

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

HCCS NO 0290 OF 2010

JAMES NDAULA}.....PLAINTIFF

VERSUS

BARCLAYS BANK UGANDA LIMITED}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff commenced this action against the Defendant bank seeking to recover from the Defendant inter alia Uganda shillings 250,000,000/=, general damages for breach of contract, interests and costs of the suit. The Plaintiff alleges that on 17 January 2011, he entered into an agreement for the purchase of land comprised in Kibuga block 7 plot 1253 blocks 7 land at Mengo from the Defendant. Under the agreement, the Plaintiff paid Uganda shillings 250,000,000/= and the Defendant covenanted among other things that the Plaintiff was to take possession of the land immediately after execution of the agreement.

The Defendant executed and handed over signed transfer forms in the Plaintiffs favour and the Plaintiff paid the necessary stamp duty for transfer of the property into his names whereupon upon lodgement of the documents, they were rejected on the grounds that one Solome Nabulya Nsibambi claimed an interest in the land alleging that it had been fraudulently mortgaged to the bank. Consequently the Defendant failed to hand over the property to the Plaintiff and further failed to transfer the property into the names of the Plaintiff.

In the written statement of defence, the Defendant admits execution of the agreement dated 17th of January 2011. The Defendant further admits having received Uganda shillings 250,000,000/= paid by the Plaintiff as land to the said agreement.

In a joint scheduling memorandum signed by Counsels of both parties, it is an agreed fact that on 17 January 2011, the Plaintiff entered into an agreement for purchase of land comprised in Kibuga block 7, plot 1253 blocks 7 land at Mengo from the Defendant. By that agreement the Plaintiff paid Uganda shillings 250,000,000/= and the Defendant covenanted among other things that the Plaintiff was to take possession of the land immediately after execution of the agreement. Thirdly the Defendant executed and handed over signed transfer forms in the Plaintiffs favour.

At the hearing, the Plaintiff was represented by Counsel Obed Mwebesa while the Defendant was represented by Counsel Richard Obonyo.

At the close of the respective party's cases, Counsels filed written submissions.

The Plaintiffs case is that it brought a suit to recover from the Defendant inter alia Uganda shillings 250,000,000/=: special and general damages for breach of contract and costs of the suit. Counsel further referred to the agreed facts set out above. The issues for trial are:

1. Whether the Plaintiff's failure to take possession and have the property registered in his names amounts to breach of contract on the part of the Defendant?
2. Whether the Plaintiff is entitled to a refund of the consideration?
3. Whether the Plaintiff suffered damages?
4. Whether the Plaintiff is entitled to the reliefs sought?

Whether the Plaintiff's failure to take possession and have the property registered in his names amounts to breach of contract on the part of the Defendant?

On this issue the Plaintiff's Counsel submits that is established by the evidence and it is not in dispute that the Plaintiff failed to gain possession of the property in question after he purchased it at Uganda shillings 250,000,000/=: Secondly the Plaintiff admits that it is not disputed that Uganda shillings 250,000,000/= was refunded by the Defendant during the hearing of the suit. The Plaintiff contends that the refund is an indication that the Defendant realised that the Plaintiff could not take possession of the property. Thirdly it is not disputed that the Plaintiff handed over all the accompanying documents of title to the Defendant. It is further not in dispute that the failure of the Plaintiff to take possession of the suit property was due to problems on the

land. The Defendant covenanted that the Plaintiff would take possession of the land after execution of the agreement.

Furthermore under clause 3 of the agreement of sale exhibit P1 at page 8 thereof of the scheduling memorandum the Defendant wanted that the land was lawfully mortgaged to it and that it had power and authority to transfer the land to the Plaintiff. However the Plaintiff could not transfer the learned much as he had paid the purchase price in full. Consequently and also as evidenced by the refund of the purchase price, the Plaintiff never took possession of the land and therefore there was breach of contract by the Defendant when it sold to the Plaintiff land that the Plaintiff could not take possession of. Counsel relied on the case of **DFCU bank Ltd versus Messieurs Ndibaza and another HCCS number 18 of 2012** where the court adopted the holding in **Jackson versus Mayfair Window Cleaning Company [1952] 1 All ER 250 at 218** that "breach of contract occurs where that which is complained of is a breach of duty arising out of obligations undertaken by the contract".

Consequently Counsel invited the court to find that the Defendant was in breach of the contract because it covenanted that the Plaintiff would take possession of the land after payment of the consideration however the Plaintiff could not because of problems encountered on the land.

On the other hand the Defendant submitted in reply that a borrower called Joseph Musoke obtained a loan facility from the Defendant of Uganda shillings 230,000,000/= at 19% monthly interest for a term of 60 months. The terms are expressed in the loan offer dated 30th of September 2010 exhibit D1. The loan was secured by titled land comprised in Kibuga block 7 plots 1253 at Mengo in the names of the borrower Joseph Musoke according to exhibit D2. Before the loan was approved, the Defendant obtained a search return from the land registry dated 22 July 2010 confirming that Joseph Musoke was the registered proprietor according to exhibit D4. There was a survey and valuation of the suit property in August 2010 according to exhibit D5 which also confirmed the ownership of the property for purposes of the mortgage. The Defendant and the borrower executed a legal mortgage to secure the borrowing which was registered on 5 October 2010 under instrument number KLA 472288. The borrower did not service loan as contracted and the Defendant instituted recovery measures by foreclosure. Legal process for foreclosure were duly complied with by the Defendant who issued the required legal

demands and notices according to exhibits D6 and D7 and also the date. Subsequently the property was advertised in the New Vision newspaper exhibit D9.

