**THE REPUBLIC OF UGANDA**

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

**(COMMERCIAL COURT DIVISION)**

**HCT - 00 - CC- CS - 442 - 2003**

**HARJIT SINGH MANGAT ..... PLAINTIFF**

**VERSUS**

1. **CHRISTINE LILLIAN NAKITTO .....1ST DEFENDANT**
2. **RAJ TREON .....2ND DEFENDANT**
3. **ATTORNEY GENERAL .....THIRD PARTY**

**BEFORE: HON. JUSTICE GEOFFREY KIRYABWIRE**

# JUDGMENT

The brief facts of this case are as follows. The plaintiff's claim is against the 1st and 2nd defendants jointly and severally for the recoveries of monies paid in respect of a transaction for the sale of land situated at Plot 40 Prince Charles Drive; Kololo Kampala (herein after called "the land"). The plaintiff claims that the 1st and 2nd defendants had no legal title to sale in the first place.

The case for the plaintiff is that sometime in 1998 the plaintiff bought from the 1st defendant the said suit land through the 2nd defendant who was the Lawyer of the 1st defendant. The 1st defendant at the time living

outside the country, effected the sale by way of a power of attorney issued to one Rebecca Nabunya Kalule. The plaintiff allegedly paid the sum of US $ 280,000 for the suit land. The plaintiff then obtained a leasehold title for the land in his names and proceeded to develop it. Shortly after the plaintiff started to develop the suit land, Makerere University intervened and claimed that the plaintiff was illegally developing the suit land for which they had a valid freehold title. Makerere University then sued the plaintiff in High court civil suit no. 485 of 2000 for trespass and in the process obtained an injunction against the continued development of the suit land. This case resulted into a consent judgment in favour of Makerere University though the plaintiff was then allowed by the University to obtain a fresh lease from Makerere University at a new cost and continue with his developments.

The first and second defendants on the other hand admit that there was a sale of the suit land but at the sum of Ug.Shs.175,000,000/= and not US $ 280,000. The 1st defendant pleads that she had good title which she sold to the plaintiff. She further pleads that the consent judgment entered between Makerere University and the plaintiff was voluntary and not obtained on its merits and therefore she cannot be held to be liable for its consequences which she in any event, viewed as remote. However the defendants applied to have the Uganda Land Commission added as a third party to indemnify them should this case go against them. The Attorney General appeared to represent the Uganda Land

Commission. The Attorney General generally denied any form of liability as alleged by the defendants.

The following were the legal issues agreed for trial;

1. Whether the consideration was US $ 280,000 or Ug.Shs.175,000,000/=.
2. Whether there is a cause of action against the second defendant and whether he was privy to the agreement of sale?
3. Whether the 1st defendant had legal title capable of transfer to the plaintiff?
4. Whether the defendants are liable for the loss to the plaintiff?

Mr James Mukasa Ssebugenyi appeared for the plaintiff, Mr Ebert Byenkya appeared for the first and second defendant and Mr Vincent Kasujja appeared for the Attorney General representing the Uganda Land Commission the third party. It is important to note that it was reported to Court that during the course of the trial the second defendant passed away in India.

**Issue No. 1: Whether the consideration was US $ 280,000 or Ug.Shs.175,000,000/=?**

The case for the plaintiff is that he paid US 280,000 for the land. According to the evidence of PWI Mr Singh Mangat this is evidenced by several documents namely;

- Exhibit P20 (1) a letter dated 17th March 1998 from the law firm of the second defendant to Trust Bank Ltd requesting a transfer of Shs.85,000,0000/= to their account which letter has an endorsement from the bank that the said money would be transferred on the 20th March 1998.

- Exhibit P20 (2) a ledger statement from the plaintiff's bank account that on the
  - 24th February 1998 $ 123,000 was transferred to Crane Forex Bureau
  - 10th March 1998 another $ 56,000 was transferred to Crane Forex Bureau.

