

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

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**HCT - 00 - CC - CS - 560 - 2006**

**WAKANYIRA GEORGE DAVID**                 :.....:                 **PLAINTIFF**

**VERSUS**

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

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**BEFORE: THE HON. MR. JUSTICE GEOFFREY KIRYABWIRE**

**J U D G M E N T:**

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The plaintiff brought this suit against the defendants claiming for mesne profits, rent, recovery of moveable property following an eviction of the plaintiff by the defendant from his properties.

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The case for the plaintiff is that on the 15<sup>th</sup> January 2007 he obtained a loan from the defendants and gave land titles to two of his properties as security for the said loan. The sum borrowed was (U) Shs. 170,000,000/= which was to be paid back within 6 months at an interest rate of 10% per month. It is the case for the plaintiff that he was asked to sign two agreements of sale, a power of attorney and a transfer form as further security for the loan. It is the case of the plaintiff however 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 Volume 30 2965 Folio 18 Plot 17 Bunyonyi Lane (Land at Kataza Kiswa, Nakawa) were security for the loan.

The sale agreement purported to indicate Shs. 272,000,000/= as consideration for the sale which the plaintiff avers he has never received.

5 The plaintiff further avers that less than three months into the agreed six month period the first defendant fraudulently without the plaintiff's consent and while there was no default in the monthly interest payment, transferred the above properties to the third defendant (Rutungu Properties Ltd a company owed by the first defendant). The defendants then proceeded to issue eviction notices to his tenants who were occupying the plaintiff's property. As a result of this sudden transfer of the property, the plaintiff was not able to recover his movable properties  
10 therein.

The defendants deny the claim of the plaintiff and contend that the properties in question were sold to them by the plaintiff. In this regard the defendants rely on a Sale Agreement dated 17<sup>th</sup> January 2007. It is the case for the defendants that the plaintiff had offered to buy back his  
15 properties from the third defendant (Rutungu Properties Ltd) at Shs. 260,000,000/= which was not accepted by the defendants. The second defendant denies even lending the plaintiff any money as alleged.

The parties agreed to the following issues for determination:

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1. Whether the agreement was a straight loan or a Sale Agreement.
  2. Whether or not the transaction was fraudulent
  3. Whether or not the plaintiff failed to effect loan repayments on time after borrowing from the second defendant.

25 Mr. Bemanyisa appeared for the plaintiff while Mr. Owaraga and Mr. Mbabazi represented the defendants. The plaintiff called four witnesses namely the plaintiff himself Mr. G.D. Wakanyira (PW1), Mr. Edgar Mutumba (PW2) a businessman who used to work for the second defendant, Mr. Paul Mungati (PW3) a Valuation surveyor, and Mr. Sam Kamanda (PW4) a Clerk Assistant with the second defendant.

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For the defendant people testified namely Mr. Alex Kiyimba (DW1) a Principal Legal Officer with M/s Housing Finance Bank Ltd, Mr. Ben Kavuya (DW2) the first defendant, Mr. Stanley Mugabi (DW3) a businessman, Mr. Moses Mkachunga (DW4) a carpenter with M/s Ogaserian

Holdings, Mr. Lawrence Baganga (DW5) a welder with M/s J.B.K. Electricals and Metal Dealers and Mr. M. Nywaana (DW6) a Lawyer.

**Issue No. 1: Whether the agreement was a straight loan or sale Agreement**

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The parties in this dispute do not agree as to the nature of transaction that they entered into. The plaintiff avers that what he entered into was a loan agreement while on the other hand the defendants state that it was an agreement of sale.

10 The plaintiff testified that he approached Mr. Ben Kavuya the Managing Director of Global Capital Save (2004) Ltd (the second defendant) to borrow Shs. 170,000,000/=. The purpose of the loan was to pay off his mortgage with Housing Finance Bank Ltd which had gone into default and as a result he was about to lose his two properties at Bweyogerere and Kataza in Kampala. The plaintiff testified that the first defendant agreed to provide him with the money but  
15 asked him to sign two agreements (as was his practice). The first was a purported out right sale agreement and the second was a loan agreement secured by the same two properties with Housing Finance Bank Ltd.