The unchallenged facts prove the propriety of the mortgage transaction that the bank undertook and the right as mortgagee to realise the suit property as it did and accordingly confirmed the warranties the Defendant gave the Plaintiff under the sale and purchase agreement between the parties exhibit D10.

Furthermore pursuant to the advert run by the Defendant for the sale of the suit property exhibit D9, the parties to this suit entered into an agreement for sale and purchase of the land exhibit D10. In accordance with the agreement, the Plaintiff paid Uganda shillings 250,000,000/= to the Defendant and received in exchange transfer forms for the suit property in his favour exhibit D11, a mortgage withdrawal instrument exhibited D 12, and a certificate of title for the suit land from the Defendant exhibit D2.

The Plaintiff claims that the Defendant failed to hand over vacant possession of the suit property; that the Plaintiff failed to transfer the suit property into his names; and that the Defendant misrepresented that the land was wrongfully mortgaged. In a reply thereto the Defendant contends that the terms of the agreement/contract signed by the parties for the sale of the suit land exhibit D10 put the burden of taking possession of the property on the Plaintiff. Accordingly the risk of loss arising from failure to gain possession of the land is also on the Plaintiff. The Defendant fully discharged its contractual obligations to the Defendant when it handed over the transfer deed exhibit D11 duly signed in favour of the Plaintiff, to the Plaintiff together with a mortgage release instrument exhibit D 12 and a certificate of title of the property.

Whether the Plaintiff's failure to take possession and have the suit property registered in his names amounts to breach of contract on the part of the Defendant?

The Defendants Counsel's submission is that the issue is resolved by examining and interpreting the sale agreement exhibit D10 to determine from its terms of the obligations of the parties on the question of possession and transfer. At page 1 paragraphs (c) and (d) of the agreement provides that the parties agreed to sell and purchase the property on the terms and conditions contained in the sale agreement exhibit P 10.

Obligation to transfer and possession are primarily contained in clause 4 of the agreement which provides that upon full payment of the purchase price and the lawyers' fees, the Defendant shall hand over a transfer of the land duly executed in favour of the purchaser to the purchaser along with the land title and mortgage release instrument. In clause 5 it is provided that the purchaser shall be at liberty to take over vacant possession of the land immediately upon full payment of the purchase price of the land.

After reference to principles of interpretation of contracts which include ascertaining the intention of the parties from the words used, to receive construction which the language of the agreement will admit and that would best effectuate the intention of the parties by reading the whole agreement to contextualise particular words used. Not to revise words used by the parties and to give full effect to the intention of the parties. An examination of clause 4 of the agreement shows that the obligation of the Defendant was to hand over the transfer of the land duly executed in favour of the purchaser, to the purchaser along with the land title and mortgage release instrument. The Defendant duly discharged this obligation as borne out by the evidence on record.

In relation to possession, the Defendant did not assume any express duty on the matter in favour of the Plaintiff under the agreement. By providing that the purchaser shall be at liberty to take over vacant possession of the land, responsibility for possession remained with the Plaintiff as purchaser. Therefore in view of the clear provisions of clause 4 and evidence on record together with clause 5, and in the absence of any express provision imposing responsibility on the question of possession upon the Defendant, there is no legal basis upon which the Defendant can be held to be in breach of contract. Counsel relied on the judgment of honourable lady Justice Helen Obura in **National Social Security Fund versus MTN Uganda Limited and Another HCCS number 0094 of 2009** that the duty of the court is simply to give effect to the contract and not to dictate to the parties what the court thinks they ought to have agreed or what a reasonable person or otherwise might have agreed if he had read the contract and addressed his mind to the problem.

Other provisions of the sale and purchase agreement exhibit D10 are the warranties under clauses 3 (a), (b), (c) and (d). In those clauses the Defendant warranted that the land was lawfully mortgaged to them; that it had the power, authority and capacity to sell and transfer of land to the

purchaser; that it has not entered into any contract or any other arrangement with any third-party the terms and conditions of which would render the sale and transfer of the land void or voidable and that it does not dispose of or agree to dispose of or granted or agree to grant any security or other encumbrance in respect of the land. Evidence on record and the Defendant's witnesses proved that the suit land was lawfully mortgaged to the Defendant. Secondly the Defendant advanced the loan to the borrower. It received a title for the suit land in the names of the borrower to secure the borrowing. Thirdly the land title exhibit D2 and the certified by the land registry exhibit D4 confirmed that the borrower's title. He was the registered owner of the land on the basis of which the Defendant lawfully registered a legal mortgage under instrument number KLA 472288 on the certificate of title exhibit D2 which authenticated the mortgage and borrowing transaction. The letter by the Commissioner of lands relied on by the Plaintiff does not refute the fact that Joseph Musoke was indeed the registered proprietor of the suit land and that the Defendant had its mortgage registered thereon. The facts as relate to ownership and legitimacy of the Defendants conduct in accepting a mortgage of the suit land from the borrower (is also clear) and is supported by the provisions of law namely sections 59 and 115 of the Registration of Titles Act. Having demonstrated that the land was lawfully mortgaged to the Defendant, the Defendant also contends that the warranties under clause 3 of the agreement were true. The Defendant's power and authority is a creature of law provided by section 2 (1) (b) and 10 of the Mortgage Act cap 229, and of contract particularly paragraphs 9 of the mortgage deed exhibit D3. Section 10 quoted above provides that where the mortgage gives power expressly to the mortgagee to sell without applying to court, the sale shall be by public auction unless the mortgagor and encumbrances subsequent to the mortgagee, if any, consent to a sale by private treaty. On the other hand paragraph 9 of the contract provided the distinctive power of sale conferred by the Mortgage Decree 1974 on mortgages may be exercised at any time without the service of any further notice on the mortgagor or the lapse of any further period of payment of the monies secured has been demanded and the mortgagor has made default in paying the same.

