THE REPUBLIC OF UGANDA

THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO 77 OF 2011

(ARISING FROM HIGH COURT CIVIL SUIT NO 298 OF 2008)

JOSEPH NANJUBU.....APPLICANT/PLAINTIFF

VERSUS

FRANK KINTU

MUSA NSIMBE.....……RESPONDENTS/DEFENDANTS

BEFORE HONOURABLE MR JUSTICE CHRISTOPHER MADRAMA

RULING

The applicant brings this application under order 6 rule 30 of the Civil Procedure Rules and order 52 rule 1 and 3 of the CPR for orders that the respondents defence be struck out for failing to disclose a reasonable answer to the plaintiffs claim; (b) that judgement be entered for the plaintiff in terms of the plaint and (c) costs of the application are provided for.

The application is supported by the affidavit of Joseph Nanjubu and Samuel Peter Kiwanuka. For the Respondent, the second respondent Mr Musa Nsimbe affirmed an affidavit in reply. Counsel Barnabas Kamya represented the applicant while Counsel Sempala David appeared for the Respondents.

In his written submissions, the applicant attacked the defence filed by the respondents in High Court Civil Suit No. 298 of 2008 that it discloses no reasonable answer to the plaintiffs claim as it inter alia consists of general denials and does not address the plaintiffs entitlement to a refund of the purchase price and agreed interest after total failure of consideration. That the defence also offends the provisions of order 6 rule 8 of the Civil Procedure Rules. He submitted

that the brief background to the application is that the plaintiff sued the defendant under High Court Civil Suit No. 298 of 2008 for a refund of the purchase price and agreed interest.

The gist of the applicants case is that the respondents in paragraph 4 of their amended written statement of defence admit the agreements entered into between the applicant and respondents on the 6th and 12th of August 2008 respectively but at the same time they deny breach of contract or being indebted to the applicant when the applicant parted with his money for a failed consideration. Applicant's submission is that the respondents are estopped from denying liability under the same agreements. This is because it is a common law principle of contract that one cannot approbate and reprobate. In law a person is not allowed to take the benefits under an instrument and disclaim the liabilities imposed by the same instrument. According to Oxford dictionary of law new edition at pages 28 "appropriate and reprobate" is defined as to accept and reject. The author goes on to say that a person is not allowed to accept the benefit of a document and reject any condition attached to it.

In the case of **LISSENDEN vs. C.A. V. BOSCH (1940) A.C. 412 per Lord Maugham** at 417, 418, the House of Lords held that "it is equally settled in the law of Scotland as in England, that no person can accept and reject the same instrument." In short the doctrine of election or approbate and reprobate estoppels a person from accepting and rejecting the same instrument at the same time.

Counsel submits that the allegations in paragraphs 4 to 14 of the defence are general denials which offend the provisions of order 6 rule 8 of the Civil Procedure Rules. That this rule is mandatory and that the defence which offends the rule is barred and should be struck off and judgement entered in favour of the plaintiff. In **Ben Byabashaijja & Another vs. Attorney General (1992) 1 KALR 161 citing from Joshi vs. Uganda Sugar Factory (1968) EA 570 at 572 Spry JA** held that the issue was whether the defendant can call evidence where his written statement of defence was merely a general denial without raising any defence. It was held that the defendant would not be given leave to call evidence since in his written statement of defence there was no specific denial.

The applicants counsel submits that the defences raised by the first defendant's affidavit are three namely:

1. The suit property was sold free from any encumbrances from disputes and there was no encumbrance whatsoever against the property.
2. The respondents have never breached the contract (agreements)
3. The applicant has no locus to bring the suit

The defence that the applicant has no *locus standi* bring a suit against the respondent is a

repetition of the preliminary objection raised in paragraph 3 of the respondent's written statement of defence the effect that the plaintiff as an individual has no cause of action against the defendant's.

