THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 36 OF 2010

Coram: ***Richard Buteera, DCJ, Cheborion Barishaki, Hellen Obura, JJA.***

WAKANYIRA GEORGE DAVID::APPELLANT

VERSUS

1. **BEN KAVUYA**
2. **GLOBAL CAPITAL SAVE 2004 LTD**
3. **RUTUNGU PROPERTIES LTD:::::::::::::::::::::::::::::::: RESPONDENTS**

(An appeal from the decision of the High Court of Uganda at Kampala (Commercial Division) before Hon. Justice Geoffrey Kiryabwire dated the 24th day of August, 2010 in Civil Suit No. 560 of 2007.)

JUDGMENT OF CHEBORION BARISHAKI, JA.

Back ground

The appellant sued the Respondents in the High Court claiming for mesne profits, rent, recovery of moveable property that were in the suit properties or their value, 36 poultry birds that were at Kataza before eviction by the respondents or their value, General damages, an order to nullify the fraudulent and illegal transfer of the suit properties and an order to rectify the titles to the suit properties, costs of the suit plus interest.

In their WSD, the respondents denied the allegations in the plaint and contended that the appellant sold the suit properties to the 2nd appellant by

a sale agreement executed between the appellant and 2nd respondent. That the appellant had signed transfer forms of the said properties to the 2nd respondent who denied any allegation of fraud. The respondents contended that no loan agreement was executed between the parties.

The facts found by the learned trial Judge were that on the 15th January, 2007 the appellant obtained a loan from the 2nd Respondent and gave land titles to two of his properties as security for the said loan. The sum borrowed was UGX 170,000,000/= which was to be paid back within 6 months at an interest of 10% per month. It was the appellant`s case that he was asked to sign two agreements; the sale and loan agreements together with a Power of Attorney and transfer forms for both suit properties as further security for the loan. It was the case for the appellant that the understanding between the parties was that the transaction was a loan and that the two properties comprised in Block 236 Plot 2062 Kyadondo (land at Bweyogerere and Vol 2965 Folio 18 Plot 17 Bunyoyi lane (land at Kataza Kiswa) were security for the loan. The respondent asserted that the transaction was an agreement for sale of the 2 properties. The sale agreement indicated UGX 272,000,000/= as consideration which the appellant said he never received.

After hearing the suit, the learned High Court Judge found for the respondents and declared that; the transaction was a sale agreement, that the main agreement was not fraudulently made, that no evidence was presented for claim of property lost worth Shs. 72,107,276 and the rent claim of Shs. 344,520,037/= was a departure from the pleadings.

Being dissatisfied with the decision of the High Court, the appellant lodged this appeal on the following grounds:

1. *That the learned trial judge erred in law and fact when he held that the transaction between the appellant and respondents was a straight sale not a loan Agreement.*
2. *That the learned trial judge erred in law in holding that the under valuation of the suit properties and cheating stamp duty was not sufficient to invalidate transfers for the suit properties.*
3. *That the learned trial Judge erred in law and fact in failing to award special and general damages when the appellant was evicted.*
4. *That the trial judge was correct to order that the commissioner Uganda Revenue Authority had authority to correct and collect the cheated stamp duty and validate the transfers.*
5. *That the learned trial judge erred in law and fact when he failed to evaluate the evidence on court record thereby reaching a wrong decision.*

Representation

At the hearing of the appeal, Mr. Stephen Kinyanga holding brief for Dalton Opwonya appeared for the appellant while Mr. Peter Nkuruzinza represented the respondents. The appellant was present in Court but the respondents were not in court.

Both parties filed written submissions which were adopted and considered in the determination of the appeal.

Counsel for the appellant submitted that he approached the 1st respondent to get a loan because he didn't want his properties to be sold by Housing Finance Bank. He contended that he accepted signing the sale agreement and other 4 blank papers as a pre-condition of getting the loan and the titles in the bank were meant to be further security for payment of the loan amount of Shs 172,000,000/= which was advanced to him and that he never sold his properties.

Counsel further submitted that the appellant signed a cheque of Shs. 158,900,000/= and a voucher of Shs. 10,850,000/= cash and these were the actual amounts the appellant received from the 2nd respondent. He contended that PW4, Sam Kamwanda the 1st respondent`s accountant failed to produce these vouchers in court.

Counsel submitted that the appellant paid 1,500,000/= as repayment of the monthly interest on the money that he borrowed but court never analysed or compared the hand writing on Exhibit P.14 that had writings of the respondent`s accountant Sam Kamwanda. The respondents did not issue receipts showing refund of their money hence the existence of Exh ID1 (Computer printout) on court record.

Counsel further submitted that the appellant never wrote a letter introducing the 1st respondent, Ben Kavuya to Housing Finance Bank. The 1st respondent prepared the letter himself and that it's how he obtained the land titles from the Bank.

