

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 415 OF 2011**

JACOB MUHUMUZA}..... PLAINTIFF

VERSUS

CENTENARY BANK LTD AND ANOTHER}..... DEFENDANT

BEFORE HON JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff's action against the defendant was for recovery of **Uganda shillings 296,000,000/=** being a claim for the value of developments comprised in land held under customary tenure and allegedly unlawfully sold pursuant to default in repayment of a loan issued by the defendant and for general damages, and costs of the suit.

The facts disclosed in the complaint are that on the 18th of August 2010 the plaintiff obtained a loan from the defendant and executed an agreement whereupon the defendant granted him a loan sum of Uganda shillings 2,000,000/= repayable with interest within nine months. The plaintiff was to use the loan for agriculture and the loan was secured by personal guarantees, stocks of cassava, eucalyptus trees, and maize together with the land held under customary tenure measuring about 9 acres on which the items were planted. On 16 December 2010 the defendant bank wrote to the plaintiff demanding payment of arrears totalling 2,000,000/=. On 7 January 2011 the defendant bank served the plaintiff with a demand notice of Uganda shillings 2,775,000/=. On the 23rd of May 2011 the plaintiff deposited Uganda shillings 500,000/= with the defendant leaving a balance of Uganda shillings 2,509,593/= in arrears. On 6 July 2011 the plaintiff was informed through an anonymous telephone call that the customary tenure had been sold to recover the loan and the balance from the seller had been deposited with his account. The plaintiff established that the defendant had sold the property for 5,000,000/= Uganda shillings. Consequently the plaintiff avers that the sale was irregular, grossly undervalued and fraudulent. The plaintiff avers that the defendant did not follow the established procedures in effecting the sale nor is there any valuation secured. By reason of the defendant's action the plaintiff claims to have suffered both general and special damages. The plaintiff seeks a declaration that the sale was unlawful and irregular, recovery of Uganda shillings 296,000,000/=, interest at commercial rate from the date of sale till payment, general damages and costs of the suit.

The defendant admits having sold the property but denied any fraud or undervaluation of any kind. When the suit came for scheduling, the parties opted to negotiate a settlement. In the course

of the scheduling directions it was noted that there were two conflicting violations of the same piece of property and that the two valuations would be referred to a professional body for peer review. The plaintiff had his own valuation and the bank has its own valuation which is greatly at variance. Subsequently the parties agreed to appoint valuation surveyors to carry out a joint valuation as directed by court. Subsequently to valuation reports were issued one for the bank and another for the plaintiff. The suit was adjourned for cross examination of the two valuation surveyors on the reports.

The plaintiff was represented by Counsel Sekabanja Kato while the defendant represented by Counsel Joseph Luswata.

The plaintiff called PW1 Sembagaya Eddie, 60 years old a resident of Ntinda village. He holds a Masters' of Science in valuation, a BA in Land Economics and is a fellow of the Institute of Surveyors of Uganda and a registered Surveyor of Uganda. He has been in practice for 35 years. His testimony is that the customary land comprises of the commercial tree plantation In Mabira (A) village, Bwikya Parish, Kigorobya Sub County, Bugaya, and Hoima District. Upon conducting a valuation survey he produced a report which was admitted as court Exhibit 1. As part of his investigations he consulted the Forrester who advised him on the trees, the species of the trees and their age, heights and spacing. Furthermore he used a land surveyor to measure the area of the property. According to PW1 the property has 1.29 ha covered by eucalyptus and 0.58 covered by pine trees. The witness was cross examined on the report by the defendants counsel and the defendants counsel. The witness did not comment on the earlier reports. The defendants counsel called another witness, a valuation Surveyor whose report is exhibit D1. DW1 Mugerwa Musisi Lawrence Martin 59 years old of Messrs Bagaine and Co Ltd, is a holder of BA in Land Economics from the University of Nairobi and was licensed in 1997. The report was made after a suit had been filed. DW1 was cross examined on exhibit D1 and counsels opted to address the court in written submissions.

