time plead the absence of writing as a bar to the action.¹¹⁰ This goes further to prove that Section 2(3) Law of Contract (Amendment) Act applies not to the substance of the contract of sale, but to the procedure and therefore that is why the courts tend to lean in favour of enforcing the contract when there are acts of part performance or where the defendant does not raise the statutory defence.

(ii) Part Performance

Notwithstanding Section 2(3) Law of Contract (Amendment) Act, the court will grant specific performance in the absence of writing where there is a sufficient act of part performance of the contract. This is the doctrine of part performance.¹¹¹

This doctrine has been expressly preserved by the proviso to Section 2(3) Law of Contract (Amendment) Act. The proviso provides that:

"Provided that such a suit shall not be prevented by reason only of the absence of writing where... purchaser or lessee who has performed or is willing to perform his part of a contract has in part performance taken possession of the property or any part, thereof or being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract."

This doctrine is one of the palliatives introduced in the early days by the court of chancery to alleviate injustice arising from a defence relying on the statute of ^Ffrauds,¹¹²

i.e. where one party to a contract has carried out his part or at least some of his obligations under the contract and when he comes and try to enforce the contract he is met with the defence of the statute - "equity will not permit the statute to be made an instrument of fraud."¹¹³

In allowing this doctrine equity allows part performance under certain circumstances to take the place of the memorandum as evidence but only as evidence of the existence of a contract between the parties. This doctrine is not in direct opposition to the Act but it is in the nature of an estoppel, the defendant having allowed the plaintiff who is seeking specific performance to do work or otherwise alter his position in reliance on the contract, and having thus induced him to do so, cannot in justice be heard to repudiate the contract as not complying with the Act.

In Rashid bin Salim Mohamed v. Mohamed bin Said bin Abeid¹¹⁴ where there was an oral contract for sale of land, Windham, C.J. followed the proviso to Section 2(3) and granted specific performance of the contract.

3. CONSENT

Transactions such as sales or disposals of land have for long been controlled under various statutory regulations

and requirements. The granting of specific performance on such transactions is affected by the controls placed by the Government in such transactions. These regulations and requirements are not mere formalities but prerequisites to the validity of such transactions and failure to comply with them renders the transactions void for all purposes.¹¹⁵

*Regula-
248(1)*

Under the Land Control Act, 1967¹¹⁶ all transactions relating to agricultural land¹¹⁷ have to be approved by the Land Control Board of the district in which the land is situated within three months of making the agreement between the parties thereto. If no application is made for such approval or the Board does not give consent to the transaction the latter is void for all purposes. This is a clear bar to specific performance.

Section 6(1) L.C.A. deals with the issue of consent and states that:

"...the sale, transfer, lease, mortgage...or other disposal of or dealing with any agricultural land...is void for all purposes unless the Land Control Board...has given its consent."

Unlike the requirement under Section 2(3) Law of Contract (Amendment) Act which is merely procedural, the requirement under section 6(1) L.C.A. goes to the validity of the contract.¹¹⁸

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In Hamadi bin Athmani v. Bwana Bin Haji¹¹⁹ the plaintiff filed a suit for specific performance of an agreement to execute a registered conveyance. Section 4(1) of the Land Alienation Decree (Z)¹²⁰ provided that no permanent alienation of land should be of any effect unless and until consent was given thereto by the Board. Since no consent had been given for the sale, Gray, C.J. held that as the property was unalienable without the consent of the Land Board, the court could not enforce the agreement for such a sale. The suit was dismissed.

It should be noted that the requirements under this Act, unlike those in the other Acts, are necessary for the validity of the contract. Under the other Acts, as already seen, ^{it is} provided that non compliance with them renders the contract unenforceable but still remains valid inter parties. This is not so in the land control Act and the position is that the Contract is void for all purposes if no consent is obtained. This is further illustrated by Section 7 which provides that any person who may have entered the land by virtue of the agreement is bound to vacate it and that any

consideration which he may have given is recoverable from the vendor as a civil debt. This shows that no part performance of such a contract would even render it enforceable. Consent or no consent, is the determining factor as to whether a decree for specific performance will lie.¹²¹

A question arises as to whether the vendor can execute the conveyance of the Registered instrument on the court's order and then seek consent of the Board after such execution. Fry on specific performance¹²² sufficiently answers this contention by stating that:

"as the consent of a third party is or may be a thing impossible to procure a defendant who has entered into a contract to the performance of which such consent is necessary, will not, in case such consent cannot be procured, be deemed to obtain it and thus perform an impossibility."

