THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT-00-CC-CS-0576 OF 2004

1. DR. JAMES KASHUGYERA TUMWINE]
2. DR. LYNNETTE TUMWINE] ::::::::::: PLAINTIFFS

VERSUS

1. SR. WILLIE MAGARA]
2. SR. MARGARET MAGOBA] ::::::::::::::::::::: DEFENDANTS

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

The Plaintiffs, husband and wife, sued the Defendants for recovery of money had and received in the sum of Shs.50,000,000-. The money was consideration in a failed sale of land transaction.

The particular facts giving rise to a question are always important for the easy grasp of that question. From the pleadings, by a land purchase agreement executed on 6/8/2004 between the parties, the Plaintiffs were to purchase property comprised in LRV 2004 Folio 13 3A Ojera Close at Entebbe, Uganda, belonging to the Defendants. Without prior arrangement

with the Defendants themselves, the Plaintiffs had before the execution of the said agreement paid a sum of Shs.50m to an Estate Agent, M/S Kasulu Property Masters (E.A) Ltd, herein after called the Estate Agent. In that Sale Agreement, the Sellers acknowledged that the buyers had made a deposit of the full amount or the purchase price with the agent but that the sellers would, upon receipt of full payment relinquish possession and all their interests in the said land. The sellers were also to execute transfer forms in favour of the buyers and on receipt of the full payment from the agent immediately hand them over to the buyer. From the pleadings and evidence, completion of the transaction depended on the sellers receiving the purchase price. Before the parties dream could be realized, the agent disappeared with the money. To-date, the sellers have not received the payment and the buyers have not taken possession of the property. The buyers have clearly called off the deal. Through this action, they seek recovery of the purchase price, not from the agent to whom they paid it but from the sellers to whom the payment was intended. Although the Defendants had indicated that they would raise the issue of the plaint disclosing no cause of action against them as a preliminary point of law, they did not do so. Hence the determination of the issues on merits.

At the scheduling conference, the parties agreed that:

1. The Defendants had property for sale.
2. The Plaintiffs became interested in the property.

3. The property, the subject matter of the sale, was advertised in the New Vision newspaper by Kasulu Property Masters on behalf of the Defendants.

4. The Plaintiffs approached Kasulu Property Masters, were shown the suit property, were satisfied with it, negotiated the price with the said agents, paid for it and were issued with receipts.

5. The payment was effected before execution of the sale agreement between the Plaintiffs and the Defendants.

6. A sale Agreement, P. Exh. 1, was executed between the parties to this suit.

7. The Defendants have not transferred the suit property to the Plaintiffs.

The sole issue for determination is: <u>whether the Plaintiffs are entitled to the remedies sought.</u>

The plaint appears to have been filed in a hurry to the extent of counsel forgetting to sign and date it. As no objection was raised to it, I have disregarded the laspse in the spirit of Article 126 (2) (e) of the constitution which mandates this Court to administer substantive justice without undue regard to technicalities.

At the hearing, only the first Plaintiff testified. He is a Medical Doctor, resident of Bugolobi. He sued the Defendants because he paid the money to

their agent. He did so in response to an advertisement that appeared it the press. The agents showed them the house and determined the price with them. They paid the purchase price in three installments of Shs.5,000,000-, Shs.40,000,000- and Shs.5,000,000- on 30/7/2004, 3/8/2004 and 4/8/2004 respectively. The agents issued them receipts indicating that it was payment for Entebbe House at Alex Ojera Close Plot 3A at Shs.50,000,000-. Then on 6/8/2004 they met with the sellers and executed the Sale Agreement. They were to have got possession by 10/8/2004 but to-date they have not. The reason they received from the sellers was that they had not received the purchase price. According to him, they did not deem it necessary to sue the agent because he was not their agent but the sellers' agent.

The evidence for the Defendants was given by Sr. Magoba, the second Defendant. According to her, she heard announcements on radio and other media involving an agency that was buying and selling land. They had a house in Entebbe which they put on the market. The agents said they would earn 10% commission on the transaction. Anything between Shs.50 – 55m was acceptable to them. Later they received communication from the Agent that a potential buyer had been found. They went to the Agent's office on 6/8/2004 and an agreement was written for them. In the course of the meeting, the issue of money took centre stage. One Kusasira who was assisting them on behalf of the Agent assured them that the money paid in by the buyers had been banked on the Agent's Account. On that

understanding they executed a sale agreement in the terms already explained. She could not allow the Plaintiffs to take possession because she has never been paid. She then received summons in connection with this suit. The detailed account of each witness is contained in the proceedings of the day.