Written submissions of Plaintiff

Counsel for the plaintiff submitted that the basis of the plaintiffs claim is the admission of liability by the defendant and the effort to compensate the plaintiff for his property since the option to return the land was not available. The plaintiffs claim of Uganda shillings 296,000,000/= is based on a valuation report attached to the plaint. The defendant also commissioned a valuation report exhibit D1 which valued both the land and trees at Uganda shillings 20,000,000/= with a forced sale value of Uganda shillings 12,000,000/=. In the state of affairs court requested both Counsels to agree that for purposes of compensation a joint valuation is commissioned whereupon Messrs Consultant Surveyors and Planners were jointly appointed by the parties and their report is court Exhibit 1. Even after the jointly commissioned report the defendant bank was not agreeable with the report and decided to cross examine the respective owners. Counsel contended that the report court exhibit 1 was agreed upon by both Counsels.

Counsel submitted that the jointly commissioned report was more detailed and explanatory as to the basis of the valuation. It outlined the methods used to calculate the number of trees, the acreage, height and girth. The final valuation for the property is July 2012 and is Uganda shillings 152,500,000/=. In contrast the report of DW1 who authored exhibit D1 lacks any details to justify the figures arrived at. It does not state the number of trees, nor the spacing or size to give an indication as to the value to be attached to the trees in the report. It only cites the age of the trees and no other steps or measurements were taken to justify how he arrived at the age he stated. Counsel therefore submitted that the court ought to believe the report court Exhibit 1 as there is nothing the defendant has shown to refute or contradict it. He prayed that the court awards the market value of Uganda shillings 152,500,000/= as at the amount of compensation to the plaintiff in the circumstances. Counsel further submitted that the issue of general damages and costs of the suit can be addressed once the compensation is finalised.

Written reply of defendant

In reply counsel for the plaintiff submitted that the suit is for compensation for land and includes developments. It was sold by the defendant to recover an unpaid loan in the process the plaintiff alleges was fraudulent. The defendant did not admit that the process was fraudulent or illegal but in cognizance of some mistakes in the process of disposal of the land, the suit proceeded on the premise that the defendant was liable to compensate the plaintiff for the land and developments. He therefore contended that the claim in the suit is in the nature of special damages because the amount claimed can be calculated to a cent.

Counsel submitted that according to the well settled or established principles, special damages must be pleaded and specifically proved. He relied on the case of **Nakaye versus KCC [1972] EA 446**. To plead specifically meant to give details of the claim. Such details include the price of the land, the price of each tree, number of trees as at the date of filing the suit. The plaintiff relied on a valuation report court Exhibit 1. The report does not give the price of the land or of any tree. There was no breakdown on how the valuation report arrived at the figure of 296,000,000/= in the plaint. In the case of **Boniface Byanyima versus Attorney General civil appeal number 69 of 2009** it was held that such a pleading of special damages was too general and would be rejected.

Counsel submitted that the duty to plead and prove special damages imposed on the plaintiff was not lessened by the course taken at the trial. I.e. the parties agreed to a valuation report with the endorsement of the court. Consequently counsel submitted that by relying on a figure which was different from that in the plaint, the plaintiff engaged in an unauthorised departure from pleadings. Consequently he contended that no amount of evidence can help the case as there was no underlying pleading and as supported by the case of **Siree vs. Lake Turkana Lodges (2002) EA 521**. Special damages cannot be awarded unless pleaded. In the case of **Inter-freight versus EADB** a departure from pleadings may be accepted where the conduct of the parties is such that

they left the issue for determination of the court but in this case that principle does not apply and the rule does not apply to special damages.

Counsel therefore submitted that court Exhibit 1 is a worthless piece of evidence because it contains hearsay evidence of the Forrester who was not called as a witness whose conclusions or notes were not attached to the report. In the case of **Afro Freight versus Shell Uganda Limited civil suit number 193 of 2002** it was held by the High Court of Uganda that a survey report signed by a witness who did not conduct the survey was useless for being hearsay. Secondly he submitted that the report is not helpful for lack of basic details. Counsel submitted that the valuation report does not contain the manner of arriving at the conclusion. The report does not show the value of the land without developments. It does not indicate what the price of a log is or the price of an electric pole etc. Counsel submitted that the court is the expert of the experts. This was held by Justice F. Khan of the Court of Appeal in **SK Walusimbi versus Standard Bank Ltd (1980) HCB**. Where there are two conflicting expert reports, the court does not play the role of an umpire but evaluates the opinion evidence of the experts with reference to and in the context of the totality of the evidence and then records its verdict.

In the alternative and without prejudice counsel for the defendant submitted that the court should rely on the forced sale value because the plaintiff had defaulted in repayment of the loan. The defendant's duty of care should be measured using the standards applicable to a person selling in a forced sale market but not in a fair market as other circumstances or condition will always produce different prices.