Both at the direction of the second defendant then,

- Exhibit P 20 (3) a hand written account of how the payments to the second defendant were made showing that a deposit of $ 28,000 (being 10% of the land cost of $ 280,000) leaving a balance of $ 252,000. it further shows that Shs 85,0000,0000/= was paid and converted at the exchange rate of 1160 to yield $ 73,275.862, plus $ 123,000 and finally $ 56,000 to make a total paid of $ 252,275.862.

- Exhibit P 23 a bank credit note for the $ 56,000 transferred above.

- Exhibit P 24 a bank credit note for the $ 123,000 transferred above.

The deposit of 10% of $ 28,000 appears not to have been documented like the rest of the payments. That not withstanding counsel for the plaintiff argues that the defendants did not adduce any evidence to contradict this testimony of the plaintiff.

Counsel for the plaintiff however does not dispute the existence of Exhibit P 2 the agreement of sale which reflects another figure of Shs.175,000,000/=. He dismisses this as a tactful drafting of the second defendant not to show the whole picture of what was in reality paid to him.

For the first defendant it is submitted that she is the wife of a former President of Uganda who at the time of trial was living in Zambia and so was unable to come to Court. Testimony showed her to be Mrs. Miria Obote. The whole transaction of sale was conducted through an attorney of the first defendant Ms Rebecca Kalule who also did not come to court to give evidence as she could not be traced.

That notwithstanding the case for first and indeed the second defendants is that the agreement of sale Exhibit P 2 is clear the sale was

done for Shs 175,000,000/= and there is nothing in the agreement to show how the figure of $ 280,000 comes about. Counsel for the defendants first starts by attacking admissibility of the evidence of the plaintiff. Counsel for the defendants referred me to Ss. 91 and 92 of the Evidence Act (cap 6 revised laws of Ugandan 2000) for the proposition of law that once an contract has been reduced into writing no oral evidence can be given regarding the terms of that contract because they are all written. Counsel for the defendants also referred me to S. 114 of the same Act stating that the plaintiff is estopped from leading evidence *"...to the effect that the real consideration...was...$ 280,000 and not the amount of (Shs) 175,000,000/= indicated in the sale agreement."* This is especially so in respect of the first defendant who lived abroad who if the said misstatement did occur it was hidden from her.

As to the role of the second defendant, counsel for the second defendant submits that the second defendant acted as advocate and agent for the plaintiff in order to procure the whole deal. Indeed counsel for the defendants further argues that the fact that the plaintiff testified that whole transaction was done between him and the second defendant without the presence of the first defendant or her attorney bears this out. Counsel for the defendants questions the evidential contradiction by the plaintiff in the figure paid and submits

*"...why? What was the plaintiff's intention in all this? Was the intention to corruptly benefit his lawyer friend, the second defendant? Was the hidden consideration some extra benefit for getting him a good "deal" at the expense of the 1st defendant? Only the plaintiff knows..."*

I must say I was taken a back by this submission of possible collusion between the plaintiff and the second defendant coming from counsel for the second defendant himself. It certainly would not help the case of the second defendant.

Counsel for the defendants then takes a second alternative approach to dealing with the evidence of the plaintiff by submitting that if it is true that $ 280,000 was actually paid instead of Shs 175,000,000/= then the contract is void for being against public policy having been designed to defraud tax revenue to Government. He submitted that the plaintiff admitted under oath that the second defendant had told him that he would pay less tax revenue if the figure of Shs.175,000,000/= was reflected in the agreement instead of $ 280,000 which on conversion into Uganda shillings would yield a higher figure. He referred to the plaintiff as a self confessed tax evader. Counsel for the defendants referred me to the text in Cheshire and Fifoot's Law of Contract 8th edition at P 331 where it is written

*"... There is a clear infringement of the doctrine of public policy if it is apparent, either directly from the terms of the contract or indirectly from other circumstances, that the design of one or both of the parties is to defraud the revenue whether national or local. In Miller v Karlinski for instance...it was held that the contract was illegal since it constituted a fraud on revenue. No action lay to recover even arrears of salary for in such a case the illegal stipulation is not severable from the lawful agreement to pay the salary."*

At P 339 counsel goes on to quote further the text

*"Neither party can recover what he has given to another under an illegal contract if in order to substantiate his claim he is driven to disclose the illegality. The maxim* ***in pari delicto patior est conditio defendentis*** *applies and the defendant may keep what he has been given...the result is that gains and losses remain where they have occurred or fallen..."*

I was then referred to the cases of

**Napier Vs National Business Agency Ltd [1951] All ER 264** and

**Berg Vs Sadler and Moore [1937] KB 158**

for basically the same proposition.