From the evidence, it was the understanding of the parties that if the sellers did not get the payment, they would not relinquish possession of the property and would not effect the transfer. It made sense because since the money had been deposited in the sellers' absence, this was their only chance of verifying the alleged payment by the buyers to the sellers. As fate would have it, the Agent disappeared soon after. I would appreciate this to be the reason for the buyers not pursuing the enforcement of the contract through an action of specific performance but to recover the amount as money had and received.

Money which is paid to one person which rightfully belongs to another, as where money is paid by A to B on a consideration which has wholly failed, is said to be money had and received by B to the use of A. It is recoverable by action by A. The paying of A to B, according to the learned author of A Concise Law Dictionary by P.G. Osborn, 5th Edn at p.212, becomes a quasi - contract, an obligation not created by, but similar to that created by contract, and is independent of the consent of the person bound. The author

gives the basis of the action for money had and received as being rooted in a quasi – contract on the footing of an implied promise to repay. The other view is that in the action for money had and received liability is based on unjust benefit or enrichment; i.e. the action is applicable whenever the Defendant has received money which, in justice and equity, belongs to the Plaintiff under circumstances which render the receipt of it by the Defendant a receipt to the use of the Plaintiff (at p.262).

Whichever way it is looked at, there must be evidence of the payment sought to be recovered. In the instant case, the payment was not made to the Defendants. It is said to have been made to Kasulu Property Masters. I say 'said' because Kasulu Property Masters is not a party t this case. While the Plaintiffs may have the confidence that they paid money to the Agent, that confidence cannot be wholly shared by the Defendants who were not present when the deposits were being received. No official of Kasulu Property Masters appeared as a witness to confirm or deny receipt of funds by them. But for purposes of this case, it is safe to assume, in the absence of any evidence to the contrary, that the money was received and retained by the Agent now said to be impecunious. In view of the two conflicting positions in the Sale Agreement, i.e. the sellers acknowledging that payment had been effected on the Agent while at the same time they withheld the transfer of the property pending receipt of the said payment, it cannot be accurately said that this was a typical act of ratification in the law of agency. In ratification, the agent's act is adopted unreservedly. In the instant case, it

was adopted with reservation, as if both parties knew or had cause to suspect that the Agent could after all be conman he turned out to be. In a typical case of ratification, the parties would have concluded the deal, including the taking of possession, independently of the receipt of the money by the sellers from the Agent. I'm therefore satisfied that the issue of money took a centre stage in the negotiations. Hence the agreement that the sale would be concluded upon the sellers receiving full payment.

I now turn to the law that governs transactions of this nature, the Law of Agency.

An agent is a person employed to act on behalf of another. An act of an agent, done within the scope of his authority, binds his principal. Once an agent has brought his principal into contractual relations with another, he drops out, and his principal sues or is sued on the contract. There are many types of agents. In the instant case, we are concerned with an Estate Agent.

G.H.L. Fridman in his book, The Law of Agency, 7th Edn at p.48, throws light on the obligations of Estate Agents. According to the author, Estate Agents are in a very odd situation, so far as concerns the general law of principal and agent. Unless given express authority in such respect, an estate agent has no authority to make a binding contract of sale between his client and a third party. Indeed no contract of sale was made between the Plaintiffs and

the Agent in this case. The parties had to meet at the Agents offices to conclude the contract. Whereas the last payment was made by the Plaintiffs on 4/8/2004, the meeting between sellers and buyers did not take place until 6/8/2004.

The same learned author, Fridman, comments on the question that has caused much more judicial debate in England than in our East African region. This is whether a estate agent has implied authority to receive a deposit from a prospective purchaser of the house or property the agent has been employed to sell on behalf of the owner. It is the same issue in the instant case where the Plaintiffs have not shown that the Agent had express authority from the sellers to receive payment on their behalf.

There is a long history of such debate in England where the institution of Estate Agents has taken much more root than in Uganda. In **Ryan –Vs-Pilkington [1959] All ER 689,** the Court of Appeal held that an estate agent was impliedly authorized to accept a deposit from a prospective purchaser. The owner of the property was held liable. A few years later in **Burt –Vs- Claude Cousins & Co. [1971] 2 QB 426,** the same Court of Appeal had a similar view over a similar deposit made to the agent. There was, though, a dissenting view among the Judges. Shortly thereafter, in **Barrington**

-Vs- Lee [1972] 1 QB 326, the same Court of Appeal, doubting the fairness in the Burt case, supra, but without over ruling it, held that in some what similar situation, the owner was not liable to the third party. But this was because the facts showed that the Agent received the deposit as a stakeholder and not as an agent. A stakeholder, to appreciate the point further, is a person with whom money is deposited pending the decision of a bet or wager; or one who holds money or property which is claimed by rival claimants but in which he himself claims no interest.