Counsel prayed that the suit is dismissed with costs and in the alternative if the suit is allowed, the forced sale value guides the court in determining the amount payable. As far as general damages are concerned, no evidence was led in support of general damages and none can be awarded.

Judgment

I have carefully considered the written submissions of counsel. I have also read through the pleadings of the parties which are set out above.

On the first point, it is the defendants counsel's submission that because the amount of **Uganda shillings 296,000,000/=** was not pleaded as special damages, it should not be allowed. The plaintiff's counsel did not file a reply to this submission which is of a preliminary nature. The pleadings are specific in that it is a claim for Uganda shillings 296,000,000/= being the value of developments of the plaintiffs land sold in pursuance of the loan. It was not claimed as special damages under a special heading entitled special damages. In the plaint it is pleaded under paragraph 9 thereof that the land comprised of 1.2 ha of eucalyptus trees comprising 700 trees and 1200 pine trees in a 0.9 ha of land. The valuation report was for 296,000,000/= annexure "C". The amount claimed is based on the valuation report which is attached to paragraph 9 of the

plaint. The basis of the amount is therefore a valuation report of the land and developments therein by way of trees.

At the scheduling conference there was good will on the part of the defendant to have the matter settled on the basis of a fair valuation. It is on the basis that the parties could not reach a fair valuation in the settlement negotiations and due to the fact that there were two conflicting valuation reports that the court advised that the matter is referred to an independent valuation surveyor to establish the value of the property. Initially it was of concern to the court that two valuation surveyors had given different valuations for the same piece of property with a wide margin of disparity. The original valuation relied upon by the plaintiff and attached to the pleadings is dated 20th of July 2011 by the Forest Department of Hoima district. In it they valued pine trees amounting to 1,200 eucalyptus trees for electric transmission poles and the valuation report is annexure "C". The defendant on the other hand relied on exhibited D1 dated 13th of January 2012 by Messrs Bageine & Company Ltd. the report gives the date of valuation as 11th of January 2012 and the land area as 9 acres approximately. The developments on the land are 1.5 acres of pine trees and 2.0 acres of eucalyptus trees. The market value of the property is **Uganda shillings 20,000,000/=** while the forced sale value is **Uganda shillings 12,000,000/=**. This was a disparity of over **260,000,000/= Uganda shillings**. It was this glaring disparity that formed the basis of my advice to the parties that a joint valuation surveyor be appointed by the parties to carry out an independent valuation of the property. The cost of the survey was supposed to be jointly met by the parties.

On 3 May 2012 when the matter came for scheduling conference it was agreed by counsels that the bank's position was to settle the matter out of court. It was on the condition that they come up with a fair valuation that the bank would compensate the plaintiff less what is owed to the bank. The parties were advised that under the Judicature Act where a matter is referred to a referee, the report becomes binding. This is under section 27 of the Judicature Act, where the parties who are not under any disability consent, the High court may refer any cause or matter to a referee or arbitrator. In this case the cause or matter was the correct valuation of the customary tenure which belonged to the plaintiff. The court was of the opinion that an independent and professional valuation surveyor establishes the value of the property. The parties were given time to appoint a valuation surveyor to carry out a peer-review and make a report. On 6 June 2012 the defendants counsel represented to court that they had agreed to a joint valuation as directed by the court. Secondly they had agreed to the valuation surveyor to carry out the joint valuation. He suggested that they conduct the valuation and then at the next mentioned date, they will determine whether to adopt it. The matter was fixed for 28th of June 2012 for further preliminary hearing. At the next hearing it was clear that the bank wanted to meet the valuation surveyor appointed by the plaintiff and the matter did not proceed. Subsequently the plaintiff indicated on 12 July 2012 that they had received a cheque from the defendant bank for payment of the valuation surveyor and were going to commission the valuation that very day. In other words the parties had agreed on an independent valuation surveyor and jointly met the costs of the exercise.

When the matter came up again on the 20 September 2012, the valuation report was ready but the bank disagreed with it. It was agreed that the issue was not liability of the bank but the valuation of the property. Because of the dispute the suit was adjourned for cross examination of the valuation surveyor on the report each party chose to rely on whereupon the court would decide the valuation on the basis of the evidence.