Counsel submits that the respondent's intends to raise a preliminary objection on the observations of his Lordship honourable Mr Justice Lameck Mukasa in his ruling in Miscellaneous Application No. 0321 of 2010 Frank Kintu and Another versus Joseph Nanjubu, where he said that the respondents averments pointed to Mr Charles Mbogo as the principal and the applicant as his agent in the transaction. These observations interpret the general rule that when a person contracts as an agent of the principal, the contract is that of the principal. He quoted the case of **Montgomery and others versus United Kingdom Mutual Steamship Association Ltd (1891) 1 QB 370**. But in the instant case, there is nothing in the plaint or in the contracts to show that the applicant was acting as the agent of the principal. Mr Charles Mbogo was only witness to the contract. In the Montgomery case there are exceptions. Besides the general rule, it was held that the principal may be excluded in several other cases such as where the contract was made by deed inter partes to which the principal is not a party. Consequently, the argument that the plaintiff as an individual has no cause of action against the defendants has no merit and should be rejected. Upon perusal of the agreement of sale, the respondents were defendants while the applicant was the owner and one of the witness was Charles Mbogo, who is the person who actually bought the land. They annex police statements and an affidavit by Charles Mbogo to make their point. These documents were not annexed to the pleadings and are therefore inadmissible.

Counsel submits that the plaintiff's plaint discloses a cause of action in that the plaintiff enjoyed a right of purchaser of land, the agreements to purchase were breached and the defendants were responsible. Referred to the case of **Auto Garage vs. Motokov [1971] EA 514**. He contended that the agreements between the parties dated 6th and 12th of August 2008 constitute contracts entered into between the applicants and the respondents.

Quoting from various cases he submitted that if the applicant had entered into a contract for the benefit of Charles Mbogo, the right and indeed the duty to enforce the contract for the benefit of Charles Mbogo is for the applicant and nobody else. The common law principle is "at common law certain principles are fundamental; one is that only a person who is a party to the contract can sue on it."

Given the above fundamental principle of common law, even if it was Charles Mbogo who provided the money to purchase the land the applicant used the money to contract with the respondents, it is only the applicant who can sue upon contract and not Charles Mbogo. In the final analysis, the respondents intended preliminary objection has no merit and should be dismissed with costs to the applicant.

Since non disclosure of a cause of action is also the sole defence available to the defendants and such a defence is sham, the defendant's written statement of defence to the plaintiffs claim ought to be struck off from the record and judgement be entered for the plaintiff in the terms set out in the plaint. The legal principles upon which the court will exercise its power to strike out pleadings are set out by Lindley MB in the case of **Hubbuck and Sons Ltd versus Wilkinson Heywood and Clerk Ltd (1899) 1 Q.B. 89** when he said;

> "the procedure is only appropriate to a cases which are plain and obvious so that any judge can say at once that the statement of claim as it stands is insufficient even if proved, be entitle the plaintiff to what he asks"

So the court must be satisfied before striking out pleadings that the case (defence) which has been presented cannot be maintained or argued. That in the instant case, the defendants are accepting the benefits of the contract and at the same time rejecting the condition of refunding the purchase price agreed interest attached to the contract, in the event of failure to deliver the land to the plaintiff free of any encumbrances before the expiry of 30 days from the execution of each agreement. As the defendant's defence is a sham, the money paid by the plaintiff to the defendants for a failed consideration is recoverable. Counsel referred to the case of **Transvaal Investment Company versus Atkinson [1944] 1 ALL ER 579 citing Sinclair versus Brougham [1914] A.C 398**; where it was held: "it was contended that money is recoverable where there has been an unjust enrichment of the defendant unintended by the plaintiff. It is held, however, that the plaintiff must go further and prove that it is fair and right that the money shall be repaid and that the circumstances are such that the law would imply a contract to repay."

In the instant case the applicant parted with money for a consideration which totally failed and therefore the defendants who took it for that failed consideration ought not to retain it, for to do so would be unfair and unjust.

