

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

CIVIL SUIT NO.457 OF 2012

DON (U) LTD:.....PLAINTIFF

VERSUS

**BIRUNGI ROSE &
SANDE KITYO:.....DEFENDANTS**

BEFORE THE HON. MR JUSTICE HENRY PETER ADONYO:

JUDGMENT:

1. Background :

The plaintiff company is incorporated in Uganda and deals in the business of importation, supply and distribution of petroleum and related products. It brought this suit against the defendants jointly and severally claiming the sum of Uganda Shillings One Hundred Twenty Million Shillings (Ug. Shs.120,000,000/=), general damages, interest and costs of the suit on the basis of the claim that it had a right to

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indemnity by the defendants which right arose from an agreement of sale of land located at Mile 7/8 Nansana Trading Centre measuring approximately 121 feet by 100 feet now registered as LVA 4226 Folio 10 plot 6348 at Nansana. The Defendants deny any obligations towards the plaintiff arguing that the suit brought against them was bad in law for the plaintiff had no cause of action against them.

2. Facts of the case:

An agreement of sale of land is said to have been entered between the parties in this suit on the 19th day of November 2010 as can be seen from Annexure A attached to the plaint. The said agreement particularly clause 3(b) and clause 3(e) thereof indicate that the defendants guaranteed that the land they were selling to the plaintiff was free from any encumbrances and that no other person or authority had any rights or claims to it.

For avoidance of any doubt I have taken liberty to quote the said clauses hereunder;

Clause 3 (b):

“... have authority to sell the land, the subject matter of this agreement and irrevocably undertake that no person or authority has any claims on their interest whatsoever”

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And

Clause 3(e):

“That in the event of any defect on the Vendors interest, the Vendors hereby undertake to reimburse to the purchaser all the monies that shall have been paid to them plus interest at 20% per annum from the date of such payment till the full reimbursement is made”.

Arising out of the assurances from, the plaintiff purchased the demised land. However, on the 21st day of August 2012 the plaintiff’s managing director, Mr. Kasozi Muwanga got a communication from the contractor who was building its of the petrol station on the demised land that the plaintiff was to be evicted from the said land following a court order with the eviction to carried out by a bailiff called Mr. Kirunda in execution of a warrant thereto. The reason for this eviction was that court had declared that the land belonged to one Aida Nakabonge Kyewalyanga and not to the defendants. The plaintiff decided to salvage its interests in the land to save the developments it had already carried on it by negotiating and buying out the interest of the decree holder which it did through its lawyers M/s Tumwesigye, Bangana & Co. Co. Advocates for a consideration of Uganda Shillings One Hundred Twenty Million Shillings (Ug. Shs. 120,000,000/=). The plaintiff thus reverted to the earlier agreement in which the defendants had agreed indemnified it

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in case of any adverse claim on the suit land claiming from the defendants the extra money it had to pay together costs and hence this suit.

The defendants of note do not deny having sold the suit land to the plaintiff and neither do they deny having executed a sale agreement in favor of the plaintiff in that regards. They, however, deny any liability to indemnify the plaintiff for additional costs it had met in the sale of the land as they had the right to sell the land as administrators to the estate of the late Yakobo Mpokota and since they concluded a sale with the plaintiff for Uganda Shillings Two Hundred Million Only (Ug. Shs. 200,000,000/=) which they received and the plaintiff applied for and got a lease on the said land which was registered as LRV 4226 Folio 10 plot 6348 at Nansana from rightful owners through the Buganda Land Board, then they had no further obligation towards the plaintiff. It is the contention of the Plaintiff that from the terms of agreement of sale the defendants guaranteed that they had authority to sell the land and indicated that there were no other claimants and they further undertook to indemnify it in the event of third party claims which could affect its interest in the title. The plaintiff state that indeed upon its paying the defendants, it started developing the suit land by constructing a petrol station but that when the said project was nearing completion a court bailiff appeared on the land with a court warrant arising from a High Court Miscellaneous Application

No. 035 of 2011 from the High Court at Nakawa which was ordering vacant
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possession of the suit land to one Aida Nakabonge Kyewalyanga who had been decreed as the lawful owner of the suit land. The suit had been decided against the defendants who had sold the suit land to the plaintiff. The plaintiff was set aback but weighed its option and decided seek for the said Aida Nakabonge Kyewalyanga whom it negotiated with and she agreed with it the sale of her decreed interests amounting to Ug. Shs 120,000,000/=. The plaintiff paid that amount and thereafter sought to recover the same from the defendants who had guaranteed to it that they had good title to the land. The defendants deny any liability to refund this additional money paid by the plaintiff.