On ground 2, counsel submitted that the value of the properties stated in the transfer forms showed that there were no developments yet the properties were fully developed. DW6, Micheal Nywana stated that he filled in the forms a value of Shs 10,000,000/= for each of the properties without looking at the sale agreement. Counsel contended that the transactions were marred with fraud, and not based on any sale agreement. He contended that the cheating of stamp duty was criminal and fraudulent and that court should not ignore such blatant illegalities. He cited **Makula International Ltd vs His Eminence Cardinal Nsubuga SCCA No.4 of 1981** for the proposition that an illegality once brought to the attention of court, cannot be ignored.

On ground 3, Counsel submitted that the learned trial Judge was not right to order for collection of taxes that were not due because the transfer was a fraud and a farce, which in its self could not be validated.

On ground 4, counsel submitted for the appellant that he was wrongfully deprived of his moveable properties that were stored in the suit premises adding that the said properties had definite value and even if the alleged sale was valid, those properties were not part of such sale.

On ground 5, Counsel for the appellant submitted that the 1st respondent, DW2 revealed that there had been fraud when he testified that he had witnessed and signed on the transaction documents yet he did not see the appellant signing the transfer forms. He contended that there was proof that the appellant was forced to sign blank forms which were later used to get titles from the bank. This according to him pointed to fraud.

Counsel for the respondents submitted in reply that the appellant had not adduced any credible evidence of a loan transaction. That a loan transaction cannot be proved orally but by documentary evidence. He contended that the appellant admitted that he owed Housing Finance Bank Ltd UGX 158,000,000/= that was paid by the 2nd respondent, Global Capital Save limited and redeemed his property. The appellant in his testimony admitted signing Exh P1, the sales agreement and executing Powers of Attorney which authorised the respondent to receive certificates of title for the two suit properties from Housing Finance Bank and that nothing more could rebut that.

Counsel further submitted that DW1, Alex Kiyimba an official from Housing Finance Bank stated that the appellant and the 1st respondent went to the bank as seller and purchaser. The appellant redeemed his securities and the certificates of title were given to the 1st respondent as the purchaser. He contended that overwhelming evidence on the record proved that the transaction was a sale not a loan transaction.

On ground 2, counsel submitted that the learned trial Judge was categorical when he stated that the sale or main agreement was valid as there was no evidence that it was fraudulently made. The sale transaction was clean and there was no way court could invalidate the transfer just because there was a short fall of tax payable to government. He contended that the learned trial Judge rightly counselled that the shortfall could be drawn to the attention of the Uganda Revenue Authority for appropriate action. He submitted the above position had been laid down by this court in **Ranchhodhai Shivabhai Patel**

Ltd & Anor vs Henry Wambuga (Liquidator of African Textile Mill Ltd) & Anor CCA No. 057 of 2010 where the 1st respondent sold the company land, building and machinery in liquidation so as to pay off the creditor; Crane Bank Uganda Limited. The appellants alleged that the contract sum was not stated in the transfer forms and that payment of less stamp duty was illegal. The appellants instituted a suit at High Court challenging the sale for being fraudulent, illegal and irregular but the suit was dismissed. On appeal, the appellate Court found that the 1st respondent lawfully sold the suit property to the 2nd respondent who obtained good title as there was no fraud committed by the 1st respondent in the process of sale and the appeal was dismissed. Court reasoned that since the title obtained was good title, the none disclosure of the contract sum in the transfer documents and paying less stamp duty on the sale agreement was a matter that could be reported and investigated by the Tax Authority and that on its own it would not vitiate the contract, but would attract legal sanctions under Tax Law.

On ground 3, counsel submitted that since the learned trial Judge held that no fraud was committed by the respondents, the decision that the shortfall in taxes paid on the transferred suit properties could be collected was appropriate and the learned trial Judge was right to hold as he did.

On ground 4, it was submitted for the respondent that the appellant failed to prove the special and general damages he suffered. He pointed out that apart from adducing a long list of properties purchased for the hostel (land at kataza), there was nothing to show in detail what was destroyed at the time

of eviction. Further, that the rent claim was a departure from pleadings and the learned trial Judge rightly decided so.

On ground 5, counsel for the respondents submitted that the appellant`s complaint with the learned trial Judge `s evaluation was in respect to not finding that the appellant`s titles were acquired fraudulently from the bank by the 1st and 2nd respondents. He contended that the transaction was a sale and not a loan and that the evidence on record proved that the appellant admitted to that effect in Exhibits PA, D1, D2 and D3.

I have perused the court record, carefully considered the conferencing notes, the law applicable, and the authorities cited and those not cited but relevant for the determination of this appeal. I am alive to the duty of this Court as a first appellate court to reappraise the evidence on record and draw its own inferences. **See: Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions S.I 13-10 and *Banco Arabe Espanol V Bank of Uganda, Supreme Court Civil Appeal No.8 of 1998.***

The appellant `s Counsel submitted on ground one that the learned trial Judge erred when he decided that the transaction between the appellant and the respondents was a sale and not a loan. Counsel for the appellant submitted that the appellant went to the respondents to secure a loan to save his properties from being sold by Housing Finance Bank. He signed a loan agreement and a sale agreement for the suit properties which were to act as a guarantee for payment. However, that a copy of the loan agreement was not given to him. To his dismay, when he went to pay the 1st instalment on the

loan, he found out that the suit properties which he had given in as security were already transferred in the names of the 3rd respondent.