The plaintiff testified that he went to Mr. Kavuya because he was a money lender and was  
20 desperate to save his two properties from foreclosure by the bank. He further testified that he signed a loan agreement with the first and second defendants on the 19<sup>th</sup> January 2007 but was not given a copy. He further signed a purported sale agreement because Mr. Kavuya told him that as money lenders that is what they required to protect themselves in the event of default. He testified that according to the terms of the loan agreement he was to borrow Shs. 170,000,000/=

25 for a period of six months at interest of 10% per month and therefore the total repayment of principal and interest would be Shs. 272,000,000/=. He also signed for the money by way of voucher which money paid directly into his bank account. The plaintiff however was not given a copy of the voucher. The plaintiff showed court a pay in slip for the sum of Shs. 158,940,397/= paid into his bank account on the 18<sup>th</sup> January 2007.

30 The plaintiff however showed court copies of transfer forms that he signed in favour of the third defendant M/s Rutungu Properties Ltd (owned by the first defendant) Exhibit P.3 and P.4. The plaintiff further testified that at the time he signed the said transfer forms in blank and that it was the defendant who filled in the rest of the forms to effect the transfers.

Mr. Kavuya in his defence and that of his two companied testified that he bought the said properties from Mr. Wakanyira and that a sale agreement was executed between the parties for the sum of Shs 272,000,000/= on the 17<sup>th</sup> January 2007. He further testified that the plaintiff's property had been mortgaged to M/s Housing Finance Bank Ltd and were in danger of foreclosure. Mr. Kavuya testified that he had to pay off the bank to secure the release of the said properties. Mr. Kavuya did so by paying Shs. 159,972,138/= the outstanding money directly into the plaintiff's bank accounts. The balance of Shs. 112,027,862/= was paid to the plaintiff in two installments. Counsel for the defendants submitted that the transaction between the parties was a straight sale and that the document marked Exhibits P.ID.2 purporting to show that the plaintiff was servicing a loan by paying Shs. 1,500,000/= was not an agreed document and was not proved and therefore was inadmissible in evidence. Counsel for the defendants dismissed as not credible the plaintiff's testimony that he signed transfer forms that were blank.

15 I have perused the submissions of both counsel and the evidence on record. Counsel for the defendant adduced into evidence six exhibits namely:

- a) Exhibit P.1 - The Sale Agreement
- b) Exhibit P.2 - The payment slip to Housing Finance Bank
- c) Exhibit P.3 - Transfer forms for Plot 17 Kataza Kiswa
- 20 d) Exhibit P.4 - Transfer forms for Plot 2062 Bweyogerere
- e) Exhibit P.9 - Copy of Certificate of Title for Plot 2062 Bweyogerere
- f) Exhibit P.10 - Copy of Certificate of Title for Plot 17 Kataza Kiswa

as evidence that the plaintiff sold his property to the defendant.

25 The plaintiff on the other hand says this was a loan and signed an agreement to that effect a copy of which was not given to him.

The plaintiff also relied on a document Exhibit P.ID.1 a copy of a computer print out suggesting that he paid Shs. 1,500,000/= to the first and second defendants on the 14<sup>th</sup> February 2007 as installments on the loan which was signed by Sam Kamwada an Accountant with the second defendant. Mr. Kamwada (PW4) gave evidence in court and denied generating the document Exhibit P.ID.1 or that the handwriting on it was his. To my mind Mr. Kamwada was a hostile witness for the plaintiff.

Another witness Mr. Edgar Mutumba (PW2) a businessman and former employee of the second defendant also testified that he was a witness to the sale agreement between the plaintiff and the first defendant. While agreeing that the second defendant company was a money lending enterprise, Mr. Mutumba however testified that all he knew about the transaction in court was that it was a sale of property by the plaintiff. This in my view made Mr. Mutumba a second hostile witness during the plaintiff's case.

The first defendant testified that he owned both the second defendant, a money lending company and the third defendant, a property company as a family business. He testified that the property business however was not his main business.

I must concede that the transaction between the plaintiff and the first defendant does raise eye brows as to its true nature. There is a tendency now days for money lenders to lend money and also secure such transactions by signing transfer forms for properties. Counsel for the plaintiff referred court to one such case namely **Patrick Kirumira vs David Tomusange** HCCS No. 225 of 2002 which was before Hon. Lady Justice C.A. Okello.