Counsel further submitted that if the court was not inclined to strike out the written statement of defence under order 6 rules 30 of the Civil Procedure Rules, it can equally proceed under order 13 rules 6 of the Civil Procedure Rules and enter judgement for the plaintiffs in the sums admitted. He submits that the defendant's admit the agreement and judgement should be entered against them under order 13 rules 6 of the Civil Procedure Rules and section 57 of the Evidence Act. He submitted that under order 13 rules 6 the plaintiff is entitled to judgement against the defendants to recover a refund and agreed interest. Citing **MAPRO LTD VS AG [1996] KALR 557**, that the defendant's prayer to dismiss the plaintiffs was not tenable because liability had been admitted under order 11 rule 6 (now order 13 rule 6) again in the case of **Zimwe Enterprises Hardwares vs. John Sentongo [1990] KALR 776** the plaintiff claimed that by an agreement of sale that he had purchased the defendant suit property and paid the full

consideration. The plaintiff claimed for a refund or specific performance in the suit. The defendant in his written statement of defence acknowledged the contract of sale and the receipt of the consideration in full, but contended that the sale was in respect of a different property of the defendant and not the suit property. At the hearing, the plaintiff relying on order 11 rule 6 (now order 13 rule 6) applied to court to rule that the defendant had admitted the claim and that an order of specific performance of the contract be made. It was held by Tinyinondi J as he then was that "Order 11 rule 6 Civil Procedure Rules (now order 13 rule 6 Civil Procedure Rules) allows the party to this suit where the other party has admitted the facts of the case to apply for judgement or order consequent on the admission without having to wait for a full trial. In the instant case, the defendant admitted the plaintiffs claim and therefore the plaintiff is entitled to judgement." In the case of **All Ports Freight Services (U) Ltd vs. Julius Kamwanyi and Another [1996] KALR 489** before Kania J . The facts were that the plaintiffs sued both defendants claiming that it had supplied to them as partners cement. They made part payment and left unpaid balance. The first defendant filed a written statement of defence where he admitted total liability and elsewhere he denied his failure or refusal to pay the debt. In an application to strike out the defence, it was held that the admissions and half-hearted denials of the first defendant did not disclose answer or defence to the claim and it was held that the first defendant's defence was un-maintainable, frivolous and vexatious and should be struck off the record.

Section 57 evidence act:

> "no fact need to be proved in any proceedings which the parties to the preceding or their agents agreed to admit at the hearing or which, before the hearing, they agreed to admit by any writing under their hands, on which by any rule of pleadings in force at the time they are deemed to have admitted by the pleadings, except that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admission".

Finally counsel referred to the case of Kampala District Land Board and Another versus National Housing and Construction Corporation civil appeal No. 2 of 2004 Supreme Court (unreported) that under section 56 (now 57) of the Evidence Act, those facts once admitted needed no further proof and were no longer in issue. There is therefore overwhelming evidence on record to establish that the respondents admitted the contract in its entirety and the plaintiff ought to be entitled to judgement for the amount admitted and agreed interest.

In reply the respondent submitted that under order 6 rule 30 of the civil procedure rules there are two salient issues that I should consider when adjudicating on the matter. Firstly that the court reserves the discretion to evaluate whether the defence gives a reasonable answer to the claim or not and secondly that the defence must be such that it discloses no reasonable answer to the

claim in the plaint

This leaves only one issue for court to decide in this matter which is whether the defendants defence discloses a reasonable answer to the applicants claim in the plaint. Paragraph 3 of the applicants amended plaint is instructive as to what his claim his. The applicant is claiming for a refund of the contract sum, they agreed interest, general damages for breach of contract and costs of this suit. In summary the applicant is suing for a refund of the contract sum and other remedies owing to the respondent's breach of the contracts for the sale of land. The respondents in the pleadings denied breaching the contract and specifically stated in paragraph 6 and 8 that;

6."The defendants shall aver and contend that even if a right plaintiff had sued, the defendants were in breach of contract as the land they had sold to the plaintiff is existing."