In response to the above submission, counsel for the respondents submitted that the appellant came to the 1st respondent to sell his properties and get money to pay the mortgage with Housing Finance Bank. That the 2nd respondent executed a sale agreement and the appellant was paid by cheque and later the balance was paid in 2 installments.That no loan agreement existed as none was signed by the parties.

While dealing with this issue, the learned trial Judge stated that;

"In this case there is no evidence of a loan agreement at all.There is also the issue of two installments said to have been given to the plaintiff being a difference between the outstanding value of the Housing Finace Bank loan and the purchase price of the suit properties which the plaintiff didnot sufficiently address. In such a situation based on evidence on record I am inclined to agree with the submissions of counsel for the defendants that the only agreement before court is the agreement of sale."

On record, no loan agreement exists. The respondents relied on 6 exhibits to prove that the appellant sold his properties to the 2nd respondent to wit; Exh P1 the sale agreement, P2 the payment slip to Housing Finance, P3 the transfer form and consent to transfer forms for LRV 2965 Folio 17, P4 the transfer form and consent to transfer for Kyadondo Block 236 Plot 2062, P9 the land title for Bweyogerere and P10 the land title at Kataza. It was the appellant`s testimony that he approached the 1st and 2nd respondents for a loan of Shs.170, 000,000/= to enable him save his two properties from being

sold by Housing Finance Bank. That he signed two agreements and other documents to wit; a loan and sale agreement, blank transfer forms for the two suit properties, A4 blank papers and Powers of Attorney.

PW1, Wakanyira George testified that the loan was to be paid within 6 months at an interest of 10% per month and that the sale agreement and transfer forms were meant to act as security/guarantee should he fail to repay the loan. He further testified that he only received 170,000,000/= from the 2nd respondent and that the consideration of 272,000,000/= stated in the sales agreement was never received by him.

PW2 Edgar Mutumba, PW4Sam Kamwanda, DW1Alex Kiyimba and DW2 Ben Kavuya all testified that the transaction between the appellant and the 2nd respondent was a sale not a loan transaction.

PW1, the appellant testified as shown at pages 21 and 22 of the record that he was given a cheque of 158,000,000/= and he signed the voucher. The balance of 10m was given to him in cash and that he also signed a voucher for that amount as well. That the respondents refused to give him copies of the vouchers.

During cross examination, the 1st respondent, DW2 testified that he paid the appellant 158,000,000/= by cheque and the balance of 112,000,000/= was paid in 2 instalments. He however admitted that he had no payment voucher to prove the payment.

The appellant was categorical that there was no way he could have sold his properties to the 2nd respondent at that price when he was aware that they

were worth much more. If he had wanted them sold, then he would have let the Bank sell them. He was firm that he only got 170,000,000/= from the 2nd respondent to be repaid within 6 months at an interest of 10% per month.

The sum of Shs. 158,940,397/= which was given to the appellant by cheque (Exh P2) was not disputed by the respondents. However, there is no documentary evidence to prove payment of the Shs.10,000,000/= cash alleged by the appellant. The 1st respondent DW2 did not adduce evidence to prove that he indeed paid 112,000,000/= in 2 instalments out of the land sale consideration of 272,000,000/= to the appellant which was said to have been the balance of the purchase price. PW4, Sam Kamwada testified that for any money given out by the 1st and 2nd respondents, the recipient would sign a payment voucher acknowledging receipt of the money but this appears not to have been the case in this transaction.

It's surprising that the 2nd respondent Company could not have in its possession and custody pertinent documents in business such as payment receipts and vouchers more so for payment of such large sums of money. One wonders how their accounts would be audited in absence of such pertinent documents. Be that as it may, the 1st respondent`s assertion that he paid the balance of 112,000,000/= in 2 instalments was not backed by any evidence. Had the respondent adduced evidence of the same, this would have been of great help to court.

PW4 testified that for any money paid out, a payment voucher was signed by the recipient. The vouchers for the period in issue that were brought forth, lacked important entries. What can be discerned from the 1st and 2nd

respondents` conduct is that if these payment vouchers actually existed and showed that Shs.10, 000,000/= had been partly repaid then this would have weakened the respondents` case. The respondent had to keep away the vouchers from Court because this would have been evidence of loan repayment. The absence of vouchers to show payment to the appellant of the alleged 112, 000,000/= said to have been made in 2 instalments would only lead one to conclude that the same were not issued because no monies were actually paid out by the 2nd respondent in full payment of the 272,000,000/= being the alleged purchase price of the suit properties.

