

**REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**COMMERCIAL COURT DIVISION**

**HCT-00-CC-CS-0497-2004**

**NDAGIRE GLADESI  
SEBWAMI HENRY**

**PLAINTIFFS**

**VERSUS**

**NSUBUGA MPOMBE HUSSEIN**

**DEFENDANT**

**BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE**

**JUDGMENT**

1. Ndagire Gladesi, plaintiff no.1, is the mother of Sebwami Henry, Plaintiff No.2. They bring this action seeking orders to declare that the defendant, Nsubuga Mpombe Hussein, breached a contract between them, and that the plaintiffs are now entitled to rescind the same. They seek, in addition, general damages, interest and costs of this suit.
2. It is alleged on the plaint that the plaintiffs agreed to sell to the defendant one plot of land at Bwaise in Bokassa Zone, measuring 10 feet by 40 feet in exchange of which the defendant would build for the plaintiffs a two roomed house with an out door annex of three rooms plus a pit latrine. An agreement in Luganda was executed. It is further alleged that it was an implied term of the contract that the defendant would build the building in question in accordance with KCC regulations and building plans.
3. It is contended for the plaintiff that there was a fundamental breach of the agreement by the defendant for the following reasons: (i) the defendant did not use any building plan during his construction and yet it was orally agreed between the parties that he would use a standard building plan. (ii) the defendant built a weak, defective and sub-standard premises that are not fit for the intended commercial and accommodation purposes, contrary to an oral agreement that the defendant should

contract recommendable structures. (Plaintiffs intend to rely on an urban planner/architect's report.)

(iii) The defendant trespassed on a neighbour's plot of land in building his own part of the building leading to the neighbour refusing to perform a different agreement with the plaintiffs.

(iv) The defendant did not build the three roomed boys' quarters.

(v) The defendant did not complete all the constructions within the orally agreed period of 3 months from the date of signing of the agreement and,

(vi) The defendant started benefiting from the contract without completing his obligations by putting a tenant in one of the completed shops in the front building.

4. The plaintiffs claimed the right to rescind the contract of sale, general damages, interest and costs of the suit.
5. The defendant opposed this action, denying all claims of the plaintiff with regard to fundamental breach of the contract. It was not possible to complete the boys quarters as there was no sufficient space available for the agreed measurements. The plaintiffs by their actions prevented the defendant from continuing with construction of the same. The plaintiffs occupied and took over possession of the building and started using the same before completion and hand over of the same to them by the defendant, rendering it extremely difficult, to complete construction of the building. Nevertheless one room was completed and the plaintiffs let it to the defendant at a monthly rent of shs. 150,000.00.
6. The defendant contends that he built the building in accordance with the 17<sup>th</sup> September 2002 agreement. No building plans were agreed upon. If there are any leakages and cracks these are the result of the plaintiffs' actions in taking over the premises before completion. The plaintiffs have been in occupation of the premises for two years and are estopped from denying that the building is not of the agreed standard.
7. With the defendant's own portion of the building, the defendant contends that he built the same on the plot of land whose boundaries were shown to him by the plaintiffs. The defendant prays that this suit be dismissed with costs.
8. Prior to the hearing of this case, the plaintiff no.2 entered into a settlement on behalf of plaintiff no.1 and himself with the defendant to settle this suit on the terms set out in a written settlement that was filed in court following mediation by CADER. This written settlement was disputed by the counsel for plaintiff no.1, at least as regards plaintiff no.1

that she had not consented to the settlement. Plaintiff No.1 was allowed to proceed with presenting her case.

9. As regards plaintiff no.2 and the defendant there is a written settlement between the two of them. As between the two of them judgment by consent is entered on the terms set out in the filed agreement.
10. I now turn to the case for plaintiff no.2. She called three witnesses, the first of which was Harriet Namugenyi. She is a grand daughter of the plaintiff no.1. She was present at the execution of the agreement between the defendant and the plaintiffs. She testified that the defendant built two rooms in front. The boys' quarters were never completed. The toilet was not built. The roof and shed on the front rooms are leaking. The walls have cracks. The defendant used sub-standard materials in construction. The two rooms are occupied by tenants, paying Shs.150,000.00 per month for each room.
11. PW1 further testified that they stopped the defendant from continuing with construction as he had deviated from the plan as the rooms being built were smaller than the agreed measurements.
12. PW2 was the plaintiff no.2. She testified that she knew the defendant. She never sold any land to him. Her house collapsed. The defendant offered to build her house for her. He was a builder. The defendant has no land or building near Kyazike. The land belongs to the plaintiff. They agreed that the defendant constructs a house for her. Three rooms would be constructed, one for her son, one for her, and the third one for the defendant. He constructed the house and put their tenants. The plaintiff did not pay the defendant for the work. She is not happy with the building the defendant constructed for her. She is blind. She wants the court to separate them so that each person goes his/her way.
13. She has never rented the house in question. The tenants in the house are the defendant's tenants. The defendant has not paid her any money. She was not happy with the defendant's work and they went with grand daughter and stopped him from continuing with further construction.
14. PW3 was Margaret Namusisi, a daughter of the plaintiff no.1. She was present at the time the agreement between plaintiff no.1 and the defendant was made. She witnessed the agreement and signed it. She testified that the defendant did not fulfil the agreement. He did not build the three rooms for the boys' quarter. PW3 stated that she saw only two

incomplete rooms at window level. The defendant was stopped from continuing with construction by plaintiff no.1.