8."the defendant shall aver that the land sold to the plaintiff is in existence and that there was no breach of any time of the contract as alleged by the plaintiff."

All the other aspects of the respondent's written statement of defence detail out how the respondents have not breached the contract in issue and further that the applicant has no capacity to institute the suit. The applicant's submissions are very diversionary in respect of the issue this court is to determine in this application. He submitted that it is true that the respondents concede to entering the agreement in issue but accepting that the contract was made is quite different from accepting that it was breached. He contended that the applicant's submissions and indeed the entire application are premised on the failure to distinguish between the two elements stated above. Whereas the respondent accepted that it executed a contract with the applicant, nowhere is it stated in the pleadings that they concede to the allegation that they breached the contract so as to entitle the applicant to a refund of the purchase price, interest and other remedies.

That the issue that is to be investigated is whether there was a breach of contract or not. This will certainly call for evidence from either side so that the court decides whether there was a breach or not. For instance if at the end of the trial court finds that the land that the respondents sold to the applicant is existing as the respondent allege then the applicants suit will be dismissed and the reverse is equally true.

Where the defendant denies the plaintiffs claim, which amounts to a reasonable answer the claim. In Libyan Arab bank versus verses Intrepo Ltd [1985] HCB Honourable Mr. Justice Benjamin Odoki held:

> "in its written statement of defence it was clear that the defendant denied being indebted to the plaintiff in the manner alleged by the plaintiff in the plaint. This was a perfectly proper defence to raise against the plaintiffs claim which raised triable issues of fact and

law fit for trial by this court."

Counsel further submits that nowhere is it pleaded by the applicant that the respondents suit is frivolous and vexatious and since this raises serious questions of law this honourable court should follow the persuasive position articulated above that pleadings should be struck out under order 6 rule 30 in plain and obvious cases and this is not one of those cases.

The applicant relies on paragraphs 4 and 5 of the respondent's written statement of defence to submit that there was cancellation of the certificate of title. The two paragraphs should be critically examined as they only allude to the fact of cancellation of title and refer to annexure "D" to the defence which is a letter from the land Registry clearly stating that there was a defect in plotting and naming of titles which had to be rectified if found to be true.
Court has to investigate the impact of the alleged cancellation on the contract in issue. Was the entire land taken away? Did it affect the acreage the applicant purchased? Was there a frustration of the contract? Was there a mutual mistake?

All the above questions are pertinent in view of clauses 12 and 13 of the sale agreement (annexure "B" to the amended plaint) that suggest that the applicant's advocate carried out a search both in the land registry and physically on the land that confirmed the authenticity of the land sold. All the above are serious questions of fact or law that have to be investigated in the course of trial which this court cannot pronounce as frivolous or vexatious issues. He prayed that the applicant's application be dismissed with costs.

In rejoinder the applicants counsel submitted that the alleged defence of the defendant in paragraph 6 and 7 of the defence is a general denial and not a specific to one and does not answer the claim by the Luyima family. It does not challenge the caveat lodged by the Luyima family and the cancellation of the certificate of title to suit land. That the defence does not show why the plaintiff has failed to take possession when there are no "encumbrances". He further submits that the defendants admit the cancellation and further states that the cancellation was beyond their control. Submits that since defenders sold land which does not exist it is no defence reversing the cancellation of title the defendants defence is sham and should be struck off as it is an abuse of court process.

The applicants counsel further submits the defence pleadings are groundless and raises no defence in law or equity.