In view of the foregoing, I find the testimony of the appellant more believable that the Shs. 272,000,000/= stated in the sale agreement as consideration was never received by him and that he was only paid 158,000,000/= by cheque and 10,000,000/= by way of cash and the remaining 2,000,000/=was held as transaction fees and thus the total of Shs. 170,000,000/= as total loan advanced.

The appellant testified that he was charged interest of 10% per month on the 170,000,000/=. If this is computed, it would come to Shs. 17,000,000/= per month and if multiplied by 6 months, it brings the total interest to Shs. 102,000,000/=. If this amount is added to Shs.170, 000,000/= which was advanced to the appellant, it would be equal to Shs. 272,000,000/= which is the exact amount the 1st and 2nd respondent included in the sale agreement as consideration for the purchase of the two suit properties. The appellant was categorical that he never received Shs. 272,000,000/= and that the only

money advanced to him was in form of a loan of Shs. 170,000,000/= to be paid within 6 months at an interest of 10% per month.

The appellant further testified that he found PW2, Edgar Mutumba the finance manager of the 2nd respondent in the office yet Edgar Mutumba testified at page 78 of the record that he had left the 2nd respondent`s company at the beginning of January and thus on 18th January 2018, he was not there. When asked whether there was a lawyer at the time of signing the alleged sales agreement in the 2nd respondent`s office, PW2 stated that he did not remember, yet at page 81 he further testified that he witnessed the signing of the sale agreement and received signed transfer forms from the vendor. This was a major contradiction by a key witness

The appellant further testified that when he went to service the loan on 14/2/2017, he paid the 1st instalment of 1,500,000/= to PW4, Kamwada Sam the 2nd respondent`s accountant, who received the same but did not issue him a receipt but instead told him that receipts would be issued to him once he paid the whole amount. He was instead issued with a computer printout, Exh IDI showing his account statement which reflected the dates, amounts, accounts and his name. That it's from this statement that he discovered that his properties had been transferred to the 3rd respondent on 7th February 2007.

Kamwada Sam further testified that his only role as a clerk assistant to the 2nd respondent for the period between November 2006 and August 2007 was to issue payment vouchers. He denied having issued or prepared Exh D1 the

computer printout of the appellant`s statement of account. He however admitted that every borrower was recorded in a ledger book.

Although PW4, Kamwada Sam testified that the 2nd respondent issued payment vouchers for that period, no vouchers in regard to the appellant`s payment seem to exist. PW4 also agreed that all borrowers were entered in the ledger book, but because the 1st and 2nd respondents alleged that the appellant was not a borrower, his name was not put in the ledger book.

It would appear that it was the practice in the 2nd respondent`s company not to follow generally known business practice of preparing payment vouchers and issuing payment receipts. Evidence shows that it was not the first time they were doing this for it had happened to one Arthur Musinguzi.

PW4 acknowledged knowing Arthur Musinguzi as their client who borrowed money from the 2nd respondent in 2007 and was paid the money by way of a cheque dated 28th April 2007which was admitted as Exh P 14. He admitted that despite this transaction having taken place, neither a payment voucher nor receipt existed despite the fact that the receipt book and payment voucher book for that period were availed in evidence. True to what had happened in the appellant`s case, even in Musinguzi`s case, his name did not appear in the ledger book of that period as a borrower. To this extent, the evidence of PW4 was consistent and believable. However, when it came to supporting the respondents` case, his evidence was marred with a lot of inconsistencies and pointing to untruthfulness. When court asked him; *"Did you issue a receipt in respect of this payment?"* he replied that; *"I do not remember my Lord. I need to check my Lord."* And when given the voucher book to check he stated; *"It is*

not in this payment voucher, it could have been over rolled". This clearly pointed to a made up show. While the documents in respect of other clients of the respondents existed in the 2nd respondent`s custody, the documents in regard to the appellant`s transaction and those of Arthur Musinguzi were nowhere to be seen apart from the contested land sale agreement and transfer forms.

The appellant was consistent that he went and paid 1,500,000/= to the 2nd respondent which was received but no receipt or payment voucher was given to him. The nonexistence of the name of Musinguzi in the 2nd respondent borrower`s ledger book whom they acknowledged was a borrower in 2008 casts more doubt on the respondent`s assertion that there was no part repayment because the name of the appellant was not in their ledger book and further confirms the appellant`s notion that the only reason Musinguzi and the appellant`s names could miss in the said ledger, was because the produced ledger was merely manufactured with the sole purpose of defeating the appellant`s claim. This makes the appellant`s testimony more believable than that of PW4 that he indeed acquired a loan from the 2nd respondent and secured the same with 2 of his properties. He went back and paid 1,500,000/= to the 2nd respondent as his first instalment on the said loan payment and he was not issued with a receipt to that effect What can be discerned from Exh PID is that he went back to pay the 1st instalment on 14th February 2007. It was then that he discovered that his properties had been transferred into the names of the 3rd respondent on 7th February 2007. According to the land titles ExhP9 and P10, the 3rd respondent was registered thereon on 15th February 2007 and 21st February respectively.