No claim is being made or evidence produced to show breach of warranty under clause 3 above. Consequently the Defendant complied with and is not in breach of the terms and its obligations as relate to possession and transfer of the suit land under the sale and purchase agreement. Furthermore a bank as the mortgagee does not have the same advantage as the registered proprietor vendor when it comes to knowledge of existing third-party claims on the property. A

purchaser from the mortgagee should therefore reasonably carry out his own enquiries to determine possible existence of underlying claims over mortgaged property under sale. When a mortgagee advertises property for sale or the mortgagee sales in exchange for the price is the legal right and ability to provide an instrument transferring proprietary interest in the mortgaged property. A legal mortgage conveys upon the mortgagee a legal interest over the mortgaged property. A person who acted in good faith as the Defendant did is empowered by section 2 (1) (b) and 10 of the Mortgage Act Cap 229 to pass over to the purchaser a good title if the mortgagor fails to exercise his equity of redemption. The evidence demonstrates that the Defendant acted in good faith and performed its obligations under the contract and the law. The capacity of the Defendant was clearly stated in the preamble of the sale and purchase agreement.

Having properly executed and handed over transfer instrument in its capacity as mortgagee based on a mortgage which was lawfully created in its favour by the mortgagor, the Defendant fully performed its contractual obligations to the Plaintiff and the Plaintiffs failure thereafter to register the transfer in his name on account of the claim by a third party over the same land does not amount to breach of contract on the part of the Defendant.

In rejoinder the Plaintiff's Counsel submitted that the evidence of PW1 and DW1 shows that the Plaintiff failed to have the property registered in his names because there are issues on the land. Inasmuch as the mortgage was properly registered within the law (which is not an issue in this case) it so happened that there was fraud in the registration thereof because the person who is not the owner of the land mortgaged to the Defendant. Clause 3 of the sale agreement exhibit P1 at page 7 of the trial bundle provides that the Defendant warranted inter alia that the land was lawfully mortgaged to them. As far as the Plaintiff is concerned, there was no need to ascertain the facts behind mortgage since there was warranty by the Defendant. The Defendant was confirming to the Plaintiff that the mortgage under which it was selling the property was proper but it turned out not to be. On the basis of those facts the Defendant quickly refunded the money and took back the transfer documents. Under clause 5 of the sale agreement, the Plaintiff was to take possession of the land after payment of the purchase price.

Upon payment of the purchase price, and after execution of the agreement, the Plaintiff was supposed to the possession of the land. He failed to obtain possession of the land because there are issues on the land. This amounted to breach of contract. The Plaintiff was assured that he

would get a good title and possession of the land. The Defendant's advocates wrote to bailiffs namely Expeditious Auctioneers and Bailiffs to complete the process of handing over possession to the Plaintiff. The letter clearly showed that the Defendant's advocates were writing to their bailiffs to hand over possession of the land. In the premises, Counsel submitted that there was breach on the part of the Defendant and it was not the duty of the Plaintiff to carry out inquiries to determine possible existence of underlying claims over the property sold.

2. Whether the Plaintiff is entitled to a refund of the consideration?

The Plaintiff concedes that Uganda shillings 250,000,000/= was refunded by the Defendant. However the Plaintiff's Counsel maintains that this was because the Defendant breached the contract by selling land that had the issues and therefore the Plaintiff could not gain vacant possession and was entitled to a refund of the consideration. In other words there was total failure of consideration. In the case of Rowland versus the Divall (1922) R 2746 Lord Atkin LJ is that the buyer had not received any part of that which he contracted to receive, namely the property and the right to possession and that being so, there was a total failure of consideration.

In reply the Defendants Counsel submitted that the Plaintiff is not entitled to a refund of the consideration paid, the Defendant having performed its obligations under the contract between the parties and as required by law. Secondly while it is true that the Defendant refunded the purchase sum of Uganda shillings 250,000,000/=, the refund was understandably made by the Defendant without prejudice to its claim for repayment by the Plaintiff should the case be resolved by the court in the Plaintiffs favour. The evidence for the refund without prejudice is the correspondence between the parties particularly letters dated 30th of October 2012, 12 November 2012 relating to the refund filed on court record.

In rejoinder the Plaintiff Counsel submitted that there was partial settlement of the claims of the Plaintiff on payment of the sum of Uganda shillings 250,000,000/=. So the issue of the Plaintiff refunding the amount does not arise. The Defendant even received the title transfer forms back because the Plaintiff failed to gain possession of the land. Consequently the consideration refunded was proper unjustified. The consideration that the Plaintiff paid included the Defendant's fees. The Plaintiff paid Uganda shillings 40,000,000/= according to exhibit P7 and the eight. This amount is not denied by the Defendant and ought to be refunded to the Plaintiff.

3. **Whether the Plaintiff suffered damages**

On this issue Counsel for the Plaintiff relied on the Plaintiff's evidence. PW1 testified that as a result of failure to take possession of the land, he lost sums of money detailed as follows:

- Uganda shillings 5,000,000/= which was paid to the Defendants bailiffs to obtain vacant possession, and they failed to do so. (See paragraph 7 of the written statement of defence)
- Uganda shillings 40,000,000/= leaders legal fees to Sempala, Mukasa and Obonyo advocates according to exhibit P6 as well as exhibit P7.
- Uganda shillings 5,000,000/= which was paid as transfer fees.
- The Plaintiff suffered unquantified damages according to paragraph 9 of the Plaintiffs witness statement.

The above evidence has not been challenged successfully through cross examination.