Counsel for the defendants then raises a third argument that he who comes in equity to recover in action for money had and received must come with clean hands and this the plaintiff has not. He goes on to submit

> *"... He also knowingly stated an incorrect consideration to allow his lawyer and friend the 2nd defendant to make a hefty commission...in a criminal court we would describe the plaintiff's actions for what they truly were. Abetting an offence. The offence of embezzlement. This at the expense of an elderly lady, helpless in exile..."*

Counsel concludes that as a result of this he should be turned away from court as not deserving.

I have addressed myself to the evidence before court and the submissions of both counsels on this issue. It would appear that there is no dispute that an agreement Exhibit P 2 was signed in relation to this suit land for the sum of Shs.175,000,000/=. However what is contentious is that it is alleged by the plaintiff, that in reality a sum of $ 280,000/= was paid and that the written agreement was for tax purposes (i.e. to attract lower tax on the conveyance). In this regard the court was deprived of the opportunity to hear the side of the second

defendant who draw up the agreement as throughout the trial he was reported to be sick and then he eventually passed away. It is not clear if he would have agreed to this allegation however para 6 to the written statement of defence of the second defendant reads

> *"6. In further answer to para 6, the 2nd defendant denies the alleged purchase price of 280,000$ (sic) alleged by the plaintiff. The defendant shall rely on the sale agreement, which shows that the total consideration was agreed at Shs.175,000,000/=…"*

At least the record shows that the second defendant denies the $ 280,000 so the onus is on the plaintiff to prove it. How now has the plaintiff chosen to prove the $ 280,000? He has done this first through exhibits P 20 (1) (2) and (3); P 23 and P 24. However it is only exhibit P 20 (1) a letter from the law firm of the second defendant which directly refers to the suit land. The rest are just statements of account which, save for the testimony of the plaintiff, objectively could be for anything. Exhibit P 20 (1) however specifically refers to the hand over of the title to the bank (I believe of the Plaintiff) with a clear demand for Shs.85,000,000/=. The bank then endorses on the same letter that it has received the title and that the money would be available to the law firm the next day. Reference to payment of Shs.85,000,000/= lends credence to the sale agreement's figure of Shs.175,000,000/=. At least the evidence clearly shows that up to this stage the whole transaction is

in Uganda shillings and not United States Dollars. Secondly he also relies on the testimony of Mr. Sushil Dudeja PW 2 a foreign exchange dealer at Crane Forex bureau from where the dollars were remitted from. However Mr. Dudeja was unable to show that all the money remitted went to the defendants and provided a list of persons unknown to court who were also paid out of the said monies.

That being the case I am persuaded by the arguments of counsel for the defendants that where a contract is reduced into writing then under Ss 91 and 92 of the Evidence Act no oral evidence as to its terms should be accepted. I am further persuaded by the argument of estoppel under S 114 of the Evidence Act with respect to this transaction in that how can the plaintiff sign an agreement as to one figure when he claims to have paid another? It is the role of the commercial Court to give sanctity to legally binding agreements made by parties and to enforce them in order to ensure the smooth flow of commerce and trade.