The appellant testified that he signed a sale agreement, blank transfer forms, an A4 blank paper one of which he accepted was a Power of Attorney. That he effected these signatures on the understanding that the documents were to act as security for payment of the money advanced to him by the 2nd respondent. That they were not meant for the 1st and 2nd respondents to use to transfer his properties.

He further testified that at the time of signing transfer forms Exh P3 and P4, he never saw a one Micheal Nywana who signed on the same documents as a witness. That he neither authorised the 1st respondent to pick the certificates of title to his two suit properties from the bank nor did he write any letter introducing him to the bank.

PW2 testified at page 78 of the record that by 18th day of January 2007, he had left the 2nd respondent`s company and yet he further testified that he witnessed the sale agreement on the 18th day of January 2007 and received signed transfer forms from the vendor.

The 1st respondent DW2`s testified that he was physically introduced to the bank by the appellant. Alex Kiyimba DW1 testified that when both the appellant and the 1st respondent appeared before him at the bank, the appellant had a letter introducing the 1st respondent to the bank coupled with Powers of Attorney. Although the Bank retained a copy of the Powers of Attorney they didn't find it important to retain a copy of the said letter in their bank records. It is surprising that the bank didn't retain a letter introducing a 3rd party to the Bank which was to enable the 3rd party collect securities kept by the Bank.

This lends credence to the appellant`s evidence that he never, either physically or by way of letter, introduce the 1st respondent to Housing Finance Bank.

In his testimony, the 1st respondent Ben Kavuya testified that he had obtained Powers of Attorney to deal with the impugned properties but later he said that it was his wife a one Barbra Kavuya who signed the transfer forms and that he was neither involved in the transfer nor was he aware of what happened regarding the valuing of the suit properties at 10,000,000/= each. This was a major discrepancy and inconsistency in the respondents` evidence.

In my view, this evidence corroborates the testimony of the appellant that he signed blank transfer forms and whatever appeared therein was filled in later by the 1st respondent`s wife as admitted by the 1st respondent with his full knowledge since he is the one who gave the appellant the forms to sign and he was present when the appellant signed the blank forms. He asserted that from the beginning he had Powers of Attorney to deal with the suit properties. Being the main director of the 2nd respondent company, there was no way he would not have been aware of what transpired regarding this transaction which he initiated from the beginning. In his testimony PW4, Sam Kamwanda clarified that transactions and dealings in the Company regarding properties, were dealt with by the Managing Director who was the 1st respondent.

What is more intriguing is that the transfer forms, Ex P3 and P4 stated the purchaser as being the 3rd respondent, Rutungu Properties Ltd yet the appellant only transacted with the 1st and 2nd respondents alone. During cross examination, the 1st respondent, DW2 admitted that the 3rd respondent

was not the purchaser of these properties. The appellant clearly stated during his testimony that the 3rd respondent was unknown to him and he never transacted with him. DW2 in his testimony stated that Rutungu Properties was not a purchaser of the properties. There was no evidence that Rutungu had given consideration for the transfer or that it was a gift. This corroborates the appellant`s earlier testimony that he signed blank documents and the contents were filled in by the 1st respondent`s wife and 2nd respondents as they so pleased with the knowledge of the 1st respondent.

In the absence of evidence that the parties intended to be bound contractually to the sale and transfer, Court should be reluctant in deciding that the executed documents formed the basis of a legal contractual relationship. The exigencies of everyday life such as the need for money to pay medical bills, school fees which cause temporary indisposition make it most unlikely that either party contemplated that one was legally bound to confer transfer of such security.

It is now settled law that one of the essentials for a valid contract to exist is that there must be an intention to create legal relations which the parties must manifest.

Section 10 (1) of the Contracts Act 2010 defines a contract as an agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound.

Black's Law Dictionary, 9th edition, defines a contract to mean an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.

If a reasonable person would consider that there was an intention so to contract, then the promisor would be bound and vice versa. On the probabilities of this case, I reach the conclusion that while admitting that a sale agreement was signed albeit not having been witnessed by the person said to have done so, and transfer forms executed, the appellant never intended to enter into a legal contract of sale of his properties. The parties never agreed to the "same thing". There was no meeting of minds on the issue of sale of the two properties

There must be a positive intention to create a legal obligation as an element of contract; deliberate promise or agreement seriously made. If reasonable people would assume that there is no intention of the parties to be bound with what they are doing, then there is no contract.

I am alive to the fact that no loan agreement exists on record. Be that as it may, after scrutinizing the evidence as a whole, it appears to me that the appellant signed the land sale agreement, transfer forms and Powers of Attorney with the sole understanding that the transaction that he was entering into with the 1st and 2nd respondents was a loan transaction. The suit properties and documents he signed were only meant to act as security should he have failed to repay the loan.