15. The roof of the main house leaks and water enters the house. Rent for one of the rooms is shs.150,000.00 per month. In the neighbourhood other houses fetch shs.250,000.00 per month. On the main house Ndagire, the plaintiff no.1, has one room and Sebwami, plaintiff no.2 has another room. The defendant was the tenant of plaintiff no.1, for two years until February 2005 when he vacated the room. He used to pay rent but arrears are demanded of him. That was the case for the plaintiff no.1.
16. DW1 was the defendant. He testified that he entered into an agreement with the plaintiff no. 1 and no.2 by which he was sold a piece of land, 10 feet by 40 feet, in consideration of which he paid them shs.10,000,000.00 and agreed to build premises for them as well. He was to build two front rooms, three boys' quarter rooms, at the rear, and a toilet. There was no time stipulation with regard to execution of the works. As he was about to complete the two front rooms, the plaintiffs took them over before completion, without the same being handed over to them. Plaintiff No. 2 entered and occupied his room. Plaintiff No.1 put a tenant in her room.
17. Defendant negotiated with plaintiff no.1 to let the room to the defendant, in order for the defendant to complete the room. They asked the defendant to pay rent of shs.150,000,000.00 which he did and he occupied the room for two years as a tenant.
18. The site was in a wetland. Construction was with hardcore, murram, dpc, slate stones and a beam in the foundation. Burnt bricks, with cement and sand of both types were used for the construction. The house was roofed with Iron sheets of Gauge 30. Ceiling was fitted for Gladesi's room. Metallic doors were fixed but no windows as the whole space available was taken up by the doors.
19. Defendant was never able to finish the boys quarters for a number of reasons. It turned that there was not enough land to build three rooms of the measurements agreed upon. He started two rooms which were at window level when he was stopped by the plaintiff and PW1 from continuing with the work. Similarly he failed to built the toilet as the available land on which he attempted to put it, was claimed by a neighbour, Mr. Masembe, who stopped him from continuing with the construction.

20. He made efforts to finish the two rooms of the boys' quarter with the aid of local council officials of the area but the plaintiff no.1 and PW1 frustrated his efforts, chasing him from the building site, and opening a criminal case against him.
21. DW2 was Ssaka Wamala. He is the Local Council 1 Chairman of Bokassa zone. He knows both the plaintiffs and the defendant and was present when they made an agreement selling land to the defendant. He witnessed that agreement. During the execution of the agreement they measured out the portion of land sold to the defendant, and not the whole land. The sale agreement was made by the Secretary Local Council One for the area.
22. He further testified that the defendant built two front rooms which are now finished, and in his view, in spite of not being an engineer, the rooms are in good condition. With regard to the boys' quarter rooms, these are not finished. A dispute arose, and a neighbour Mr. Masembe complained that they had built the foundation on his land. Similarly Mr. Masembe objected to the building of the toilet, which he claimed was on his land.
23. The defendant did start the construction of two rooms on the boys' quarter but Ndagire and Namugenyi stopped the defendant from further construction. When the local committee attempted to intervene and mediate the problem between the parties, they were not successful.
24. DW3 was Abubaker Kawoya, the secretary, Local Council One, Bokassa Zone. He knew both the plaintiffs and the defendant in this case, and was the author of the agreement between them for sale of land to the defendant. He testified that the front house was constructed. Both plaintiffs and the defendant had a room each on the building. The boys' quarters were not finished due to disputes that arose. On the one hand there was not enough land to build the three rooms as Mr. Masembe complained that they were encroaching on his land. On the other hand plaintiff no.1 complained that the measurements agreed upon for the boys quarters were not being followed by defendant. Efforts to resolve the dispute by the local council committee were not successful.
25. DW4 was Hajji Masembe, the neighbour to plaintiff no.1. He testified that the plaintiff's boys' quarter was being constructed partly on his land and he objected. This was at foundation stage. He referred the case to the land tribunal and it is not yet finalised. That was the case for the defendant.