Before I leave this issue let me address the argument in relation to the maxim **in pari delicto.** I believe that Counsel for the defendant has covered the general principal of law. However the position of law compared to what was stated by Counsel for the defendants is much wider. The position as stated by the learned author **Dr. Nelson Enonchong** in his book **ILLEGAL TRANSACTIONS** published by LLP

1998 presents a more holistic picture. In chapter 16 of his book and para 16-1 the learned author writes

"…where the plaintiff was in a sense and there was no illegality on his part, recovery was allowed because although the defendant was guilty of illegality, the plaintiff was not in delictum. They are other cases where both parties were guilty of the illegality, but their respective guilt was not at par of the one with the other. In this class of case, a claim by the party who is less blameworthy will not be defeated by the illegality defence. This exception developed largely because the defence of illegality was originally based on the maxim in pari delicto patior est conditio defendentis (where the parties are equally guilty the position of the defendant is the stronger), from which it followed that where *"the delictum is not at par…the [in pari delicto] maxim does not apply [quote from Kearley v Thomson (1890) 24 QBD 724, 746 per Fry LJ]"*

It would appear to me that the first test to deal with in establishing whether parties are in pari delicto is whether the parties are at par with respect to their guilt. The learned author then goes on to give more perspective to the test and that is

*"There are certain recognised circumstances when a party, although particeps criminis, will be considered not to be in pari delicto and will be allowed to recover. These include cases where the illegality involved was the contravention of a statue designed to protect a class of persons*

*of which the plaintiff is a member, or where there has been oppression, duress, undue influence or fraud on the part of the defendant, or where there was a mistake of fact on the part of the plaintiff."*

This creates a set of exceptions to the general rule. The second group of tests then to be considered is whether the parties though guilty would fall within the named exceptions. Applying the above tests to this case would be difficult considering the one-sidedness of the evidence given. It cannot be said that the parties were therefore in pari delicto.

Lastly I find as I have stated before the submissions on this point in relation to the second defendant by his retained counsel as unfortunate. Without calling evidence on the matter (indeed that would not have been possible because of the illness and subsequent death of the second defendant) counsel submitted on a possible collusion between the plaintiff and his client the second defendant! This surely would not have made matters look good for his client!

In answer finally to the first issue I find that the consideration was Shs.175,000,000/= and not $ 280,000.

**Issue No. 2: Whether there is a cause of action against the second defendant and whether he was privy to the agreement of sale?**

It is the case for the plaintiff that there is a case for money had and received against the second defendant. Counsel for the plaintiff submitted

> ***"…****it is in issue as to how much money was received by the 1st defendant from the 2nd defendant and in so far as the 1st defendant only accepts receipt of Shs.175,000,000/=the case is properly brought against the 2nd defendant on the money had and received."*

Secondly counsel for the plaintiff says the second defendant is privy to the agreement as he negotiated everything in the absence of the first defendant. Lastly that it is the 2nd defendant who can resolve all the questions and disputes in this suit.

The submissions for the first defendant only concede that the second defendant acted as counsel for both parties i.e. the first defendant and the plaintiff.

For the second defendant it is merely submitted that the suit against the Second Defendant Mr. Treon has abated under order 21 rule 1 because he died. He then argued that it is for court then to determine whether the suit continues to survive against the first defendant only or not.

Court was notified after it had finished the hearing in respect of the plaintiff and the third party and the defence had notified court that it would not call any witnesses. It is clear to my mind that given the nature of claims in this case the suit must now abate the second defendant, where he is concerned but will continue to survive the first defendant as the principal behind the sale of the land.

**Issue No. 3: Whether the 1st defendant had legal title capable of transfer to the plaintiff?**

This issue in many ways is the crux of the dispute and revolves around the land title Exhibit P1. The case for the plaintiff is that on the 16th March 1998 the said leasehold title was transferred from the first defendant's names into the plaintiff's names. There appears to be no contest as to that. The second defendant then sold the land to the plaintiff who started to develop it. Later in 2000 the plaintiff was told that the land actually belonged to Makerere University which held a freehold title over the land. Makerere made it clear that it had not issued any leasehold under the freehold title to either the first defendant or the plaintiff. This was notified to the second defendant as the party's lawyers. The plaintiff attempted to defend the lease against Makerere University in Civil Suit No 485 of 2000 but then later decided to settle the case out of court. A consent judgment was entered in favour of Makerere University. The plaintiff then obtained a fresh lease from

Makerere University on paying a premium of Shs.80,000,000/=. Counsel for the plaintiff submitted that