Special damages

The claim for refund of Uganda shillings 250,000,000/= was overtaken by events because the amount was refunded by the Defendant. However the claim in respect of legal fees, brokers and transfer as well as bailiffs fees have to be paid. Counsel invited the court to awarded general damages as they meet the test in the case of **Christopher Kiggundu and another versus Uganda Transport Company [1975] Ltd** Supreme Court civil appeal number 7 of 2003 and **John Nagenda versus Sabena Belgian World Airlines in HCCS number 1148 of 1988** where it was held that special damages have to be specifically pleaded and proved. Counsel submitted that the special damages claim flow naturally from the Defendant's breach of contract.

General damages

The Plaintiffs Counsel submits that under paragraph 8 and 9 of the Plaintiffs witness statement, the Plaintiff intended to develop the suit property which it could not do because of the conflict on the land as a consequence of which he lost time and money. Counsel relied on the case of **Wakiso Cargo Transporters versus Wakiso District Local Government Council and the Attorney General HCCS Number 070 of 2004** in which the court cited with approval the case of **Attorney General versus Blake (1998) All ER 376 at page 309**, for the proposition that the general principle regarding assessment of damages is that they are compensatory in nature. They

measure of damages is to be as far as possible that amount of money which would put the injured party in the same position he would have had he not sustained the wrong. Counsel prayed for an award of Uganda shillings 50,000,000/= as general damages. He submitted that the award would be commensurate with the principle of compensation of the Plaintiff under the above authority.

Interest

The Plaintiff prays for interest on the monies they had paid out at the commercial rate until payment in full.

Costs

The Plaintiffs Counsel prays that costs of the suit are awarded to the Plaintiff.

In reply the Defendants Counsel submitted that the Plaintiff is not entitled to damages. Damages claimed by the Plaintiff include alleged commission fee of Uganda shillings 70,000,000/= paid to brokers. It was held in the case of **Diary Development Authority versus David Ngarambe HCCS number 10 of 2011** by honourable Justice Geoffrey Kiryabwire that special damages must be specifically pleaded and strictly proved.

Firstly, the land was advertised for sale by the Defendant through its appointed agents, in view of which, there was no logical basis for the Plaintiff's involvement of commission agents in the transactions to do what the agents are alleged to have done. If the Plaintiff was willing to buy the property, when did the so-called commission agents did not deserve payment. Counsel contended that it was a self-inflicted cost and the Plaintiff should bear the loss in any event.

Secondly the purported commission agreement for a sum of Uganda shillings 70,000,000/= and acknowledgement of payment presented by the Plaintiff are highly questionable. There is a variance the Plaintiff signature in the sale and purchase agreement and the purported commission agreements. It was therefore very doubtful whether a commission agreement was in fact executed and payment effected to the agents as claimed. Furthermore the alleged commission of Uganda shillings 70 million is grossly exorbitant, exaggerated and unjustified taking into account the value of the suit land at Uganda shillings 250,000,000/= and the fact that the alleged recipients of the commission are not licensed commission agents. There is a clear contradiction in the witness statement of DW2 paragraph 2 thereof where he states that he was requested by

the Defendant bank to give them a buyer for the suit property as against the commission agreement which presents DW 2 as an agent of the Plaintiff. In the absence of legal proof for breach of contract on the part of the Defendant on issue number one above, the Defendant is not liable for any damages claimed.

Remedies available to the Plaintiff

The Defendants Counsel reiterated submissions in the previous issues discussed and prayed that the Plaintiff's suit is dismissed with costs.

In rejoinder the Plaintiff the Plaintiffs witness PW2 clearly proved in court that he received an amount of Uganda shillings 70,000,000/=. The Plaintiff testified that he paid the commission because the bank directed him to pay the brokers. Counsel invited the court to award general damages of Uganda shillings 50,000,000/= because the Plaintiffs plans were upset because of the breach of contract by the Defendant.

Judgment

I have carefully considered the evidence on record, the agreed facts, the written submissions of Counsel, the pleadings and authorities cited.

In the joint scheduling memorandum signed by both parties on 30 August 2012 and filed on court record on 5 September 2012, the first agreed fact is that on the 17th of January, 2011, the Plaintiff entered into an agreement for the purchase of land, raised in Kibuga Block 7, Plot 1253 Blocks 7 land at Mengo from the Defendant. By the agreement the Plaintiff paid to the Defendant Uganda shillings 250,000,000/= and the Defendant covenanted among other things that the Plaintiff was to take possession of the land immediately after the execution of the agreement. Thirdly the Defendant executed and handed over signed transfer forms in the Plaintiffs favour.

Additional evidence

DW1 Angelina Namakula Ofwono, the head legal of the Defendant bank testified that there was a loan agreement between the bank and Joseph Musoke dated 30th of September 2010 exhibited D1. Secondly the certificate of title mortgaged by Joseph Musoke is the suit property the subject

of the sale agreement between the Plaintiff and the Defendant and was exhibited as exhibit D2. Thirdly the Defendant before the loan agreement carried out a search of the property according to this act report dated 22nd of July 2010 exhibit D4. Furthermore there was a survey and valuation report dated ninth of August 2010 exhibit D5. Upon default of Joseph Musoke, the property was advertised in the new vision newspaper dated 17th of December 2010 exhibit D9. Subsequently there was an agreement of sale and purchase of the suit property dated 17th of January 2011 exhibit D10.