Counsel further criticised the defendants for raising the question of interest which in the instant case was agreed at 10% of the contract price, in case of failure to deliver the land after 30 days of each agreement. He submitted that to raise the question of interest is an admission of the contract. Counsel submitted that the contract itself provides what should happen if there was a

breach and among the terms it allows a party to rescind the contract.
Quoting from Atkin in Encyclopaedia of Court Forms in Civil Proceedings, 2 edition Vol. 34 (1) page 29 paragraph 12 thereof:

> 'a party may also be given the right to rescind in certain specified events by the terms of the contract itself, which terms usually expressly provide the circumstances in which and the conditions upon which the right to rescind will be exercisable. Exercise of such right will terminate the contract and require the vendor to repay the deposit'.

The purchaser was by agreement given the right to rescind the contract and demand a refund of the purchase price and agreed interest in the event that the defendants failed to pass title and give possession within 30 days of each agreement. The 30 days of the first agreement of 6 of August 2008 expired on the 5th September 2008 while the second agreement of 12th of August 2008 expired on 11th September 2008 without the respondents having passed title and given the applicant vacant possession of the land. Counsel submitted that time was of essence in the contract.
Finally almost all the questions raised by counsel for the defendants in opposition of the application have no merit since the land was never delivered to the applicant free of any encumbrances from third parties, within 30 days of each agreement. After the expiry of the time within which the applicants was to take delivery of the land, the applicant lawfully exercised the right to rescind the contract conferred upon him by the agreements. In the premises this is a proper and suitable case where the court should use its coercive hand and strike out the defence which is a sham.

I have read through and carefully considered the rather lengthy submissions of the applicant and a reply thereto by the respondents counsel. In considering an application under order 6 rules 30 of the Civil Procedure Rules the court is required to look at the pleadings which are sought to be struck out.

The powers given by order 6 rule 30 are discretionary. Order 6 rule 30 of the Civil Procedure Rules provides as follows:

> **"30. Striking out pleading.**
> (1) The court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer and, in any such case, or in case of the suit or defence being shown by the pleadings to be frivolous or vexatious, may order the suit to be stayed or dismissed or judgment to be entered accordingly, as may be just."

Two aspects of the sub rule 1 of rule 30 of order 6 should be specifically noted. The first one is that the rule by using the word "may" gives the court discretionary powers whether to strike out

a pleading or not even if it does not disclose a reasonable answer to the claim. Secondly, it must be shown by the pleadings only that the defence is frivolous or vexatious. In this case, the applicants seek to strike out the written statement of defence of the defendant/respondent. Just like a plaint the court looks at the written statement of defence and attachments thereto and assumes that the facts pleaded in the defence are true. The question to which I must address my mind is only whether the defences raised in the written statement of defence have a reasonable chance of succeeding if proved and whether in the circumstances I should exercise my discretional powers to strike out the defence.

For the proposition that the court looks at the pleadings only, reference should be made to the Court of Appeal case at Kampala of **Jeraj Shariff & Co v Chotai Fancy Stores [1960] 1 EA 374 Court of Appeal at Kampala**, where Windham JA at page 375 stated that "The question whether a plaint disclose a cause of action must be determined upon a perusal of the plaint alone, together with anything attached so as to form part of it, and upon the assumption that any express or implied allegations of fact in it are true." This is further specifically as far as order 6 rule 30 is concerned elucidated in the case of **S C Baxi v The Bank of India Limited [1966] 1 EA 130** by the Court of appeal at Kampala. In this case the appellant whose cheque was erroneously dishonoured in India by the Bank of India where he had gone to purchase property and upon occurrence of the dishonour of the cheque failed to complete his deal, chose to file a suit against the Bank of India Branch in Uganda. The respondent applied by notice of motion under O. 6, r. 29 (Now order 6 rule 30) and under the court's inherent power (section 101 CPA) for the suit to be dismissed as being vexatious and an abuse of the process of the court. The application was supported by an affidavit from the respondent's Kampala branch manager. The trial judge found that the inconvenience which would result in trying the suit in Uganda would be vexatious, and relying on the matters raised in the manager's affidavit, and not on the pleadings, dismissed the suit pursuant to O. 6, r. 29. The appellant thereupon appealed on the grounds (a) that the affidavit was inadmissible and (b) that the trial judge had failed to consider that the appellant was resident in Uganda and could only proceed to India for the purpose of litigation at considerable inconvenience and expense.
LAW JA Held at page 132 that:

