

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**

**HCT-01-LD-CA-0024 OF 2017**

**NKEMBA ELIZABETH:.....APPELLANT**

**VS**

**KABAHENDA JOY:.....RESPONDENT**

**BEFORE: HON. MR. JUSTICE OYUKO. ANTHONY OJOK**

**JUDGMENT**

This is an appeal against the Judgment, decree and orders of His Worship **Muhumuza Asuman** Magistrate GI delivered at Fort portal on the 1<sup>st</sup> day of April 2016

**Background**

The Respondent sued the Appellant claiming ownership of land at Kyamakemba Village, Busoro Sub-County, Kabarole District. The learned Magistrate delivered Judgment in favour of the Respondent and the appellant being dissatisfied with the judgment lodged this appeal whose grounds are;

1. That the learned trial Magistrate erred in law and in fact to hold that the appellant never completed payment of the purchase price and the seller of the suit land one Nsekanabo remained in possession when it was clear that it was the appellant who was put in possession of the suit by Nsekanabo (purchaser) after paying the full purchase price.
2. The trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record which showed that the appellant purchased the suit land first and the Respondent subsequently and consequently the appellant has superior title than that of the Respondent.
3. That the learned trial Magistrate erred in law and in fact in holding that the Respondent got good title over the suit land from Nsekanabo and is the rightful owner of the suit land when all the evidence showed that the land belongs to the appellant as the first purchaser
4. That the learned trial Magistrate was wrong to hold that Nsekanabo legally rescinded the sale agreement between him and the appellant.

## **Representation**

Counsel Bwiruka Richard represented the Appellant while Counsel Luleti Robert appeared for the Respondent. They both agreed to file written submissions.

## **Duty of first Appellate court**

It is the duty of the 1<sup>st</sup> appellate Court to appreciate the evidence adduced in the trial court and the power to do so is as wide as that of the trial Court. Where the trial Court resorted to perverse application of the principles of evidence or show lack of appreciation of the principles of evidence, the appellate court may re-appreciate the evidence and reach its own conclusion. (See **Fredrick Zaabwe Vs Orient Bank Ltd SCCA No. 4/2006 & ULR Volume I at pp 98 and 130**).

## **Resolution of grounds**

Counsel for the Appellant submitted the grounds 1, 2, 3 jointly and 4 separately

- 1. That the learned trial Magistrate erred in law and in fact to hold that the appellant never completed payment of the purchase price and the seller of the suit land one Nsekanabo remained in possession when it was clear that it was the appellant who was put in possession of the suit by Nsekanabo (purchaser) after paying the full purchase price.**
- 3. That the learned trial Magistrate erred in law and in fact in holding that the Respondent got good title over the suit land from Nsekanabo and is the rightful owner of the suit land when all the evidence showed that the land belongs to the appellant as the first purchaser.**
- 4. That the learned trial Magistrate was wrong to hold that Nsekanabo legally rescinded the sale agreement between him and the appellant**

The Respondent sued the Appellant claiming ownership of land at Kyamakemba, Busoro Sub-County, Kabarole District. The Respondent bought the suit land from Nsekanabo Stephen on 1/8/2005 at SHs 2 Million and he only paid Shs 1,500,000/= leaving a balance of Shs 500,000/= see evidence of PW1.

It is not disputed that the suit land had been sold to the Appellant by the said Nsekanabo Stephen in September 2003. Nsekanabo PW2 admitted executing an agreement on 8/9/2003 (DE1) where he received Shs 350,000/= as part of the purchase price leaving a balance of Shs 850,000/=.

PW2 also admitted executing the agreement of 20/9/2003 where he received Shs 450,000/= leaving a balance of Shs 400,000/=. PW2 however denied receiving any other money and denied the agreement of 30/9/2003 (DE3). The Appellant DW1 explained the circumstances how DE3 was executed. DW2 witnessed all the transactions. PW2 Nsekanabo Stephen

informed DW3 that he wanted to sell the land again and indeed he sold it again to the Respondent. Nsekanabo Stephen gave vacant possession of the land to the appellant and after he threatened the Appellant's workers that is when a complaint was made to police, at police, Nsekanabo (PW2) admitted selling the land to the Appellant and receiving all the money. The police statement recorded by DW4 received as DE4.