The House of Lords finally resolved this conflict in **Sorrell –Vs- Finch [1977] AC 728.**

The facts in that case are almost on all fours with the ones in the instant case. I will set them out in greater detail than in the other cases I have already referred to because of their relevancy to the issue now before Court. The Appellant instructed one L, who had set up business as an estate agent, to find a purchaser for his house. L, unknown to the Appellant, was an undischarged bankrupt. The house was to be offered for negotiations at pounds 5,500. Nothing was said about the deposit being taken by L. Five prospective purchasers, apart from the Respondents, paid deposits to L. The Respondents themselves paid 10% deposit of pounds 550 to L who issued 2 acknowledgment receipts to them. Both documents contained the words, 'subject to contract.' L disappeared. The Respondents then visited the

Appellants who informed them that many other prospective purchasers had made similar deposits of money with L. The Respondents sued the Appellants for recovery of pounds 550 as money had and received by the Appellant. The trial Court followed Burt –Vs- Claude, supra, and decided in favour of the Respondents. On Appeal, the Court of Appeal, by a majority dismissed the Appeal. On further appeal to the House of Lords, the Court held, and this is very significant in as far as the instant case is concerned, that it was not in accordance with the first principles in the branch of the law concerned to hold that the estate agent in such circumstances as the present was athorised to receive on the vendor's behalf a pre-contract deposit in the absence of express or implied authority so to do, and in neither authority was such authority herein given; nor did the prospective vendor's knowledge that a deposit had been received of itself impose any liability upon him to repay it.

I agree with the principle stated in that case. It makes sense. The prospective buyer can at that stage, before the contract is concluded, get another property and abandon the earlier deal. He will be entitled to recover his money from the Agent. On the other hand, until the contract of sale is concluded, the prospective seller would have no access to such money. It is not yet his money. He could even get a better offer and sell the property without the Agent's knowledge. He would not be in any breach of contract with the prospective buyer or the Agent since no contract would have been

concluded anyway. Nearer home, in **Tanganyika Farmers Association Ltd –Vs- Unyamwezi Development Corporation Ltd [1970] EA 620,** money was paid by the Defendants to the Plaintiff's agents who subsequently disappeared. The Plaintiffs successfully claimed from the Defendants. In other words, the Defendants had to pay twice, in respect of the same transaction. The Court approved the words of the trial Judge when he said:

> *"..... I find they (the agents) had no authority to receive payment on behalf of the Plaintiffs. There is no evidence of it and no reason to assume it. Such authority is not necessary to the business of brokerage and was not necessary to this particular transaction. There is no evidence or precedent of any relevant customary authority ..... there is no ostensible authority."*

I'm persuaded by the above reasoning. Relating it to the instant case, in the absence of any authority from the sellers, express or implied, which the buyers can hold them against, that is, that the sellers had given the Agent instructions to receive the money from the prospective buyer, only themselves know why they paid such a hefty sum of money to a person who was not in position to conclude a sale agreement with them on behalf of the sellers. They could have sought legal advice at that stage as to the effect of such payment to an Agent, or they could have sought audience with the sellers to confirm to them whether the Agent had their blessing to receive

payment on their behalf. They did neither of the above. In my view, it is immaterial that when they eventually met, the sellers acknowledged that payment had been passed on to the agent. The harm had already been done. The acknowledgment was made, as lawyers say, without any consideration at all. From the evidence of PW1 and DW1, the only witnesses in this case, the sellers made the acknowledgment in the hope that the Agent was indeed keeping the money. The sellers were not present when the money was allegedly being deposited with the Agent. None of it has been released to them. The sellers are not, in my view, out of order to doubt the fact of the payment itself. I would therefore hesitate to hold that they, the sellers, are bound by the Agent's unilateral decision to receive the money from the buyers. It is the buyers who entrusted it to the Agent and it is only them who can recover it from the said Agent.

In these circumstances, I'm in agreement with counsel for the Defendants that the Plaintiffs have no sustainable claim against the Defendants. Accordingly, they are not entitled to the only remedy sought herein, namely, the refund to them of Shs.50m by the Defendants. I would find no merit in the suit and dismiss it.

As regards costs, the usual result is that costs follow the event. However, this rule is subject to the Court's discretion so that the winning party may not be awarded his costs. Given the circumstances of this case and the

peculiarity of the issue between the parties, fairness dictates that each party be ordered to bear its own costs. I order so.

Yorokamu Bamwine

J U D G E

27/06/2005