> *"The liability of the defendants to the plaintiff arises not on the process of how the 1st defendant obtained her lease title but on the failed transaction of Sale of Land. The plaintiff is entitled to refund of his monies as because the defendants had no lawful title to transfer and as such has not obtained what he bargained for from the defendants."*

Counsel for the defendants on the other hand contends that the first defendant had legal title as shown in Exhibit P1. Counsel submitted that

*"It (the land title) was never cancelled by the Registrar of titles. Nor was it cancelled pursuant to an order of court following adjudication on the respective merits of the leasehold title held by Mr Singh vis a vis the freehold owner, Makerere University...that the plaintiff voluntarily and without the involving the first defendant in any way, decided to surrender the lease transferred from the 1st defendant to makerere University....he voluntarily entered into a consent agreement with Makerere University....This agreement was entered without leading any evidence or presenting any legal argument. It did not therefore constitute adjudication on the merits of the makerere University claim. It was merely an amicable settlement recorded in court and its effects*

*bind only the parties' thereto i.e. Makerere University and Harjit Singh..."*

Counsel for the defendants wondered why the plaintiff did not in HCCS 485 of 2000 rely on the defences he raised in that case like

> *"... limitation of time, laches, absence of fraud or illegality acquiescence and so forth..."*

rather than act in fear and haste to negotiate a settlement. Counsel for the defendant goes on to argue that this court can not try issues which should have been more properly tried in the other case as Makerere University is not party to this suit.

On this issue counsel for the third party (Mr Kasujja for the Attorney General) also submitted as to the alleged liability of The Uganda Land Commission.

He started by contesting the third party notice issued on the third party as incompetent under order 1 rule 14 as not being accompanied with an affidavit. Secondly he further faults the third party notice dated 27th November 2003 as contrary to order 6 rules 2 and 6 because it claims an indemnity of Shs.243,100 and Shs.2,500,000/= as special damages particulars of which are not given nor which are not mentioned anywhere in the first defendant's statement of defence. Thirdly Counsel

for the Attorney General submitted that if there was any liability then it would not go to his client the Uganda Land Commission but rather the Kampala District Land Board which has its own separate legal existence. I directed that the trial proceed and that I shall address these preliminary issues in respect of the third party in the judgment.

Two witnesses were called by the third party namely Mr. Ahamed Kabuye TP1 the Acting Board Secretary Kampala District Land Board (part of Kampala City Council) and Mr. Robert Nyombi TP2 a Registrar of Titles in the Ministry of Lands. Mr. Kabuye testified that the Kampala Land Board received and processed the application of the first defendant for the suit land. She first got the lease in 1985 for 5 years then applied for it to be extended for 7 years in 1997 (which was retrospectively given from 1995). Mr. Kabuye testified when they first dealt with the land, they were not aware of a subsisting title to the same land and they only got to know of it afterwards when they came across correspondence on the matter from the Registrar of Titles on the 24th March 2001. Mr. Nyombi TP2 testified that the Kampala Land Board of KCC and not his department granted the lease. He further testified that the grant was made in error because there was a freehold title. He was of the view that Kampala City Council and the first Defendant should have exercised due diligence to confirm that the land was available for leasing. Mr. Nyombi testified that because of the way the lease was granted it was therefore null and void ab initio. He was therefore of the view that the grant could

not transfer any third party rights. Mr Nyombi further testified that the lawyer on record for the conveyance was the Second defendant's law firm Treon & Singh.

I have perused the submissions of all three counsels and reviewed the evidence on record. Counsels for the plaintiff and third party submit that the first defendant did not have legal title cable of being transferred to the plaintiff. Counsel for the defendants says there was a legal title capable of transfer to the plaintiff and that is what happened had it not been for the consent judgment in HCCS 485 of 2000. Counsel for the defendant argues that as a consent judgment it was not binding on his client.