The claim by the Respondent that, that statement was made under duress cannot be sustained Nsekanabo never complained anywhere after making the statement and he has never taken steps to challenge it. The respondent cannot plead duress on behalf of Nsekanabo Stephen. It is Nsekanabo supposed to challenge the said statement and not the Respondent.

The suit land was sold to the Appellant on 8/9/2003 and part payment made. The case of **Ismail Jaffer Akkubhai & Others Vs Nandakak Harjivan Karia & Another SCCA 53/95 reported in (19960 KALR 109** is very clear that in a deal of immovable property, upon payment of a deposit, property passes to the purchaser who acquires an equitable interest in the property and the vendor becomes the trustee who holds the property in trust for the purchaser. The legal title remains with the vendor until the final payment when the legal title passes to the purchaser.

In the instant case, on 8/9/2003 when a deposit was made to Nsekanabo, the property in the suit land passed to the appellant. The Appellant made further payments on 20/9/2003 and completed payment on 30/9/2003. The legal title passed to the appellant and Nsekanabo had nothing to sell to the Respondent.

The alleged oral rescission of contract by Nsekanabo has no basis and there is no evidence to support it. The appellant and Nsekanabo had made a written agreement and to rescind it, it should have been done in writing.

There is no evidence of any demand by Nsekanabo of payment from the appellant. He went ahead to handover vacant possession to the appellant. One would wonder why he would handover possession yet he had not been fully paid. The evidence of the appellant that he had paid Nsekanabo fully and De3 are believable in the circumstances and it was therefore an error for the Trial Magistrate to hold that appellant never completed payment of the purchase price and the seller of the suit land one Nsekanabo remained in possession.

He submitted that Nsekanabo passed no title to the Respondent and grounds 1,2 and 3 be resolved in favour of the Appellant.

**Ground 2. The trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record which showed that the appellant purchased the suit land first and the Respondent subsequently and consequently the appellant has superior title than that of the Respondent**

It is not disputed that the suit land had been sold to the appellant by the said Nsekanabo Stephen in September, 2003. Nsekanabo PW2 admitted executing an agreement on 8/9/2003 (De1) where he received Shs 350,000/= as part of the purchase price leaving a balance of Shs

850,000/=. The respondent bought the suit land from Nsekanabo Stephen on 1/8/2005 at Shs 2million and he only paid Shs 1,500,000/= leaving a balance of Shs 500,000/=.

The second sale to the Respondent was void and the Respondent should just claim refund of the part payment she made to Nsekanabo. It is a settled principle that when there are two equities, the first time prevails. See the case of **Tifu Lukwago Vs Samwiri Mudde Kiiza & Anor SCCA 13/96 reported in (1999) KALR 296.**

He submitted that Nsekanabo passed no title to the Respondent and ground 2 be resolved in favour of the Appellant.

However counsel for the Respondent argued all the 4 grounds of appeal jointly.

1. That the learned trial Magistrate erred in law and in fact to hold that the appellant never completed payment of the purchase price and the seller of the suit land one Nsekanabo remained in possession when it was clear that it was the appellant who was put in possession of the suit by Nsekanabo (purchaser) after paying the full purchase price.
2. The trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record which showed that the appellant purchased the suit land first and the Respondent subsequently and consequently the appellant has superior title than that of the Respondent.
3. That the learned trial Magistrate erred in law and in fact in holding that the Respondent got good title over the suit land from Nsekanabo and is the rightful owner of the suit land when all the evidence showed that the land belongs to the appellant as the first purchaser
4. That the learned trial Magistrate was wrong to hold that Nsekanabo legally rescinded the sale agreement between him and the appellant.

He submitted that it is not disputed that there was an agreement to sell land between Nsekanabo Stephen and the Appellant (contract for the sale of land), however the Appellant breached this contract or agreement when she failed to pay on balance of the contractual price.. he submitted that part payment should not bar the vendor from renegotiating sale with another person if the previous purchase fails to pay the balance of the contractual price since this is a breach of condition in any contract for any subject matter.

He further submitted that anyone who comes to court under equity or claims the same ought to come or claim with clean hands in order to rely on equity. Instead of the appellant completing the last instalment and purchase the land she opted to use the police to force Nsekanabo Stephen to agree that he had sold yet she had not completed payment. The said Nsekanabo acknowledged signing the 1<sup>st</sup> and 2<sup>nd</sup> agreement under free will which is a sign and evidence of the truth but denied ever signing the last under free will as he was under duress.