This was the issue in Administrator General of Zanzibar v. Busaida (Z)¹²³ where the court held that in such a case specific performance cannot be granted before the consent is obtained because the court cannot interfere with the discretion of the Board giving consent. Until such consent is given the purchaser has no equitable right in the land.

Another question is whether the court itself can apply to the Board for the grant of consent to a transaction so that it can then grant specific performance. Supposing that a purchaser of land under a contract has been put to special expense, for example, in constructing a building on the land in question. Since in such a case mere damages are not usually a sufficient remedy,¹²⁴ the court will if at all possible grant a decree of specific performance, but since the Board's consent is necessary for the transfer of title in the land and that this necessity is not a mere formality, can the court itself before passing a decree, if this is necessary in order to enable it to grant the proper remedy of specific performance, apply to the Board for consent?

On the analogy of Busaida's case (supra) it may on the one hand be that the courts have not yet thought of taking such a step in applying to the Board for consent. All what the courts can do is to ask the party seeking to enforce the contract to obtain the consent of the Board if three months have not elapsed since the contract was entered into.¹²⁵ On the other hand one can argue that since Section 7 L.C.A. provides for recovery of consideration given on such a contract, the plaintiff/purchaser would therefore

not get a decree of specific performance (whatever the expense he might have incurred on the land) but would be left to his right at law to claim for the consideration given and expenses incurred as a civil debt from the vendor.¹²⁶

This issue was considered in the Sudanese case of El Khidir Hag Omer v. Alla Maana Farah Massoud¹²⁷ where it was held that the court can itself apply for the Governor's consent anytime before a decree is passed if this is necessary in order to enable it to grant the proper remedy of specific performance.

CONCLUSION

Consent of the Land Control Board as required by the Land Control Act goes to the root of the Contract of Sale and lack of such consent therefore makes the contract void and unenforceable.

FOOTNOTES TO PART IV

- 80 See Part II (supra) and Part III (infra).
- 81 These include R.L.A.; I.T.P.A.; G.L.A.; R.T.A.
- 82 See Section 38(1) R.L.A.
- 83 Cap. 300 Laws of Kenya.
- 84 See 91, 93, 95 infra.
- 85 The controversy has arisen because the various registration statutes state that unregistered instruments are either unenforceable or invalid or void.
- 86 Applied Acts, Group 8.
- 87 Such as payment of the vent, construction of buildings according to the leasehold agreement, etc.
- 88 Cap. 280.
- 89 Cap. 281.
- 90 This is because under some Acts the registration of the transaction doesn't go to the validity of the contract but it is only procedural. It only affects enforcement.
- 91 (1960) E.A. 926
- 92 Cap. 123 Laws of Uganda, similar to the Kenya R.T.A. Cap. 281.
- 93 (1963) E.A. 107.

Can't you deduce what was intended?

- 94 (1966) E.A. 186
- 95 Cap. 28 Laws of Kenya.
- 96 (1882) 21 Ch. D. 9; 46 L.T. 858.
- 97 For "duly authorised agent" see HALSBURY'S LAWS OF ENGLAND
4th Ed. page 728.
- 98 Cap. 23 1961 Laws of Kenya.
- 99 Section 2 of 19 supra states that "the common law of
England relating to contract as modified by the doctrines
of equity...shall extend and apply in Kenya".
- 100 An English Act, section 4 of this Act is reproduced in
section 2(3) Law of Contract (Amendment) Act. 1968.
- 101 Cap. 300 Section 38(2).
- 102 1968 Number 28 of 1968 Kenya Acts.
- 103 See 23 supra
- 104 1961 Cap. 23.
- 104 See subsection 1 of this Part.
- 106 This may occur anytime after the contract is entered
into and not necessarily at the time the contract
is entered into.
- 107 Gunter v. Halsey (1739) Amb. 586.
- 108 Skinner v. McDonall (1848) 2 De G & Sm. 265.
- 109 James v. Smith (1891) 1 Ch. 384 (affirmed on the
facts, 65 L.T. 544)
- 109 Spurrier v. Fitzgerald (1801) 6 Ves. 548.