26. Counsel for the parties framed three issues and I will proceed with each issue in the order they were framed. The first issue was whether there is a legally enforceable contract between the plaintiff and the defendant. This issue can be answered in the affirmative as both parties hereto attest to the contract that they entered, though there is a dispute over the terms of the same in some respects. The contract was written in Luganda.
27. The second issue is whether the defendant is in breach of the said contract. The alleged breaches were set out in paragraph 6 of the plaint. I examine each alleged breach in the order that they were set out in the plaint. The first one is that the defendant did not use a building plan during the construction and yet it was orally agreed between the parties that he would use a standard building plan. The defendant denied in his testimony that there was ever any agreement that the defendant would use a standard building plan. In any case the plaintiffs did not supply any building plan whatsoever.
28. None of the plaintiff's witnesses testified as to the existence of a standard building plan. Nor did the plaintiff herself. I am not too sure what a standard building plan is in this case. Is it a standard plan for Bokassa Zone? Or is it a standard building plan for commercial buildings in wetlands? Who provides such plans? No answer to these questions exists in the evidence for the plaintiff. The written contract is silent on the matter of the building plan. No term has been proved to exist with regard to the issue of the building plans. No breach of the same can therefore be established.
29. The second breach of contract alleged is that the defendant 'constructed/built weak, defective and sub-standard premises that are not fit for the intended commercial and accommodation purposes. It was an oral agreement that the defendant should construct recommendable structures. The plaintiffs shall rely on an urban planners and/or architecture's report attached hereto and marked as Annexure B.'
30. In the first place the report referred to above was never introduced into evidence whatsoever. It is not part of the record of trial. Its author was never called to testify. I am unable to have any regard to it. Secondly the oral agreement to build recommendable structures was not proved in evidence, whatever its meaning. None of the witnesses of the plaintiff testified about this term. Thirdly, the alleged oral agreement itself is far from clear taken alone, or together with the written agreement. What are recommendable

structures? Is this a term of art in the building trade? And what is imported by the phrase recommendable structures? No answer is available to these questions.

31. The plaintiff's witnesses testified that the commercial rooms were substandard and that the roof leaks and the walls have cracked. The testimony of PW1 does not describe in any detail what the defects are save in those rather general terms. On the other hand it is not in dispute that two rooms for the plaintiffs are occupied. Plaintiff No.2 occupied his room more than two years ago. Plaintiff No.1 let his room to someone who was replaced by the defendant. The defendant occupied this room for two years paying rent of Shs.150,000.00. He sublet it to a tenant, Katwe Diary that carried on a diary business (selling milk and milk products) in the room for this period.
32. In the settlement agreement between the plaintiffs and the defendant which was repudiated by plaintiff no.1's counsel, the defendant agreed to remedy all defects in the premises. These defects were not mentioned save for the completion of the shed and the boys quarter.
33. It may be true that the roof leaks and there are cracks in the walls but the plaintiffs are in occupation of the rooms. The rooms are used for human habitation and as commercial premises. It is not suggested on the testimony of the plaintiffs that these mentioned defects cannot be remedied. Nor has the cause of the leaking roof and cracks in the walls been established. The evidence of the plaintiff in this regard is too general to found a definitive finding that the defendant constructed/built weak, defective and sub-standard premises that are not fit for the intended commercial and accommodation purposes.
34. The third breach that is alleged against the defendant is that he built his portion of building beyond the land sold to him, encroaching on a neighbour's land. The neighbour, who had a transaction with the plaintiffs then refused to pay the plaintiff shs330,000.00 due to the plaintiff, on account of the defendant's encroachment. Two independent witnesses, DW2 and DW3, testified that this allegation was investigated by them, and they found that the defendant had built his portion of the building, on the land sold to him, and had not encroached on a neighbour's land. The neighbour was not called to testify. This allegation stands unproven.
35. The fourth alleged breach of contract is that the defendant did not build all the agreed three rooms boys quarter and even the two he built were not completed and were of poor

quality. I am satisfied that a dispute arose between the plaintiff No.1 and DW4 as to the ownership of part of the land that the boys quarter was to be built upon. This dispute has not been resolved today. This dispute is not the fault of the defendant. The failure to build a three room boys quarter cannot be, in the circumstances, ascribed to the defendant.

36. As for failure to complete the two rooms that he started to build, it is clear that disputes related to the size of those rooms, given the inadequacy of land free of conflict, surfaced between the parties. It is the plaintiffs that stopped the defendant from continuing with construction. This cannot be held against the defendant in the circumstances. This alleged breach too fails.

37. The fifth alleged breach of contract is that the defendant did not complete all the constructions within the orally agreed period of three months from the date of signing the agreement. The defendant denied that there was ever any such oral agreement. The Plaintiff No.1 did not give any testimony with regard to this alleged agreement. Neither did any of her witnesses. It was never established in evidence that this was orally or otherwise agreed to by the parties. This alleged breach fails.

38. The last alleged breach is that the defendant has started benefiting from the contract without completing his obligations. No particular term of the agreement between the parties is pointed to which this alleged breach ran foul of. As framed it is simply incompetent as a breach of the agreement between the parties.

39. All in all the plaintiff no.1 has not succeeded in proving the case she has put forward. I have no alternative other than to dismiss this suit with costs to the defendant.

Signed, Dated and Delivered at Kampala this        day of    December 2005

FMS Egonda-Ntende  
Judge