The critical question to ask is “why would Nsekanabo risk acknowledge signing the document signed between him and the appellant then go ahead to sell the land to the appellant if he was greedy as the appellant wants this honourable court to believe?” the only reason he would risk admitting the said documents and go ahead to sell the said suit land to the Respondent was because he was truthful to himself and to the court that since he was not fully paid by the Appellant he agreed with her to dispose off the land to another buyer and refund the appellant the money she had paid (UGX 800,000/=) out of the total contractual price of UGX 1,200,000/= (One Million two Hundred thousand) this was after two years of failure by the appellant to complete the balance of money owed.

There is no documentary evidence on record to show Nsekanabo acknowledging receipt of the final instalment of the contractual price apart from a document signed alleging to be a sale agreement which was done after Nsekanabo was arrested (page 7 line 10-12 of the proceedings). He submitted that by the Defendant using coercive measures to obtain the signature of the vendor on the sale agreement only meant that she was never willing to pay the balance of the contractual price but intended to deny the vendor of this money. This was a breach of contract by the Appellant hence entitling the vendor a right to rescind the contract. Had the appellant completed the payment then she would have occupied the land and in the event of any alleged disturbances by the vendor then she would have sued him for specific performance or trespass. However the only reason she could not pursue these remedies is because she had failed to complete payment of the contractual price and had agreed with the vendor to have the suit land sold. He submitted that matters of land disputes especially those pertaining ownership are civil matter which have to be handled under civil procedure coercing an agreement from vender at police never at one point fostered a legally binding agreement hence the police statement and the agreement dated 30/9/2017 ought to be disregarded.

That since the vendor (PW2) agreed with the Appellant to resell the land and the vendor repays her back the part payment she made to him, there was no need for the vendor to demand for the balance of payment. He further submitted that had she any intention of clearing the remaining balance then it would not have taken her over two (2) years to claim so. There is no acknowledgement by the vendor of ever receiving the balance of the contractual sum.

He further submitted that had there been a valid sale then the Appellant would not need to use the words “I Nsekanabo Stephen selling .....” (Exhibit D3). This only shows that the Appellant was not sure of her status since she had not completed payment of the contractual price, hence she was trying to concoct a new sale agreement with a different contractual price.

The Appellant on page 19 of the typed proceedings testified that she had a document from the LCI confirming that she was the 1<sup>st</sup> purchaser however she never presented the same to Court yet the same LC I testified to being informed of the oral agreement between the Appellant

and Nsekanabo hence could not have signed such a document being well aware of the arrangement between the Appellant and the Vendor (Nsekanabo).

That payment of the balance of the contractual price in an agreement to sale land, should not be held in perpetuity merely because one believes they have attained an equitable interest in land and hence should delay or never pay a balance of a contractual price, but there should be intent and commitment by the unpaid purchaser to complete the contractual price in a reasonable time otherwise like in any other contract the partly paid vendor retains the right to rescind the contract

The Appellant relied on the case of **Ismail Jaffer Alibha & Others Vs Nandlala, Haji Van Karia & Another SCCA 53/93**. However this case materially differs from the case at hand. In that case the land in contention was registered land and not customary land as is the case here. It was held inter alia in **Ismail Jaffer Alibhai & Others vs Karia** (supra) that the legal title remains with vendor until the final payment when the legal title passes to the purchaser. In this case there is no equitable or legal title since the land is unregistered. Furthermore there were no competing equities in that case. In the case of **Ismail Karia Jaffer Alibhai & Anor Vs Namdlah Karia** (supra) sharply differs from the facts at hand since in that case the vendors were no longer living in Uganda due to the expulsion of the Asians. Further in that case the balance of the contractual price was paid to the custodian board. The facts in the above case do not tally with the facts at hand since in this case no evidence of final payment was ever tendered yet the vendor (Nsekanabo) had always been available. The Appellant having failed to complete payment of the contractual price and having orally agreed to be refunded her contractual price (which was deposited with LC I) only meant she ceased to have any interest in the suit land hence the vendor passed a good title to the Respondent.

A critical analysis of the statement at police only reeks of duress and coercion. This is because ordinary police statements are only recorded by a police officer and are not witnessed by any other person. That the aim of the police statement was no act as a rod to bind the vendor (Nsekanabo) in order to pave way for his forced and coerced signing of Exhibit DE3 which was back dated to 30<sup>th</sup> September 2003. One would wonder why he would acknowledge DE1 and DE2 and refuse DE3. This is only because DE3 was obtained through coercive means, that is threats of imprisonment and death. Furthermore the statement was written in English with no jurat or evidence showing it was read back to the Vendor and that he understood the same. This gives the Vendor every right to rescind this contract since the Appellant instead of showing any willingness to pay the balance of her contractual price opted to use coercive measures to force the vendor to sign an agreement. If indeed, the Appellant had a genuine problem with the vendor, then she ought to have sued him in a civil court and not use the police.

It is a general principle in equity that he who comes to equity must come with clean hands. In the instant case the Appellant never had clean hands as she sought to deny the vendor of the full payment of the contractual price and opted to use coercive means against the vendor. Thus there was no valid or specifically enforceable contract because it had been rescinded by

the vendor, and this rescission was communicated and agreed to by the Appellant which is why he even refunded her the part payment of the purchase price.

The Appellant having reported the vendor to the police presumably on charges of a criminal nature, then a charge and caution statement ought to have been read to him if the Appellant wanted to rely on it as a confession of some sort. Hence this only shows that this entire procedure of arresting the vendor was meant to scare him into signing a document he had never consented to. The evidence of the later agreement is seen in the testimony of Sgt. Musaviri Francis (DW4) on page 25 line 14 of the certified proceedings that, "Nsekanabo also agreed to make statement showing how he had sold the land to the Defendant" this shows that he was coerced into making a statement to that effect since it even left out the fact that he had subsequently sold the suit land to the Respondent on 1/8/2005 before he was arrested. The arrest and statement were geared at getting a favourable position for the Appellant but, good enough the learned trial Magistrate saw through this heinous ploy and judged otherwise. There was no even a CRB number availed by the Appellants or her witnesses to show that she had reported a genuine claim against Nsekanabo.

Furthermore the Appellant's claim that she had tenant on the suit land was watered down by DW3 Ntaza Patrick who claimed that the house on the suit land was a habitant for thieves. This only means that the suit land was not with tenants as she wanted the Court to believe hence this was a grave contradiction by the Appellant in her evidence which goes to the root of this case. He submitted that DE3 was obtained as a result of coercion and duress as it even contained a difference amount (Ugx 1,300,000/=) from the one initially agreed upon (Ugx 1,200,000/=) with no apparent reason on the document to explain the chances in the contractual price.

He submitted that she hence failed to complete the contractual sum neither did she have any intention of finishing the same thus entitling the vendor to rescind or repudiate the contract.

**In Holland Vs Wiltshire (1954) 90 CLR 409,420 also approved in Kagumya Godfrey Vs Ntale Deo HCCs 298 of 2004 Lord Kitto stated as follows:-**

*"In the context of contracts for sale of land the vendor's obligation is to deliver a good title and the purchaser's obligation is to pay the price. Those are concurrent and mutually dependent obligations in the absence of any provision in the contract to the contrary. If any party informs the other that it cannot or will not complete the contract by the settlement date he or she commits anticipatory breach amounting to a repudiation which gives the innocent party a right to terminate the contract. Presented with the repudiatory conduct of the guilty party, the innocent party has an election to either refuse to accept the repudiation or continue to require performance or accept the repudiation and bring the contract to an end".*

Basing on the above statement, he submitted that the Appellant should not be an unfully paid purchaser in perpetuity since he had taken over two years without clearing the un paid balance to the vendor, thus this was a breach of contract which warranted rescission of the

same by the Vendor. Despite the fact that the vendor had this right of repudiation, out of courtesy he agreed with the purchaser to resale the land and refund her part payment of the contractual price. To bind a vendor to such a purchaser would be allowing any purchaser who may never pay, such as a bankrupt, ability or power to deny a vendor the full and contractual benefit from his/her property. He submitted that failure to pay the full contractual price is a breach of condition which is sufficiently serious to justify rescission to the future of the contract, and since to date the Appellant has never paid the balance then she cannot claim any interest in land.