- 110 Cooth v. Jackson (1801) 6 Ves. 12 at 37. As to the possibility of a pleading in one action being capable of being used as a memorandum of the Contract to maintain another action, see Grindell v. Bass (1920) 2 Ch. 493; Hardy v. Elphick 1973 The Times March 27.
- 111 The doctrine is adequately discussed in the standard text books on real property and contract e.g. Megarry and Wade, The Law of Real Property; 3rd Ed. pp. 569 et seq; Cheshire, Modern Real Property, 11th Ed. pp. 379 et Seq. Cheshire and Fifoot, Law of Contract, 8th Ed. pp. 191 et seq.
- 112 1677 Section 4. See Maddison v. Alderson (1883), 8 app. cas. 467 per Lord Selborne and Kay, J.
- 113 Re Duke of Marlborough, Davis v. Whitehead, (1894) 2 Ch. 133 at p. 141.
- 114 (1949) 16 E.A.C.A.
- 115 See section 6 Land Control Act (Cap. 302).
- 116 Cap. 302 Kenya Acts Number 34 of 1967.
- 117 See definition of "Agricultural land" in section 2 L.C.A. and Section 2(1) Agriculture Act.
- 118 See 41 infra.
- 119 7 Z.L.R. 109.
- 120 Zanzibar Decree similar to the Land Control Act of Kenya.

- 121 See the following cases on consent; Kanji and others v. Christie (1970) T. Digest T.H. Patel v. R. Lawrenson & Matzen (1957) E.A. 249; El Khidir El Hag Omer v. Alla Maana Farah Massoud (1968) SLJR 152; Sabila Fadh v. Ahmed Abdalla Ahmed (1956) SLJR 62, 63; Chun bin Hassan v. Ame bin Haji Shabulla and Another 8 Z.L.R. 44; Mobi Goke v. Chege Kibaki (1967) E.A. 166.
- 122 3rd Ed. Act. 999 at p. 457.
- 123 (1958) E.A. 513.
- 124 Equity will intervene where there is no adequate remedy at common law, ie. where damages will not fully compensate for the injury, specific performance will be granted. see part I of this paper.
- 125 See Section 6(2) (a) L.C.A. 1967.
- 126 See Sec. 7 L.C.A.
- 127 (1968) S.L.J.R. 152.

SUMMARYCONCLUSION AND COMMENT

From the argument of the preceding survey it is possible to collect some of the salient features of specific performance of contracts of sale of land in the modern law and discern some of its trends.

"Equity follows the law"¹ - for equity to intervene and give relief in such a contract the latter must be valid in law. If a contract is void at law no equitable relief would be granted. A question arises as to whether this maxim is of universal application i.e. whether it is universally true? This contention was answered by Lord Hardwicke in Paget v. Gee² where he said that if the maxim was universally true there would never have been occasion the development of a separate code of equitable principles. This is true because if equity follows the law, then there would be no need for it because the law would do what equity does. The learned Lord Chancellor in trying to show that the maxim was not universally true said that where the court finds that the rules of law *are* right it will follow them, but then it will likewise go beyond them. There are few occasions in granting or

refusing of specific performance where the courts have gone beyond the rules of law.

Most of the statutory provisions discussed in chapter four do not totally exclude the intervention of equity in case of non compliance except where the statute expressly provide that the contract entered into in contravention of that particular statute will be void for all purposes.³ In such a case even though the equitable rights prevail over the legal rights no equitable relief, by way of specific performance, would be granted. The equities which the purchaser may have acquired as a result of the contract are of no effect.⁴

In all other cases the statute merely provides that no action shall be maintained if the statutory requirements are not satisfied. Such a requirement is rather procedural and does not go to the validity of the contract.⁵ As such equity is not barred from intervening by regarding the contract as valid inter partes⁶ and can found an action for specific performance.

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FOOTNOTES TO CONCLUSION

- 1 See footnote 19 of Part IV.
- 2 (1753) Amb. 807, 810; 20 Digest 237, 49
- 3 See section 6(1) Land Control Act, 1967.
- 4 See Richard Wainaina Njoroge v. Daniel Jomo Munyua
unreported. (1974) No. 187.
- 5 Leroux v. Brown (1852), 12, C.B. 801 at p. 824
per Jervis, C.J.

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