On the other hand PW1 and also the Plaintiff in the suit testified that on 17 January 2011, he entered into an agreement for the purchase of the suit property from the Defendant bank. Pursuant to the agreement he paid Uganda shillings 250,000,000/= and the Defendant's manager promised him that he would take possession of the land immediately after execution of the agreement. Thereafter the Defendant's manager handed over signed transfer forms and the title deed upon which the Plaintiff proceeded to pay stamp duty ready to transfer the property into his names. Upon lodgement of the documents for the transfer to be effected, the Commissioner for land registration rejected the application for transfer on the ground that one Solome Nabulya Nsibambi claimed an interest in the land and alleged that it was fraudulently mortgaged to the Defendant bank. As a consequence of the claim, the Defendant failed to hand over the property to the Plaintiff and the transfer forms were also rejected by the lands office. In paragraph 7 of his witness statement, the Plaintiff testified that upon failure to take over vacant possession of the suit property, the Defendants agents requested him to pay Uganda shillings 5,000,000/= to their authorised bailiffs Messieurs Expeditious Auctioneers but they also failed to obtain vacant possession of the suit property.

The first issue is **whether the Plaintiff's failure to take possession and have the suit property registered in his names amounts to breach of contract on the part of the Defendant?**

Both parties relied on exhibit P1 which is the basis of their relationship and is entitled agreement of sale and purchase of land between Barclays bank of Uganda Ltd and the Plaintiff. It is dated 17th of January 2011. It is in respect of plot 1253 Kibuga block 7 land, at Mengo district. The preamble shows that the Defendant is a mortgagee of the property. The mortgagor is indicated as Mr Musoke Joseph who owed the Defendant Uganda shillings 230,000,000/= and a loan had not

been serviced according to the loan agreement between the mortgagor and mortgagee. The bank was desirous of selling and the purchaser was desirous of buying the suit property.

Clause 3 of the agreement provided that the bank warranted that the land was lawfully mortgaged to the bank. Secondly that it had the power, authority and capacity to sell and transfer the land to the purchaser. Thirdly the bank warranted that it had not entered into any other contract or agreement with any other party the terms of which would render the purchase agreement void or voidable. The bank had not disposed of or agreed to dispose of or granted or agreed to grant any security or any encumbrance in respect of the suit property. The two last contentious clauses would be quoted in full and provided as follows:

"4. Execution of transfer, title and loan payments.

Upon full payment of the purchase price and the lawyer's fees for said, the bank shall handover to transfer of the land duly executed in favour of the Purchaser to the Purchaser along with the land title and mortgage or lease instrument."

5. The Purchaser shall be at liberty to take over vacant possession of the land immediately upon full payment of the purchase price of the land."

It is not in dispute that the Plaintiff failed to obtain vacant possession because of adverse claims of a third-party. During preliminary proceedings on 21 June 2012 when the matter came for pre-trial conferencing, Counsels informed the court that there was a possibility of settlement of the suit. Secondly there was a possibility of involving Joseph Musoke in the suit. The court was however informed that he was on the run. On 6 September 2012 the court was informed that there was a possibility of settlement by the Defendant and the parties were exploring avenues of settling the suit. The Defendant was considering how to get the Plaintiff out of the way by refunding the money and getting back the title deeds etc. On 18 December 2012, the Plaintiff's Counsel informed the court that the Defendant bank had paid the Plaintiff Uganda shillings 250,000,000/= deposited on the land the subject matter of the suit. Consequently the matter was partially settled. That left them with other claims which were been negotiated. Counsel's prayed for more time to pursue avenues for settling the rest of the suit. Subsequently on 5 February 2013, Counsels reported that negotiations for settlement had failed.

By refunding the money, the parties had brought the contract to an end without prejudice to claims in the suit. I first need to indicate that neither of the parties has given pertinent details about the alleged adverse claims. The certificate of title exhibit D2 at page 16 of the trial bundle clearly shows that the property was registered in the names of Gertrude Kavuma, Solome Nabulya and Serwano Mwanje jointly as administrators of the estate of the late Bulesio K. Kavuma on 11th of January 1983 under instrument KLA 104270. Subsequently it was registered in the names of Musoke Joseph on 13 July 2010 under instrument number KLA 461907. The encumbrance page shows that on 5 October 2010 under instrument number KLA 472288 Barclays Bank of Uganda Ltd registered a mortgage.

Exhibit D4 is a letter of the Ministry of Lands, Housing and Urban Development dated 22nd of July 2010 in which the Commissioner for land registration confirms that Musoke Joseph is the registered proprietor of the land. Again exhibit D5 is a valuation of the property which confirms at page 2 thereof that the registered proprietor is Musoke Joseph. Exhibit D3 is the legal mortgage between the Defendant and Musoke Joseph and is dated 4th of October 2013. It was registered subsequently on the title deed. In a letter dated 16th of December 2010 exhibit D6 the Defendants lawyers KSMO wrote to Mr Musoke Joseph demanding Uganda shillings 230,000,000/= outstanding. Exhibit D8 is a statutory notice dated 16th of December 2010 by the Defendants lawyers addressed to Musoke Joseph to pay the principal sum of Uganda shillings 230,000,000/= or the property would be auctioned by public auction or sold by private treaty pursuant to section 10 of the Mortgage Act. The sale agreement is dated 17th January 2011 by which the Defendant sold the property to the Plaintiff. The property was advertised in the New Vision newspaper of 17 December 2010.

In the absence of a trial of the propriety of the mortgage and the subsequent sale, the law is that the court goes by the registered proprietorship proved in evidence. The conclusion is that at the time of the transaction, the property was registered in the names of Joseph Musoke, the mortgagor who mortgaged the suit property to the mortgagee. Section 59 of the Registration of Titles Act provides that:

"... every certificate of title issued under the Act shall be received in the courts as evidence of the particulars set forth in the certificate and of the entry of the certificate in the Register Book, and shall be conclusive evidence that the person named in the

certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate is seized or possessed of the estate or interest or has that power."