> *"Had the application to dismiss the suit been made only under O. 6, r. 29, it would have been necessary for the respondent to show by the pleadings alone that the suit was frivolous or vexatious, and Mr. Shukla's affidavit would have been inadmissible for this purpose as the only way of dealing with such an application is by looking at the pleadings* (Attorney-General of the Duchy of Lancaster v. London and North Western Railway Company (1). In this case, however, the application was also made under the court's inherent jurisdiction, on grounds other than those appearing from the pleadings, and in such a case it is perfectly proper for the court to look at the affidavits of the parties filed in support of and in opposition to the application (Logan v. Bank of Scotland (2)). The first ground of appeal, that the judge erred in admitting and relying on Mr. Shukla's

affidavit, must accordingly in my opinion fail." (Emphasis added)

From the above authorities, this application was made under order 6 rule 30 of the Civil Procedure Rules and not under the inherent powers of court. I am only required to peruse the pleadings only to determine the question of whether the defence discloses a reasonable answer to the claim in the plaint and whether triable issues of fact and law arise from its terms.

In his rather lengthy submissions counsel for the applicant submitted that the defendants cannot approbate and reprobate, that is they have admitted the contract and have taken a benefit out of it by receiving the purchase money. They have however refused to comply with the term which prescribes or gives the applicant a right to seek a refund if any encumbrances or third party claims are not removed or dealt with respectively within 30 days from the date of the agreement. In the second leg of his submissions counsel asserts that paragraphs 4 - 14 of the Written Statement of Defence are general denials and offend the provisions of order 6 rule 8 of the CPR. That as far as the question of the applicant's *locus standi* is concerned, the contract is between the applicant and the Respondents and therefore only the applicant can sue on it, even if it is for the benefit of an undisclosed principal (Charles Mbogo). He agreed that order 6 rules 30 of the Civil Procedure Rules should be applied in plain and obvious cases where the defence as stated is insufficient even if proved. He contended that there is a contract to repay the money and this term can be applied. Last but not least counsel prayed that I enter judgment for the plaintiff under order 13 rules 6 of the Civil Procedure Rules. He bases himself on the authorities submitted that where there has been an admission of the claim, the defence is not tenable and should be struck out.

On the question of the *locus standi* of the applicant and evidence of Mr. Charles Mbogo being the principal who bought the land, I agree with the applicant's counsel that the question in the plaint concerns a contract which the defence does not dispute. This contract has parties and is enforced between the parties to it. However, it does not affect the merits for me to find as I do that the issue will not and cannot affect my decision as to whether the WSD discloses a reasonable defence and I shall not consider it.

The basis of the plaintiff's claim is the alleged failure of the defendants to refund his money when he demanded the same after they allegedly failed to fulfil their part of the contract. As can be read from the pleadings alone, the plaintiffs claim is based or founded on contract. The contracts are dated 6 and 12 of August.

The contract dated 6 of August 2008 is made between the first and second Respondents as vendors and the plaintiff/applicant as purchaser.

Paragraph 9 of the agreement stipulates as follows:

"The vendor guarantee that the land he is selling is his as beneficial owner being the son of the late Aloziyo and encumbrances from 3 parties and or adverse claims and in case there is such encumbrances and or any squatters on the land, then and in such a case the vendor undertakes to remove the squatter or encumbrances from the land immediately and also give to the purchaser and his advocate written proof of the removal of the encumbrances and squatters, but in case of failure to pass title and also give vacant possession to the purchaser for any cause, then he shall refund the full purchase price and all incidental expenses to the purchaser within thirty (30) days from the date of this agreement plus 10% per month on the purchase price calculated from the date of this agreement."

The agreement is not disputed in the written statement of defence. The defendant pleaded that the alleged cancellation of title of the first defendant was due to circumstances which in law cannot be termed fraud but inadvertence in the process of procuring the title. That the cancellation of the relevant land title was beyond their control. Furthermore the defence avers that the land they sold still exists and they are not in breach of the terms of the agreement. They further aver that all disputes with regard to the plaintiffs land had been settled with the Luyima Family.

Last but not least under paragraph 13 the defence avers that:

"13. That pursuant to the ruling of the Resident District Commissioner, Wakiso district, 90% of the land sold to the plaintiff belonged to the first defendant and ownership of the 10% was awaiting confirmation. As such, the cause of action ought to have been flowing from the 10% of the land which was disputed and not the whole transaction."

To my mind the question of legal doctrine is whether the applicant was entitled to rescind the contract on the basis of the fact pleaded in the plaint and which remain uncontested by the written statement of defence. The defence does not aver that no third party or adverse claims to the land they had sold the applicant had been made. Secondly they do not state whether they as defendants had put the plaintiff in possession within 30 days. It is clear that the plaintiff is not in possession. Both agreements of the parties unequivocally provide that and I quote the relevant part of clause 9 thereof:

"... but in case of failure to pass title and also to give vacant possession to the purchaser for any cause, then he shall refund the full purchase price and all incidental expenses to the purchaser within thirty days from the date of this agreement plus 10% per month on the purchase price calculated from the date of this agreement."

The plaintiff pleaded in the amended plaint that:

a. It was a term of the contract that the land was sold free from all encumbrances from 3 parties and adverse claims.
b. If there were adverse claims or encumbrances, they were to be removed within 30 days from signing the contract.
c. Failure to do so would entitle the plaintiff to a refund of the money with interest at 10% per Month.
d. On the 18 of September 2008 the applicant demanded a refund which the respondents have refused to respond to.

From the above pleading of the plaintiff, the claim of the plaintiff is based on clause 9 of the relevant agreement. It was incumbent upon the defendants to plead facts showing that they have a defence to clause 9 of the agreement which permits a refund of the applicant's money if title to land sold not passed to the plaintiff and he is not put into possession for any cause. The term "any cause" is not defined. It can however be read to mean "any reason". The only hypothetical possible defences to the plaint available to these pleadings may include the following:

a. That the respondents did pass title to the plaintiff/applicant
b. That the applicant was put into possession of the suit premises,
c. That the respondents fulfilled their part of the bargain in that they removed or dealt with adverse claims within 30 days.
d. That they passed title to the applicant and or that the applicant was given vacant possession or refused to take up vacant possession after adverse claims were dealt with or he was invited to take possession free from any claims and refused to do so within 30 days.

From my reading of the defence the defendants intend to bring evidence or set up a different defence namely

1. That the plaintiff has no standing to bring the application because he bought the land for an undisclosed principal (Mr. Charles Mbogo). However I have already noted the foundation of the suit is a contract between the plaintiff and the defendants which contract has not been denied.
2. That the 3 party claims were dealt with and that there was a dispute concerning only 10 percent of the land.
3. That the land "exists". This obviously shows that the applicant was not put in possession within 30 days for any cause and therefore does not give a defence to clause 9 of the relevant agreements.

It is my finding that on the face of the pleadings the defences set up by the respondents do not set up plausible defences to the claim in the plaint brought under clause 9 of the relevant

agreement under which the applicant could seek refund if he was not passed title and given vacant possession within the time specified. Or whether any adverse claims and encumbrances were not removed within the 30 days agreed. It is not even averred that the agreement is unconscionable or unlawful or void for any reason. The agreement is admitted. I further agree with the applicant's counsel that in clause 9 upon which the claim in the plaint is founded, time is of essence. If what is stipulated in the contract namely resulting in the giving of vacant possession and transfer of title to the plaintiff did not occur within 30 days of the date of each agreement, the applicant reserved the right to seek a refund of his money. The defence does not deny receiving the money pleaded.