The appellant wanted to save his properties from being sold by Housing Finance Bank. That's why he ran to the 1st and 2nd respondents for financial rescue and abided by the aforementioned practices. The would be rescuers turned out to be worse than the Bank where he was running from.

The 1st and 2nd respondents` conduct of asserting that the transaction was a sale in total disregard of the parties understanding and their subsequent dealing with the loan securities in a way inconsistent with what was intended and agreed to by the parties was not only illegal but was also marred with fraud. The act of transferring the suit properties, well knowing that the same were intended to be securities for the loan advanced, of dealing with the securities as though they belonged to the 1st and 2nd respondents when they were merely to hold them as interest in equitable mortgages, of realising the securities before the agreed date of repayment of the loan, of transferring the suit properties to a third party without the consent of the appellant, of declaring the suit properties as empty plots for valuation purposes by the chief government valuer and of declaring the value of the suit properties lower than their actual estimated market value at the time when the respondents had allegedly bought them imputes no other conduct than fraud on the part of the respondents.

For the above reasons, I find that the transaction between the appellant and the 1st and 2nd respondent was a loan transaction and the subsequent conduct of the respondents thereafter was illegal and fraudulent.

On grounds 2 and 4, the learned trial Judge is faulted for having decided that the cheating of stamp duty by under valuation of the suit properties was not

enough to invalidate their transfer and that the Commissioner General URA could correct and collect the cheated stamp duty and validate the transfer.

Counsel for the appellant submitted that the values reflected on the transfer forms stated that there were no developments on the suit properties yet both properties were fully developed. The cheating of stamp duty was criminal and fraudulent and court ought not to have ignored such blatant illegalities and should not have ordered for collection of taxes that were due because the transfer was a fraud.

In Exhs P3 and P4 (transfer forms), the value of the suit properties was stated to be 10,000,000/= each on the basis that there were no developments thereon.

According to PW3 the surveyor, there were developments on both properties, comprising of apartments at Bweyogerere and a Hostel at Kataza. This was admitted by the 1st respondent during cross examination.

PW3, Paul Mungati who surveyed the land stated in his Survey report Exhs P11 and P12 that the value of the property at Bweyogerere was 170,000,000/= and that at Kataza with the Hostel at 365,000,000/=.By this valuation, the total value of the properties was therefore 535,000,000/=

The respondents contended that PW3 was a surveyor not a valuer, and thus his valuation and value of the properties was contested. What is clear from the evidence on record is that the value of the two suit properties was far beyond the 10,000,000/= which was filled in the transfer forms. The 1st respondent was at the centre of this transaction from the beginning to the

end. It is therefore absurd to for him to have said that he wasn`t involved when it came to what was filled in the transfer forms regarding the value of the suit properties. The learned trial Judge pointed out and rightly so that the transfer forms and valuation documents were indeed very important documents which ought to have been taken seriously.

From the evidence and upon scrutiny of the documents lead to the finding that the transaction between the parties was a loan transaction and the 1st and 2nd respondents' subsequent transfer of the suit properties into the name of the 3rd respondent was illegal and fraudulent. None of the respondents obtained good title from the appellant to the suits properties and the transfer to the 3rd party Rutungu Properties Ltd was unlawful.

The respondent asked court to follow the reasoning and decision in **Ranchhodbhaii Shivabhai Patel Ltd & Another v. Henry Wambuga (Liquidator of African Textile Mill Ltd) & another: Court of Appeal Civil Appeal No. 057 of 2010** where court held that;

> *"Having held as we have on ground one, that there was no fraud committed by the 1st respondent in the process of sale, we find that the 2nd respondent obtained good title. The issue raised in this ground of appeal regarding none disclosure of the Contract sum in the transfer documents and paying less stamp duty on the sale agreement is a matter that ought to have been reported and investigated by the Tax authority. On its own this would not vitiate the contract, but it would probably attract legal sanctions under Tax Law."*

The principle in the above case was that were title is good title, the cheated stamp duty can be reported to and investigated by the tax authority and the Commissioner General of URA can thereafter collect the cheated stamp duty or shortfall in the said tax. The decision is distinguishable from the present in that the main agreement (land sale agreement) relied on by the respondents herein was illegal and tainted with fraud. The transfer forms that were signed were not intended to effect immediate transfer. Execution of the sale agreement was tainted with illegalities and fraud and no good title could pass. Similarly, I find that the transfer of the suit property to the 3rd defendant, was tapered with falsehoods, non-disclosures and blatant dishonesty was tainted with fraud. The 1st, 2nd and 3rd respondents were directly responsible for that fraud.

For those reasons ground 2 succeeds.

On ground 3, the learned trial Judge is faulted for failing to award special and general damages to the appellant when he was evicted from the suit properties. The appellant`s counsel submitted that the appellant was wrongly evicted and his moveable property which was stored in the suit premises was wrongfully taken away. That the said property had a definite value and even if the sale of the land was valid the moveable properties would not be part of the sale.