Counsel for the defendant says the consent Judgment cannot bind his client as she was not a party to it and was not adjudication on the merits. That on the face of it is true. However this case in substance covers the same dispute albeit from a different angle. Counsel for the defendant argues that this court cannot try this case because another interested party Makerere University has not been joined. With the greatest of respect I must disagree with this line of argument. There is a "Land triangle" involved here between the plaintiff, the first defendant and Makerere University. The "triangle" as between the plaintiff and Makerere University has been resolved by a consent judgment. Such consents are provided for in order 22 rule6 of the Civil Procedure Rules.

Section 67(2) of the Civil Procedure Act (Cap 71 Laws of Uganda 2000) provides that no appeal will lie from the consent of parties. A consent judgment between parties does present a resolution of the dispute as between them and should not be seen in the same light as default judgment. In the renowned treatise **Odgers' Pleadings and Practice in Civil Actions (Edited by Giles F Harwood)** Universal Law Publishing 2000 at P 251 it is written

> *"The possibility of settling the action is probably in the minds of the parties at all stages of the proceedings, but assumes special prominence after discovery, when each party has a clearer picture of the strength or weakness of his case…an action is often settled by agreement before or at the trial.."*

Such settlements in law are referred to as a compromise and **Odgers'** (supra) at P 326 goes on to write

> *"in all cases it should be appreciated that a compromise at trial involves two elements: (i) it is a contract whereby new rights or immunities are created between the parties in substitution for and in consideration of the abandonment of, the former claims or contentions of either or both of them; (ii) it will ordinarily be necessary for the court to take some action agreed upon by the*

*parties e.g. to give judgment, make an order of discontinuance or stay etc…"*

It appears to me that HCCS No 485 of 2000 was settled by the parties after the discovery of the existence of a freehold title in favour of Makerere University. It also appears to me that in order to complete the "triangle" the plaintiff brought this suit against the defendants who still appeared to deny the absence of legal title. I do not think that in light of the consent judgment it was necessary to add Makerere University as a party and in any event that would be contrary to the finality and non multiplicity principles enunciated in S 33 of the Judicature Act (Cap 13 Laws of Uganda 2000).

Now as between the plaintiff and the defendants the evidence on record suggests that the first defendant did not have legal title capable of transfer to the plaintiff. I agree with the testimony of Mr Nyombi that The Kampala District Land Board should have established and verified the actual status of the land before leasing it to the first plaintiff. The Kampala District Land Board has the technical and profession competence to do this. How it failed to do so defeats any objective thought on the matter. I accordingly find that the first defendant did not have legal title capable of transfer to the Plaintiff.

Before I leave this issue there were the two preliminary objections raised by the Attorney General. In my view the first one was very technical and could have been cured by amendment. However the second one was valid but required testimony. In respect to the second objection I agree with counsel for the Attorney General and find that The Uganda Land Commission is not liable to indemnity the defendants in the event of proof of loss by them.

**Issue No. 4: Whether the defendants are liable for the loss to the plaintiff?**

The plaintiff has prayed for a refund of the money he paid the first defendant. As found in answer to the first issue the first defendant by agreement received the sum of Shs.175,000,000/= for the sale of the suit land. However since that sale was not valid she is ordered to refund the said Shs.175,000,000/= as money had and received for a contract whose consideration had totally failed for want of title.

The plaintiff in the plaint also prayed for special damages being

"15...

(b) Legal fees and title processing charges Shs.2,473,000/=.

(c) Legal fees to Sebalu & Lule Advocates Shs.2,500,00/= ..."

During the trial these amounts were not specifically proved to court and appear to have been abandoned. I however see from the document filled by the plaintiff, though not relied upon at trial, that item (b) may have had something to do with rectifying the lease with Makerere University which to they had to do any way so as to mitigate their loss. I therefore decline to grant special damages for the reasons given above.

The plaintiff also claims commercial interest on the money to be refunded at commercial bank rate from date of filling of the suit. Given the many people involved in this failed land transaction some of whom have passed away I grant interest at court rate from the date of filling this suit.

I award costs of the suit to the plaintiff.

That is my Judgment

**Justice Geoffrey Kiryabwire.**

**Dated: 18/05/06**