Whereas paragraph 9 of the plaint actually pleads a specific amount and attached the basis of the claim as valuation survey report, the submission that there was no pleading for special damages has no substance. At best it is a question of form and not substance for the plaintiff not to entitle the claim in paragraph 9 as a claim for special damages. In any case, the basis of the reference of the dispute for valuation by valuation surveyors is to establish the fair market value for purposes of compensation of the plaintiff. The parties agreed that the fair market value would be determined by a valuation survey. However, the report of the jointly commissioned valuation survey was not acceptable to the defendant bank. There was further agreement that the court would determine the proper value of the property for purposes of compensation and after cross examination of the valuation surveyors relied upon by each of the parties to the suit. These agreements during the scheduling conference are binding on the parties. It is up to the court whether to accept the findings wholly or partially.

I have carefully considered the matter at hand. The court cannot rely on exhibit D1 which formed the bone of contention between the defendant and the plaintiff in the first place. The court can also not rely on annexure "C" which was hotly contested by the bank in the first place. It was because of the disparity between the two reports that it was agreed that a joint valuation survey be carried out by an independent surveyor. When the report came out, it was still not agreeable to the bank and it was decided that the parties would cross examine the valuation surveyors accordingly. It's my holding that the bank cannot go back to its original valuation report.

I have carefully considered the jointly commissioned valuation survey report by Messrs Consultant Surveyors and Planners. The report was erroneously entitled 7 to July 2012 whereas the date of inspection of the property was 14th of July 2012 and this was cleared up by the surveyor in cross examination as a typographical error. I am satisfied that the date which appears on the face of the report was an error in the writing of the report. The methodology used in the report is contained at page 6 thereof and indicates that the valuation surveyors used the services of a professional forester to determine all tree characteristics and assessed the economics of commercial tree planting. Secondly it was assumed that the pine trees had one rotation and would mature at the age of 20 years. Thirdly it was assumed that the eucalyptus trees matured at the age of between 8 to 10 years for electricity transmission poles. It was further assumed that they had three rotations in that after harvesting, another would sprout and would be harvested and again a third rotation would be harvested. Fourthly, it was assumed that the pine trees would be cut for saw logs and the first rotation eucalyptus trees would be cut for electricity transmission poles. The subsequent two rotations for eucalyptus trees would be cut at intervals of four years for construction of tobacco curing bans or some other commercial use.

The report defines a market value as the estimated value of property on the date of valuation between a willing buyer and a willing seller. On the other hand a 'forced sale' value is the amount which may reasonably be received for the sale of property within the timeframe too short to meet the marketing timeframe of a market value definition. It may involve an unwilling seller and buyers with the knowledge of the disadvantage of the seller. The summary of the findings of the valuation report is as follows:

1. The market value by May 2011 will be Uganda shillings 138,500,000/=.
2. The market value by July 2012 will be Uganda shillings 152,500,000/=.
3. Forced sale value by May 2011 will be Uganda shillings 85,000,000/=.
4. Forced sale value by July 2012 would be Uganda shillings 92,000,000/=.

There is admission in the plaint that the plaintiff was in default as far as obligations under a loan agreement with the defendant are concerned. The basis of the suit is the undervaluation of the property. However no evidence was led to prove the contents of the plaint and no conclusions can be reached about the liability of the defendant on the basis of the pleadings. The only conclusion is that the plaintiff is willing to accept compensation in return for the property and the bank is willing to accept a fair market value as the basis of compensating the plaintiff. That the plaintiff was in arrears, it is a correct assumption to make that the bank would be entitled upon default of the plaintiff to use a forced sale procedure to realise its money. Secondly there are still some monies owing to the bank from the plaintiff. The third principle to be applied is that normally valuation is at the date of judgement. In the circumstances, the court accepts the forced sale value of the property of **Uganda shillings 92,000,000/=**. What is owing to the bank amounting to Uganda shillings 2,775,000/= and any additional interest from after 7th January 2011 shall be deducted from the amount of 92,000,000/= by the defendant

The plaintiff is awarded **Uganda shillings 92,000,000/=** less what is owing to the bank as represented to the plaintiff and pleaded in paragraph 4 (c) of the plaint. Costs of the suit are awarded to the plaintiff.

Judgment delivered in open court this 8th day of February 2013

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Joseph Luswata for the Defendant

Opio Moses Holding brief for the Kato Sekabanja for the plaintiff

Plaintiff in court

Defendant represented by Innocent Kyakuwa

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge