THE REPUBLIC OF UGANDA

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

HCT-00-CC-CS-0265-2006

BOB DRANI :: PLAINTIFF

VERSUS

1. ROBERT SSEBUGWAWO
2. GRACE LUBWAMA SSEBUGWAWO ::::::::::::::::: DEFENDANTS

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

The plaintiff's claim against the defendants, jointly and severally, is for recovery of Shs.380, 000,000=; an order of specific performance plus general damages and costs.

From the records, the plaintiff and the defendants entered into an agreement of sale dated 12th January 2006 in which it was agreed by both parties that the defendants purchase the property comprised in Plot 657 Block 214 Kisaasi. The property belonged to the plaintiff. The purchase price was Shs.380m.

It was further agreed that the defendants assume and pay the mortgage loan amounting to Shs.119,014,000= to Housing Finance Co. (U) Ltd being the outstanding balance of a mortgage on the said property as per the terms and conditions of the mortgage/loan between the plaintiff and the said Housing Finance Company of (U) Ltd. The parties agreed on how the balance would be paid in installments.

The plaintiff's case is that the defendants have since 12th January, 2006 only paid Shs.2,800,000= towards settlement of the mortgage which amount was paid to Housing Finance Company of Uganda in 2 installments in the months of January and February 2006. Hence this suit in which the plaintiff seeks recovery of the purchase price (less the only amount paid to Housing Finance Company), general damages, interest and costs.

From the records, the suit was filed here on 10th May, 2006. Summons to file a defence was issued on 11th May, 2006. It was not served out. Another one was issued on 28th August, 2006. Thereafter, the plaintiff made a request for service abroad. The request was that service be made on the defendants at:
"8306 Wilshire Blrd Suite 358 Beverly Hills, California, USA".

The records does not show the fate of that request. It was bound to present problems to the plaintiff because in the notice of intention to sue, the Suite No. is indicated as 385 (not 358 as it appears in the request for service abroad).

Be that as it may, the plaintiff obtained yet another summons to file a defence on 24th October, 2006. In the application for the summons, counsel indicated to Court that due to procedures entailed in effecting service abroad, the Court Summons had since expired. In view of this letter on record dated 24th October, 2006, Court can confidently say that the request for service abroad was fruitless.

The plaintiff then changed tactics. The change was apparently prompted by a letter dated 4th October, 2006 to M/S Byenkya & Kihika Advocates from M/S Buwule & Mayiga Advocates. The letter was attention: Mr. Sendagire. It reads:

> *"Dear Madam,*
>
> ***RE: AGREEMENT BETWEEN BOB DRANI AND ROBERT SSEBUGWAWO & GRACE LUBWAMA***
>
> *Reference is made to the above, which was executed on the 12th day of January 2006 and wherein we acted for and on behalf of the purchasers, Robert Ssebugwawo and Grace Lubwama Ssebugwawo upon whose instructions we address you as here under.*

As you are aware, the above mentioned deal flopped. The purpose of this letter therefore is to request a refund of the monies that had been paid by the purchasers in the amount of Shs.2,800,000= (in words) as part of the purchase price for land comprised in Block 214 plot 627 at Kisaasi.

Your co-operation will be highly appreciated.

Yours faithfully,

……

FOR: BUWULE & MAYIGA ADVOCATES

c.c. Client"

There is nothing in the letter to suggest that M/S Buwule & Mayiga Advocates or their clients were aware of any pending suit in respect of the same agreement. And there is no evidence on record either that upon receipt of the said letter; M/S Byenkya & Kihika Advocates took advantage of the communication to inform the defendants, through M/S Buwule & Mayiga Advocates, about the suit already pending in Court. Given the two conflicting suite Numbers in the notice of the intended suit and the request for service of summons abroad, it would be unwise to assume that the defendants ever received the notice of the intended suit. Nevertheless, on getting the said letter, M/S Byenkya & Kihika Advocates sought to effect service of the summons to file a defence on the defendants through their said lawyers in the ill-fated sale transaction. They did so on 24th October, 2006.

From the affidavit of service of Paddy Zirimu dated 9th November, 2006, the summons was dropped at the chambers of M/S Buwule & Mayiga Advocates on 26th October, 2006. On 27th October, 2006, the same were returned unsigned to M/S Byenkya & Kihika Advocates, implying that the lawyers had declined service. On the strength of this uneffected service, however, the plaintiff's lawyers went ahead to apply for judgment in default of the defence. The learned Registrar of this Court graciously granted it on 29th November, 2006.

When the matter was put before me for hearing on 30th May, 2007, Mr. Kihika addressed me thus:

"Neither defendant nor counsel is present. Interlocutory judgment was entered on 29th November, 2006 following service of summons on defendants. Case for formal proof, assessment of damages".