In other words a conclusion cannot be made that the mortgage was not a regular or lawful mortgage. Furthermore a conclusion cannot be made that the Defendant did not have power to warrant that the property was lawfully mortgaged without any evidence of fraud on the part of the Defendant or on the part of Joseph Musoke with the Defendant having notice of the fraud or illegality. Indeed the Defendant had a legal power of sale over the property. Additionally there is no evidence that the Defendant had notice of any fraud. Most importantly, it could not be concluded without any claim to that effect or any evidence in support of the claim that the Plaintiff could not enforce the agreement and obtain vacant possession of the suit property as a bona fide purchaser for value without any notice of fraud.

The partial settlement of the suit has not made the situation any easier for determination on the merits. This is because; Mr Joseph Musoke is not a party to the suit. There is no clear evidence of what the adverse claims to the suit property are and the issue has in any case not been the subject matter of the suit. The Plaintiff's submission is that there are issues on the suit property. Partial settlement is apparently without prejudice to the determination of the issues on the merits. The testimony of PW1 who is also the Plaintiff and particularly as embodied in his witness statement merely indicates that the Plaintiff was unable to obtain vacant possession and that the Defendant failed to hand over vacant possession of the property after executing the necessary documents of transfer in favour of the Plaintiff. Secondly Messieurs Expeditious Auctioneers also failed to obtain vacant possession. PW2 only testified about the commission paid for in the purchase of the suit property. Notwithstanding the burden of proof, DW1 testified that the responsibility of taking possession of the suit property remained with the Plaintiff. Secondly that the Defendant acted bona fide and in good faith and the difficulties relating to the registration of transfer of the suit property into his name and procurement of possession were frustrating events for which the Defendant is not responsible.

The obtaining of vacant possession of the mortgaged property cannot prejudice the sale of the property. It could have been prudent to first obtain vacant possession of the property before the sale but the provisions of the law for possession seemed not to deal with outright sale of the

property possessed by the mortgagee. Section 7 of the Mortgage Act cap 229 permits the mortgagee for the purposes of realisation of his or her security in the mortgage, to enter into possession of the mortgaged land after giving at least 60 days notice of his or her intention to do so to the mortgagor. Particularly section 7 (1) of the Mortgage Act which was then in force, provides as follows:

"The right of possession by the mortgagee under this section shall be against the mortgagor and any person deriving an interest in the mortgaged land through the mortgagor where that interest is subsequent to that of the mortgagee."

The right of possession could have been exercised by the mortgagee to realise its interest in the mortgaged property pursuant to section 7. Obtaining possession under section 7 however caters for management of the suit property for realising the security in the mortgage and not sale of the property. On the other hand section 9 deals with sales by foreclosure which requires an order of the court. The Defendant relied on the sale otherwise than by foreclosure under the provisions of section 10 of the Mortgage Act which provides that:

"Where the mortgage gives power expressly to the mortgagee to sell without applying to court, the sale shall be by public auction unless the mortgagor and encumbrancers subsequent to the mortgagee, if any, consent to a sale by private treaty."

In other words there was a sale of the property under the provisions of section 10 of the Mortgage Act. The terms of the sale were not challenged as not being in compliance with the law. Paragraph 3 of the plaint avers that the suit is to recover from the Defendant Uganda shillings 250,000,000/=, general damages for breach of contract, interest and costs of the suit. In paragraph 5 of the plaint, the particulars of breach of contract and the failure to hand over possession of the land and failure to transfer the land into the names of the Plaintiff. Lastly, the Plaintiff pleads that the Defendant misrepresented that the land was lawfully mortgaged. There is no suggestion of any form of fraud alleged against the Defendant.

Consequently the rights of the parties are governed by their own sale agreement. By agreeing to refund the money, the Defendant seemed to confirm the status quo that the Plaintiff was unable to obtain vacant possession at the time of the partial settlement of the suit.

The settlement proposal of the Defendant is contained in a letter dated 30th of October 2012 addressed with the words "Without Prejudice" and addressed to lawyers of the Plaintiffs filed on court record on 7 November 2012 in which the Defendants lawyers KSMO wrote that they had instructions to refund Uganda shillings 250,000,000/= being the purchase price of the suit land to the Plaintiff in full and final settlement of the matter. They further requested for the account details of the Plaintiff to effect the transfer of funds before the next court hearing. In the letter dated 9th of November 2012 and filed on court record on 8 November 2012, the Plaintiffs advocates wrote to the Defendants advocates giving the account details and part of the letter reads as follows:

"Please note that this money will be received by our client strictly without prejudice to his other claims in the suit which remain outstanding."

Notwithstanding the fact that the receipt of the money by the Plaintiff from the respondent was without prejudice to other claims, the Plaintiff is estopped from claiming vacant possession of the suit property or damages beyond the breach of contract alleged up to the point when the Defendant opted to refund and the Plaintiff agreed to receive a refund of the purchase price for the suit property. Consequently, the question is who had the duty under the contract clauses 3, 4 and 5 to hand over vacant possession of the suit property. A resolution of that issue does not engage any considerations as to whether the Defendant in actual fact can still retain an interest in the suit property as the mortgagee and therefore subsequently sell the property to another person.

Starting with clause 3 of the agreement, the Defendant warranted that the land was lawfully mortgaged to it. On the basis of the provisions of section 59 of the Registration of Titles Act read together with section 176 thereof, the registration of Joseph Musoke at the point when Joseph Musoke mortgaged the suit property and the Defendant agreed to lend money to the mortgagor, was conclusive. The registration of Joseph Musoke as the registered proprietor in the title deed of the property was notice to the world that Joseph Musoke had authority to mortgage the suit property. However subsequent to the transaction of the loan, the title of Musoke Joseph was challenged by Salome Nabulya Nsibambi and there is no evidence of what happened subsequently. Possibly, if the adverse claims succeed, and there is no holding that the bank was privy to any fraud; the Defendant would be able to have a cause of action against the mortgagor

for damages. By the same token, the issue cannot be tried in this action without the presence of the claimant or Joseph Musoke.

As far as the terms of the agreement of sale and purchase of land dated 17th of January 2011 is concerned, it is proven by the Defendant under that agreement and the title deeds has a mortgagee of the suit property. It is also proven that on 16 December 2010, Mr Musoke Joseph the mortgagor of the property was indebted to the bank to the tune of Uganda shillings 230,000,000/=. Under paragraph 1 of the agreement, the bank agreed to transfer the legal and equitable title to the land to the purchaser and the purchaser agreed to purchase the same.

As far as the second warranty is concerned, the Defendant warranted under clause 3 (b) that it had the power, authority and capacity to sell and transfer the land to the purchaser. Transfer of land is effected by documents. The power and authority and capacity to do so are derived from the law. In so far as at the material time the bank was a registered mortgagee on the title deed, it had the power, authority and capacity transfer the land and execute the necessary instruments to that effect which were handed over to the Plaintiff. Consequently the warranties under clause 3 of the sale agreement were lawful in so far as on the face of it and without a challenge to the registered proprietorship and illegality of the mortgage, the bank on the basis of cited registration and the legal authority so the suit property had power to realise its security.

As far as clause 4 of the agreement is concerned, it provided that upon full payment of the purchase price, and the lawyer's fees, the bank shall handover transfer forms of the land duly executed in favour of the purchaser together with the land title and mortgage release instrument. The Plaintiff's problem is that upon being handed over a duly executed transfer of land in his favour together with the mortgage release instrument, the Commissioner for land registration refused to make the necessary transfers on the basis of adverse third-party claims which are not the subject matter of the suit. However as far as the literal and express terms are concerned, the Defendant complied with clause 4.

As far as clause 5 is concerned, it dealt with possession. It provided that the purchaser shall be at liberty to take over vacant possession of the land immediately upon full payment of the purchase price of the land. The clause only proclaimed a right of the Plaintiff to take over vacant possession of the land upon full payment of the purchase price. A very careful perusal of the

clause brings out an important intention which is for the Plaintiff to only take over vacant possession of the suit property upon full payment of the purchase price of the land. Implicit in the agreement is the fact that the Plaintiff would be able to take over vacant possession of the suit property. There was no express warranty on the part of the Defendant that it would hand over vacant possession to the Plaintiff. It was however clearly implied that the Defendant had a power of possession and by the agreement that the Plaintiff would not obtain vacant possession until after full payment. It meant that the Plaintiff upon paying the full purchase price would be able to take over vacant possession of the suit property.

It was assumed by both parties that upon exercising the right of sale, the Plaintiff would be able to obtain vacant possession of the suit property. No express provision was made as to how this was to be done.

There is no evidence that the Defendant had any knowledge that the suit property had adverse claims or was going to have adverse claims at the time of execution of the agreement. If anything the evidence that has come up from the Plaintiff and the Defendant is that the adverse claims were discovered upon the Plaintiff lodging his documents of transfer and release of mortgage for registration with the Commissioner for land registration. The Commissioner rejected the application and notified the Plaintiff about adverse claims. In other words the adverse claims were made subsequent to the agreement of the parties. There is no evidence that it was a foreseeable event.

On the other hand when the Defendant agreed to refund the purchase price for the suit property, the sale agreement was and the suit was compromised. The Defendant currently does not owe the Plaintiff any duties under the sale agreement as far as handing over vacant possession is concerned. In other words the parties have agreed to discharge their obligations under the agreement. All in all, the court cannot reach the conclusion that the Plaintiff or the Defendant breached the contract. There were intervening forces or adverse third-party claims which came up on the parties and particularly which interfered with the interest of the Plaintiff. However as I have held above, the adverse claims have not been established and the parties concerned therefore have not been joined to this suit for the matter to be completely and effectually adjudicated upon.

In those circumstances, the first issue is answered in the negative. For purposes of emphasis, Joseph Musoke is a necessary party for the complete and effectual resolution of all questions relating to adverse claims to the suit property before conclusions can be made about the rights of the parties namely the Defendant, the Plaintiff, Joseph Musoke and the adverse claimant.

The second issue is **whether the Plaintiff is entitled to a refund of the consideration.**

The second issue has been overtaken by events because it was resolved by agreement of the parties without prejudice. The Defendant agreed to refund the consideration. As contained in the judgment above, the Defendant refunded Uganda shillings 250,000,000/= to the Plaintiff. The Defendant had offered it as a complete and final resolution of the dispute but the Plaintiff accepted it without prejudice. There was therefore no consensus about the terms of the refund. In the acceptance letter, the Plaintiff reserved the question of damages, interest and costs only. Some other money was paid by the Plaintiff pursuant to the agreement. However, the question of the other monies will be considered under the issue for remedies.

Having taken the refund, the only other question other than the question of other monies paid pursuant to the agreement to be determined is whether the Plaintiff is entitled to damages, interests and costs.

The third issue is **whether the Plaintiff suffered damages and fourthly the remedies available if any.**

The evidence is very clear that the Plaintiff paid out Uganda shillings 250,000,000/= in early 2011. Subsequent to the payment the Plaintiff could not use the money. The money was eventually refunded at the end of the year 2012 by the Defendant. It was refunded without interest. The letter of the Plaintiff written by his lawyers accepting the offer for refund of Uganda shillings 250,000,000/= reads in part as follows:

"Please note that this money will be received by our client strictly without prejudice to his other claims in the suit which remained outstanding."