As far as the prayer for judgment on admission is concerned, I agree with the Respondents counsel that agreeing to the terms of the contract does not imply an agreement that money is due and owing to the applicant. They claim that they land is available. However the pleadings by the defence in terms of terminology that the "land is existing" is misleading. The fact that the land exists does not define who the owner is or whether the suit land had adverse claims to it. It does not terminologically define what the defence is. Land may exist even if it belongs to someone else. Lastly as far as admission is concerned an application is made under order 13 rule 6. The admission has to be unequivocal and must admit the claim in the plaint.

My holding on the written statement above however raises a matter of great concern given the history of this case. The background of this case is that the applicants filed a summary suit on the 14 of November 2008 and an ex parte decree was entered in the applicants favour on the 12 of December 2008. In the decree the defendants were jointly and severally to refund UG shillings 57,500,000/= and agreed interest to the plaintiff until payment in full. Secondly that the second defendant refunds UG SHS 3,000,000/- and agreed interest to the plaintiff until payment in full. On the 11 of May 2010 a warrant of arrest was issued by this court for arrest of the respondents for a sum of Uganda shillings 181,500,000/- together with costs of executing the process.

After arrest and committal to civil prison, the Respondents filed High Court

Miscellaneous Application No. 0331 of 2010 to set aside the ex parte decree and execution. On the 6 of September 2010 the second respondent Musa Nsimbe was released from Prison on the term that he deposits his passport in court and secondly he is to report every week to the deputy registrar of the high Court.

Eventually in a ruling delivered on the 30 of November 2010 the decree was set aside and the Respondents were ordered to file a written statement of defence within 14 days from the 30 of November 2010. They filed a written statement of defence on the 14 of December 2010. To put it in other words the facts show that the Respondents have after protracted hearings sought to be heard in defence of the suit.

The state of the written statement of defence is to be regretted. A further factor which is of concern to this court is that this case arose in 2008 and if the plaintiff is to success, the interest in the agreement would have continued to accrue unless otherwise ordered.

For the reasons stated above and despite the general state of the defence and given the fact that the defendants have made a lot of effort to be heard after civil prison on the same matter, I decline to rule on the application to strike out the written statement of defence at this stage. Order 6 rule 30 gives me discretionary powers to decide whether to strike out the pleadings at this stage or not. The decision on this issue is stayed until after evidence has been adduced on the

question of whether clause 9 of the relevant agreement can be applied to make an order for refund of the plaintiffs money give the facts and circumstances of this case. The defendant may be heard on this issue. To cut the defendant out at this stage does not meet the intention of the order of this court dated 30 November 2010 in HCMA No. 0321 of 2010 setting aside the ex parte decree and giving the respondents leave to file a defence and be heard on the merits. It is assumed that in the application to be heard, arguable issues had been proposed before court. To do otherwise by striking out the defence at this stage amounts to giving with one hand and taking away the other. A striking out order would mean that the decree set aside would be restored in another form before the respondents have been heard. The applicant suffers no prejudice and may raise the same issue of the competence of the respondent's pleadings at the end of the hearing in final submissions. I further direct that this suit be fixed for hearing on the nearest date convenient to court and that it be heard from day to day until completed. The costs of this application shall abide the outcome of the main suit.

Ruling signed and delivered in open court the 1st of April 2011 at 2.30 pm

Hon. Justice Mr. Christopher Madrama

Ruling delivered in the presence of;
Mr. Charles Mboyo for Applicant – Applicant absent
David Sempala for Respondent
2nd Respondent in Court
Ojambo Court Clerk

Hon. Justice Mr. Christopher Madrama