However in the **Patrick Kirumira case** unlike this one there was both a loan agreement and transfer forms that were signed. 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 the difference between the outstanding value of the Housing Finance Bank loan and the purchase price of the suit properties which the plaintiff did not sufficiently address. In such a situation based on the 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.

I therefore find in answer to the first issue that this agreement was a sale agreement between the parties.

## **Issue No. 2: Whether or not the transaction was fraudulent**

Counsel for the plaintiff approached this issue from three angles. First that if there was a money lending agreement then the interest charged therein of 10% p.m. is illegal under Section 12 (1) of the Money Lenders Act (Cap 273) as being harsh and unconscionable .

The second is that based on the alleged terms of the loan agreement the duration of the loan was six months, but the said properties were transferred into the third defendant's names within one month.

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Thirdly that the transfer was illegal and fraudulent as according to the two transfer forms the two properties in question though elaborately developed were declared to be empty plots worth Shs. 10,000,000/= each, with a view to make an under-declaration for stamp duty purposes.

10 I have already found that the argument of a loan agreement cannot be sustained. Therefore the first two grounds of fraudulent transaction must fail. The third ground however is different. Counsel for the plaintiff submitted that a contract is bad if it offends public policy. In this regard he referred me to the case of **Dr. Kaijuka Mutabazi Emmanuel vs Fang Min** SCCA No. 23 of 2007.

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Counsel for the plaintiff further referred me to a decision of Justice Alfred Karokoora (J. as he then was) in the case of **Samuel Kizito Mubiru & Another vs G.W. Byansiba & Another** [1985] HCB 106, where he held that by Public Policy any transaction designed to defraud the Government of its revenue is illegal.

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Counsel for the defendant in his submissions conceded that there was evidence of under declaration and misdescription of the two properties in this case. He however submitted that such a finding cannot be made in isolation as it is a common practice. Counsel for the defendant submitted that if court were to cancel the transaction it would open a flood gate of cases.

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Counsel for the defendant submitted that under the Stamps Act (Cap 342) as amended there are sanctions and penalties for not paying tax and those are more appropriate in the circumstances.

I find that there is a difference between not paying stamp duty on a sale agreement and not  
30 paying stamp duty on a transfer form. There is no doubt that by failing to pay due tax is contrary to public policy. In attacking which document should be scrutinized I think it should be the transfer form. This present case should be distinguished from the **Mubiru case** (Supra) because in that case the plaintiff sought protection in a land transaction that he was a bona fide purchaser

for value without notice. However, the Judge in that case rightly pointed out that you cannot be a bona fide purchaser if you do not pay Government tax. That is different from this case. In this case I agree that the short fall of tax should be drawn to the attention of the Uganda Revenue Authority for appropriate action. The main agreement however remains valid as there is no evidence that it was fraudulently made. This also disposes of all the outstanding substantive issues and leaves court to look at the remedies available.

**Issue No 3. Remedies:**

The plaintiff prayed for special damages on the grounds that he was served with a 14 day notice to vacate that suit properties but before that notice period was over he was forcefully evicted as a result of which a lot of his property was destroyed. As a result the plaintiff lost property worth Shs. 72,107,276/=. He also claims he lost rent worth Shs. 344,520,037/=. As to the claim for property that was destroyed there is evidence of notices of eviction. 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 civic 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 the pleadings of the plaintiff and should be disallowed. I agree. That being the case the head for special damages must fail.

All in all the plaintiff has failed to prove his case save for the issue of unpaid taxes against the defendant. That being the case this suit fails and is dismissed with costs.

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**Geoffrey Kiryabwire**  
**JUDGE**

**Date: 24/08/2010**

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**24<sup>th</sup> August 2010**

**9:45 am**

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Mr. B. Kanya H/B for A. Bemanyisa for the Plaintiff

**In Court**

20 The Plaintiff

Mr. Okune Court Clerk

**Court**

25 Judgment read and signed in open court

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**Geoffrey Kiryabwire**

**JUDGE**

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**Date: 24/08/2010**