The other claims in the suit are set out in the plaint and paragraph on prayers. The first one is an order for refund of special damages in paragraph 4 which specifically is a claim for refund of Uganda shillings 250,000,000/=. Secondly the Plaintiff prayed for general damages. Thirdly the

Plaintiff sought interest on the claimed sums namely special damages and general damages. Lastly the Plaintiff sought costs of the suit.

I have carefully considered the Plaintiffs evidence. The sale agreement clearly indicated that the Plaintiff was supposed to pay in paragraph 2 thereof a sum of Uganda shillings 250,000,000/= to the Defendant in one instalment immediately upon execution of the agreement. This money was paid and refunded. Secondly under the same paragraph/clause, the Plaintiff was obliged in addition to the purchase price, to pay the collections fee payable to the mortgagee's lawyers in respect of the transaction separately and directly to the Defendant's lawyers. The Plaintiff proved that he paid Uganda shillings 40,000,000/= to the Defendants lawyers under the agreement.

The Plaintiff additionally incurred expenses in trying to obtain vacant possession of the suit property. The Plaintiff paid Uganda shillings 5,000,000/= to Messieurs Expeditious Auctioneers in an attempt to obtain vacant possession of the suit property after failure to do so on his own. The Plaintiff further paid Uganda shillings 5,000,000/= as stamp duty/transfer fees.

For over a period of one year, the Plaintiff was kept out of his money. The transaction having come to an end, the Plaintiff obviously suffered both the loss of the property which he had purchased and also incurred additional expenses. The question therefore is whether the Plaintiff is entitled to a refund and the damages. The transaction having come to an end, it is only fair that the Plaintiff is refunded all the money he has so far incurred upon purchase of the suit property. In addition to the refund of Uganda shillings 250,000,000/=: the Plaintiff incurred Uganda shillings 40,000,000/=: and an additional Uganda shillings 10,000,000/= as detailed above. Stamp duty and transfer fees and attempt to obtain vacant possession of the suit property let the Plaintiff to incur losses. In those circumstances, the Plaintiff as a member of the public who bought property advertised in the newspapers, from a reputable bank, should be refunded Uganda shillings 50,000,000/= which he incurred after purchase of the suit property. The expenditure was a natural consequence of the purchase of the suit property. It would be unjust for the Plaintiff who is a member of the public buying property advertised in the newspapers, to lose his money. The transaction having come to an end, the Plaintiff is awarded Uganda shillings 50,000,000/= as a refund.

The Plaintiff also claimed Uganda shillings 70,000,000/= as commission. Without much ado, the Defendant advertised the suit property in the newspapers. It was an invitation to each and everybody interested in property to bid for the property. The Plaintiff was entitled to obtain the property from brokers. However he cannot pass on the cost of brokerage to the Defendant who was not privy to the brokerage. In paragraph 7 of the witness statements of PW1 which was confirmed on oath, the Plaintiff testified that he paid Uganda shillings 70,000,000/= to brokers. On the other hand Yiga Alex PW2 claimed that he was instructed by the Defendant to obtain the buyers. Secondly on the 20th day of January 2011, the Defendant paid the commission fee of Uganda shillings 70,000,000/= to the brokers. Exhibit P7 is the commission agreement between the Plaintiff and three other persons. It was the commission for the job done to purchase for the Plaintiff property sold by Barclays bank.

The bank having advertised the property for sale is not obliged to the Plaintiff for any commission that he could have paid to third parties. The bank only agreed that the Plaintiff would pay the bank's lawyers which the Plaintiff did. Those were the terms of the agreement between the Plaintiff and the Defendant. There is no other written agreement between the Defendant and the Plaintiff concerning any commission. In the circumstances the claim for refund of Uganda shillings 70,000,000/= is disallowed.

As far as general damages are concerned, the question of general damages should depend on the fault principle. The court could not establish without having Joseph Musoke and the adverse claimant in the suit and without pleadings alleging the bank to be at fault in the sale of the property, that the bank was at fault or any breach of contract. In those circumstances, general damages cannot be awarded. In other words, the Defendant and the Plaintiff ought to have pursued the mortgagor of the property or even the adverse claimant. The court cannot assess the merits of whether the Plaintiff could have upon an action obtained the suit property and have it transferred into his names as a bona fide purchaser for value without notice of any fraud. The court cannot conclude that the Plaintiff could not have obtained general damages upon proof of the fault or breach of anybody who could have caused injury to the Plaintiff's money. Consequently the Plaintiff is not entitled to general damages in the suit.

As far as the claim for interest is concerned, the Plaintiff is entitled to interest at commercial rate from the date the cause of action arose in February 2011 on a sum of Uganda shillings

250,000,000/= at the rate of 21% per annum up to the date of refund of the money in November 2012. Additionally the Plaintiff is awarded interest at 21% per annum on the sum of Uganda shillings 50,000,000/= from the date of filing the suit until judgement. Secondly the Plaintiff is awarded interest at the rate of 21% per annum from the date of judgement till payment in full on the said sum of Uganda shillings 50,000,000/=.

In the circumstances of this case, costs shall follow the event and the Plaintiff is awarded costs of the suit as follows:

The Plaintiff is awarded half of the costs of the claim for Uganda shillings 250,000,000/=. Secondly the Plaintiff is awarded full costs for the rest of the award of Uganda shillings 50,000,000/= plus the interest up to the date of judgement.

Judgment delivered in open court on 1 November 2013.

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Christine Tumuhaiwre holding brief for Obed Mwebesa Counsel for the Plaintiff

Jordan Asodio holding brief for Richard Obonyo representing the Defendant bank

Plaintiff is in court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

1st November 2013