In determining this matter the learned trial Judge stated as follows;

"However, apart from a long list of receipts for property purchased for the hostel at kataza, Bugolobi there is nothing to detail what was destroyed at the time of eviction.

The plaintiff did not raise the destruction with the police or other civil authorities who could have come to testify about this. No inventory of destroyed property was given or valuation made. Special damages must not only be pleaded but also strictly proved. In this regard the plaintiff has failed the test.

As to rent due counsel for the defendants submitted that this is a departure from pleadings of the plaintiff and should be disallowed. I agree. That being the case the head for special damages must fail...."

Special damages must be specifically pleaded and strictly proved. **(See; Estate of Shamji Visram Kurli Karsan Shankesprasad Maqanlal Bhatt and Anor. Civil Appeal No. 25 of 1964 [1965] E.A 789 at page 796).** The appellant claimed a sum of Shs. 72,108,276/= as special damages.

The appellant pleaded that due to the illegal eviction he was deprived of his properties. He listed the particulars of the properties and attached thereon payment vouchers showing how much he bought them as annexures H1 to H30 to the plaint. DW3, Stanley Mugabi a business man, DW4, Okacunga Moses a carpenter, DW5, Lawrence Baganga, a welder all gave testimony to the effect that they used to do business with the appellant and he used to buy

the listed properties from them. That upon purchase, they would issue him with receipts.

The appellant`s claim was not based on properties that were destroyed during the time of eviction as stated by the respondents and decided by the learned trial Judge. His claim was hinged on properties he left behind in the said suit properties when he was evicted enlisted under particulars of special damages. Particulars of special damage totalling to Shs. 72,108,276/= were as follows;

1. Tables Code 0101 7,114,080/=
2. Television Sony Code 0102 719,760
3. Chairs Code 0103 8,980,000/=
4. Water jerry cans Code 0301 267,000/=
5. Steamer Lamps Code 0401 193,280/=
6. Hurricane Lamps Code 0402 334,000/-
7. Double metallic decker beds Code 0501 4,742,632/=
8. Vono Single Beds Code 0502 375,080/=
9. Wooden Beds Code 0503 5,804,992/=
10. Maize Mill Machine Code 0601/- 14,800,000/=
11. Electric Motor Code 0701-0703 12,349,652
12. Electric Starters and Solar Code 0801-0803 3,590,000/=
13. Electric Cables, Bulbs & Fittings Code 0901-907 11,090,000/=
14. Chickens/birds 247,800
15. Valuation fees 1,500,000/=

The appellant tendered in receipts as evidence in proof of his claim for special damages. The respondents relied on the testimonies of DW3 Stanley Mugabi

a business, DW4 Okacunga Moses a carpenter and DW5 Lawrence Baganga a welder.

The appellant stated that Lawrence made the double decker beds and vonos and Moses made the tables and chairs DW4, Moses and DW5 Lawrence admitted that they knew the appellant as their customer while DW3 stated that well as the receipts bear his business name and contact number and the things therein are the ones he deals in, he never issued the receipts but agrees that the same could have been issued by his fellow workers.

His list and their values were not contested during the hearing. The receipts adduced by the appellant collectively attached to the plaint as annexure H1-H26 and H28 clearly show the properties that were in the suit properties and the amounts of how much they were purchased. However, despite the appellant pleading 247,800/= for Chicken/birds and attached an inventory H27 for the birds, no evidence was led to prove the claimed amount. They appellant prayed for Shs 72,108,276 as special damages. In light of the above findings, I award Shs. 71,860,476/= as special damages after deducting Shs. 247,800/= for Chicken.

The appellant also made a claim for rent. In the pleadings before the trial court, he made prayers for;

a) *General damages*

b) *Special damages or return of enlisted items*

c) *An order that the sale of the suit properties to the first and second defendants and consequently to the third defendant be declared null and void.*

d) *An order to rectify the titles to the suit property by transfering them back to the plaintiff's names.*

e) *Interest on (a) and (b) above*

f) *Costs of this suit*

g) *Any other relief that the court deems necessary.*

It is clear that there was no prayer for rent .

Order 7 Rule 1 (g) of the Civil Procedure Rules provides;

> *Every plaint shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the court may think just to the same extent as if it had been asked for; and the same rule shall apply to any relief claimed by the defendant in his or her written statement.*

The Supreme Court in ***Ms Fang min V Belex Tours and Travel Limited SCCA No.6 of 2013 consolidated with Civil Appeal No.1 of 2014, Crane Bank Limited V Belex Tours and Travel Limited*** was clear that a party cannot be granted relief which it has not claimed in the plaint or claim.

I agree with the learned trial Judge that rent was never pleaded. The claim was a departure from pleadings and I have no reason to depart from the finding of the learned trial Judge.

The apellant claimed general damages which by law are compensatory in nature. General damages must be a direct, natural or probable consequence

of the breach that caused the dispute, **See Storms V Hutchinson (1905) AC 515**.

In the instant case, the apellant was deprived of his properties in a manner tainted with illegality. He was using the suit properties for commercial purposes in the apartments and hostel. He was therefore, deprived of financial earnings from them. The apellant resided on one of the suit properties in Bweyogerere where he was evicted forcefully. All these events made the apellant suffer emotionally and economically. This entitles him to an ward of general damages. I consider the sum of Shs. 50,000,000/= as sufficient to compensate him for the injury he suffered.

On ground 5, the learned trial Judge is faulted for having failed to evaluate evidence on record. The appellant's complaint is that the learned trial Judge did not find that; the appellant was made to sign blank transfer forms, DW6, Micheal Nywana never witnessed the appellant signing the transfer forms and that the titles were fraudulently acquired from the bank by the 2nd respondent.

I have already determined these aspects of the appeal under separate grounds 1 and 2 above and I find no reason to go into them again.

The appellant claimed interest on special and general damages but never prayed for a specific percentage. Award of interest is discretionary and the basis for such award is that the respondent has had the use or denied the appellant the use of his property so he ought to compensate the appellant appropriately.

In **Sietco vs Noble Builders (U) Ltd SCCA No. 31 of 1995** court stated thus;

> *"Where a person is entitled to a liquidated amount or specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing the suit. In keeping with this principle, I would award interest on the decretal sum at the commercial rate of 25% per annum from the date of filing the suit till payment in full."*

In the instant case, I would award interest at 20% p.a on special damages of Shs. 71,860,476/= being monies for the items he left in the suit properties from the date of filing till payment in full and 6% p.a on general damages from the date of judgment till payment in full.

Although the 2nd respondent did not claim for the Shs. 170,000,000/= which the appellant acknowledged as having received as a loan, it is just and equitable that the appellant refunds this sum of money to the 2nd respondent. I hasten to note, that the loan had to be paid back within 6 months at an interest rate of 10%. However, the appellant cannot be made to pay the said interest as he had started paying the loan when he realised that his properties had been transferred into the names of the 3rd respondent. I have no reason and basis to award the earlier on agreed interest. I would however award interest at an annual rate of 20% p.a on the Shs.170, 000,000/= from the date of Judgment until payment in full.

In the result and for the reasons given herein, the appeal succeeds. The judgment and orders in the lower court are hereby set aside and its ordered as follows;

a) That the transaction between the appellant and the 1st and 2nd respondents was a loan transaction.

b) The sale of the suit properties to the 1st, 2nd respondents and the consequent transfer of the same to the 3rd respondent was illegal and fraudulent thus rendering the transaction null and void.

c) The titles to the suit properties be rectified by transferring them back into the names of the appellant.

d) The appellant is awarded Shs. 71,860,476/= = as special damages;

e) Shs. 50,000,000/=is awarded as general damages

f) The appellant refunds Shs. 170,000,000/= to the 2nd respondent being the loan amount advanced.

g) Interest on (d) and (f) above at the rate of 20% p.a from the date of judgment until payment in full and (e) above at a rate of 6% p.a from the date of judgment till payment in full.

h) The appellant is warded costs in this court and in the court below.

I so order.

Dated this.....12th.....day of.....Oct.....2021.

Cheborion Barishaki

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 36 OF 2010

Coram: [Richard Buteera, DCJ; Cheborion Barishaki; Hellen Obura, JJA]

(An appeal from the decision of the High Court of Uganda at Kampala (Commercial Division) before Hon. Justice Geoffrey Kiryabwire dated the 24th day of August, 2010 in Civil Suit No. 560 of 2007)

WAKANYIRA GEORGE DAVID :::::::::::::::::::::: APPELLANT

VERSUS

1. **BEN KAVUYA**
2. **GLOBAL CAPITAL SAVE 2004 LTD**
3. **RUTUNGU PROPERTIES LTD :::::::::::::::::::::: RESPONDENTS**

JUDGMENT OF RICHARD BUTEERA, DCJ

I have had the benefit of reading in draft the judgment of my learned brother Cheborion Barishaki, JA and I agree with him that this appeal should succeed. I also concur with the orders and declarations he has proposed.

As Obura, JA also agrees with the judgment and orders of Barishaki, JA the appeal is allowed with costs, there will be orders in the terms proposed by the learned Barishaki, JA.

Dated at Kampala this ..... day of ..... 2021.

.....

Richard Buteera

DEPUTY CHIEF JUSTICE

THE REPUBLIC OF UGANDA

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VERSUS

1. **BEN KAVUYA** }
2. **GLOBAL CAPITAL SAVE 2004 LTD** }::**RESPONDENTS**
3. **RUTUNGU PROPERTIES LTD** }

JUDGMENT OF HELLEN OBURA, JA

I have read in draft the judgment of my learned brother Hon. Justice Cheborion Barishaki, JA and I concur with his conclusion that this appeal succeeds and the orders proposed.

Dated at Kampala this...12th......day of........Oct...............2021.

....

Hellen Obura

JUSTICE OF APPEAL