Assuming as it were that all was okay, I allowed the plaintiff to espouse his claim. I have now had the time to fully address my mind to the issue of service. In the absence of any evidence of service on the defendants, directly or through their duly authorized representative(s), I do not hesitate to say that going ahead to write judgment herein after due discovery of the true state of affairs would be to condone an illegality. It would impinge on the defendants' right to be heard in a matter involving such a huge claim.

It is noteworthy that M/S Buwule & Mayiga Advocates were again served with a hearing notice dated 10th January, 2007. They declined service on account of lack of instructions to represent the defendants and returned the hearing notices to the plaintiff's lawyers. However, despite that clear message from the lawyers, the plaintiff has continued sending hearing notices to the same firm.

For the reasons I have given above, it is clear to me that the interlocutory judgment cannot be allowed to stand. It was wrongly entered against the defendants and an illegality once detected cannot be swept under the proverbial carpet. The said judgment was based on the assumption that M/S Buwule & Mayiga Advocates were still lawyers for the defendants and/or that they had instructions to represent the defendants in the suit. This assumption was wrong.

As if non-effective service was not bad enough, when the matter appeared before me on 7th November, 2007, I made an order that the plaintiff's lawyers file written submissions within 2 weeks from the date of the order, that is, on or before 21st November, 2007. As I write this judgment nothing has been filed here.

I now turn to the substance of the plaintiff's claim.

As to whether or not there was an agreement of sale of the suit property between the plaintiff and the defendants, the Sale Agreement (Exh. P1), in the absence of any reason to the contrary, renders this a non-issue. I so find.

As to whether or not the defendants breached the agreement of sale, the plaintiff alleges in paragraph 6 of the plaint that he has performed his part of the Agreement by offering possession of the sold property to the defendants. On possession, the Agreement provided as follows:

"3. POSSESSION

(i) The vendor shall hand over possession of the property to the purchasers and/or their representatives immediately upon execution hereof.

(ii) The purchaser shall take possession of the property together with ALL Chattels found therein including household domestic items, namely; beds, refrigerators, televisions, tables, etc".

However, at the hearing, this was the plaintiff's evidence as regards possession:

"About possession, he sent his brother to me to take over the management of the house. It was a Hotel. This was after about 5 – 6 months after the sale. I told him he had not complied with the terms of the sale so I did not hand over possession. Between me and him, we had agreed that he would take over the property when he had started paying me. Then he sent his brother to come and take over the property and run it. By the time he sent his brother I had not received any payment from him. So did not handover the property on account of non-payment".

From the Agreement itself, taking possession was not conditional upon payment of the entire purchase price by the defendants or at all. Taking possession was immediate upon execution of the Agreement. Accordingly, by his own admission, the plaintiff acted in breach of the agreement by refusing to vacate the suit property. The plaintiff cannot be heard to say that between him and the defendants they had agreed that he would take over the property when they had started paying him. The Agreement must be read as a whole to give meaning or effect to the intention of the parties. The intention of the parties in the instant case was very clearly stated in the agreement itself. It cannot be varied by oral evidence when the parties themselves agreed, in clause 6 (iv) thereof, that the agreement would not be amended or otherwise varied except by a supplementary written agreement executed by both parties to it.

From the agreement, the defendants made an immediate assumption of all existing obligations between the plaintiff and the mortgagee. In the event of the defendant failing to pay, the matter was not to be referred to the plaintiff but rather the bank (mortgagee) would be at liberty to realize the security. After the sale, the property was no longer the plaintiff's but the defendants'. The decision of this Court in **Paul Kalule Kagodo –Vs- Reuman Kanyoro HCCS No. 740 of 1989** (unreported)

appears to dispose of the issue herein. In that case, a similar sale had taken place and the seller wanted to reposess the property. Court held that he couldn't.

In the instant case, however, following the flop of the sale, the plaintiff went ahead and sold the property. The defendants appear to have given up on their rights under the sale, including the Shs.2, 800,000= which they paid to the Housing Finance Company. In view of that sale, I do not see how the plaintiff can turn around and seek an order for specific performance herein. In all these circumstances, it appears to me that even if Court were to take the generous view that the interlocutory judgment be set aside and the defendants be served a fresh with the summons to file a defence, the plaint as it is does not disclose a reasonable cause of action against the defendants. The law is settled that a plaint which discloses no cause of action be rejected. It is accordingly rejected in the terms of 0.7 r. 11 (a) of the Civil Procedure Rules and the suit struck out on account of this. There will be no order as to costs.

Yorokamu Bamwine
J U D G E
5/12/2007

5/12/2007
Parties absent.

Court: Judgment date herein was communicated to the plaintiff through one Daniel Mugisha who on 7/11/2007 appeared before Court holding brief for Kihika Oscar. Time is 9:30 am and neither the plaintiff nor his counsel is present. The judgment is released to the Registry.

Yorokamu Bamwine
J U D G E
5/12/2007

Later at 12 Noon
Mr. Kihika for plaintiff appears and receives the judgment after apology.

Yorokamu Bamwine
J U D G E

5/12/2007