The principles governing rescission were articulated in **Buckland Vs Farmer & Moody (1978) 3 ALLER 929 at 938. Halsburt laws of England, Vol. 9 (1)**. Re-issue, paragraph 989 cited in **Sihira Singh Santoh Vs Falulu Uganda Ltd HCCs No. 517 of 2004** as follows:

“where one party (A) to a contract has committed a serious breach of contract by defective performance or by repudiating his obligation under the contract, the innocent party (B) will have a right to rescind the contract *de futuro*, that is, to sue for damages for any loss he must have suffered as a result of breach. Such a breach by A does not automatically terminate the contract. B has a right to elect to treat the contract as continuing or to terminate the contract by rescission. In case where it is alleged that B has a right to rescind for breach, it must be determined (1) whether there has been a breach by A of the term of the contract or a mere representation; (2) Whether the breach is sufficiently serious to justify rescission *de futuro* of the contract by B as well as claim for damages, and (3) Whether B has instead elected to affirm the contract”

Presented with the repudiatory conduct of the Appellant, the innocent party Nsekanabo Steven had an election to either refuse to accept the repudiation or continue to require performance or accept the repudiation and bring the contract to an end and there is some high authority for the proposition that communication of the acceptance of the repudiation is not strictly necessary **Holland V Wilshire at P.416 per Dixon J; Port V Development underwriting (vic) Pty Ltd [No. 2[1977] VR 454**. The vendor Nsekanabo Steven expressed an intention to rescind as follows;

1. He contacted the purchaser Elizabeth and informed her of his desire to sell the land agreed orally that he should sell and refund her deposit.
2. He informed the public including the neighbours and the local authorities that the Appellant had agreed to a refund of her deposit and of his intention to resell the land.
3. He asserted ownership of the property and appropriated for himself all proprietary and ownership right in the property and transferred them to the Respondent.
4. The vendor looked for a buyer and ultimately in 2005 sold the land to Kabahenda Joy at Ushs 2,000,000/= (Two Million Shillings).



5. He informed the public including neighbours and the local authority that the Appellant had agreed to a refund of her deposit and of his intension to resell the land.
6. The vendor deposited the purchasers/Appellant's deposit of Ugx 800,000/= (Eight Hundred thousand) with the chairperson LCI as instructed by the Appellant.
7. The LC I chairperson handed over the money to Nkemba Elizabeth who refused to take it.

The Appellant's breach of contract was a continuing breach such that for each day that the purchase price remained due, the purchaser continued to be in breach of the contract giving rise to daily right to rescind n favour of the vendor see **Sihra Single Santokh V Faulu Uganda Ltd HCCS No. 517 of 2004** where the Defendant retained the right to rescind the lease though he had continued to honour it for some time. Further in the circumstances of the case Nsekanabo Steven did nothing to show that he continued to be bound by the contract (he refused to hand over possession).

The High Court in **Sihra Singh Santokh V Faulu Uganda Ltd HCCS No. 517 of 2004** defined rescission to mean:-

“But it is often used to describe the consequence of acceptance by one party to a contract by another party by breach of some essential term of the contract...

The High Court further explained in **Sihra Singh Asantokh Vs Faulu Uganda LTD HCCs No. 517 of 2004** that:-

“Where a wronged party such as the Defendant, elect to rescind a contract de future following a breach by the other party all the primary obligations of the parties under the contract which have not yet performed are terminated..... ” .

Therefore the vendor from the time he informed Elizabeth Nkemba that he would sell the land and refund her deposit from the time the vendor sold the land he communicated an intention to rescind the contract within the case of **Sihra Singh Santokh Vs Paulu Uganda Ltd HCCS no.517 of 2004** and ceased to have any obligation to perform the contract extinguish the Defendant's equitable interest in land.

In my honest opinion, having perused the entire proceedings, submissions and Judgment, I entirely agree with the submissions of the Respondent in its entirety. This appeal is dismissed with costs and all the orders of the lower court is upheld apart from interest at 6% per annum be awarded to the Appellant by Nsekanabo Steven from 2003 till payment in full.

Right of Appeal explained.

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**Oyuko Anthony Ojok**

**Judge**

**31/10/2017**

In the presence of;

1. Robert L for the Respondent.
2. Joseph Kaahwa holding brief for Richard Bwiruka for the Appellant.
3. In the absence of the parties

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**Oyuko. Anthony Ojok**

**Judge**

**31/10/2017**