3. Evidence on record:

During the hearing of this matter, the plaintiff produced two witnesses thus the plaintiff's its Managing Director and M/s Aida Nakabonge Kyewalyanga. The defendants on the other hand produced three witnesses namely Mr. Bernard Sserwadda Mpokota, M/s Birungi Rose and Mr. Michael Kyewalyanga. The two parties further produced a number of documents which are on record and during a joint scheduling conference, they agreed to a number of issues which they believed would help the court to determine the dispute between them. The issues have been adopted by court for resolving the dispute and are as below.

4. Issues for determination of this matter:

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- a) Whether the defendants were in breach of the sale of land agreement between them and the plaintiff.
- b) Whether the plaintiff is entitled to indemnity from the defendants as claimed in this suit.
- c) What are the remedies available to the parties?

5. Whether the defendants were in breach of the sale of land agreement between them and the plaintiff

The contents of the agreement of sale of land between the plaintiff and the defendants as executed in the agreement is not in doubt for the defence witnesses Sserwadda Bernard Mpokota (DW1) and Birungi Rose (DW2) both confirms that the Agreement with the plaintiff was clear and further DW2 confirms that the contents of the said agreement was read over to her by her by DW1 who is her brother. Both defence witnesses further stated that the plaintiff was aware of a dispute with PW2 when it bought the land but PW1 denies this assertion. DW1 also in his evidence when cross examined admitted that there were court proceedings at the High Court at Nakawa but denied that those proceedings were for claim on the suit land but from the testimony of Aida Nakabonge Kyewalyanga (PW2) it was clear that the proceedings at Nakawa high Court were for claims of interests on the estate of the late Yakobo Mpokota and indeed came out the successful party in the decision of court for the suit land which decision the ***6: Judgment for indemnity on additional expenses incurred by a plaintiff upon the purchase of property which was illicitly sold to it by the defendants: per Hon. Justice Henry Peter Adonyo: February, 2015.***

defendants never appealed against to date though DW1 and DW2 insisted that PW2's claim was merely for the occupation of house on the suit land and not the Kibanja which had been sold to the plaintiff. However, a look at the decision of the court showed that the court's decision touched the suit land which had been sold to the plaintiff. Although both DW1 and DW2 testified to the fact that the house claimed by PW2 was a distance away from the land, Michael Kyewalyanga (DW3) in cross examination admitted that the defendants actually sold to the plaintiff the house in which PW2 resided and which was found in the disputed land.

Of interest is the defendant's claim that PW2 was under the Baganda culture not entitled to a share of the estate of the late father of the defendants for she was an unmarried spouse to the late Mpokota as the matter of who was entitled to the share in the estate of the late Mpokota had been resolved by the High Court at Nakawa which considered in details the same. It is, however, clear to me that the defendant having been aware of the claim by PW2 which was still in court went ahead and sold the suit land to the plaintiff (well aware that there was a dispute before court in regards to the same and even purported to have sole vested interests in the land yet that was still a matter to be resolved by court and for going ahead to mislead the plaintiff so through the contents of the agreement which was tendered in this court which was to that effect then the defendants are liable to the plaintiff for giving it a misleading information. Clause 3(e) in the agreement for **7: Judgment for indemnity on additional expenses incurred by a plaintiff upon the purchase of property which was illicitly sold to it by the defendants: per Hon. Justice Henry Peter Adonyo: February, 2015.**

sale of the suit land refers clearly to the defendants' undertaking to indemnify of the plaintiff in case their title to the suit land was defective even though they sold the property to the plaintiff in their capacity as the administrators of the estate of the Late Yakobo Mpokota after having secured letters of Administration dated 19th day of March 2003, it is clear to me that the suit property was part of the estate that they were administrators to and they went on to dupe the plaintiff to doubly paying for the same even if Aida Nakabonge was a mistress or not to the their elder brother for I find that this was not the issue for this court to considers. She was eventually found by a competent court to be entitled to a share of the estate and the quite possession of what the defendants had sold to the plaintiff for the orders of the court at Nakawa was in respect of inheritance and did not refer to any specific property that formed part of the estate of the Late Yakobo Mpokota which comprised many undistributed houses which fact was admitted by all the witnesses who testified in court including PW1, PW2, DW1, DW2 and DW3 for my reading of the court's order or the warrant of attachment show that they refer to any specific property either yet the plaintiff's evidence was that before the said court order had been made it had acquired a lease title from the Buganda Kingdom for land that was described as Kyadondo LRV 4226, Folio 10, Block 203, Plot 6348 at Nansana measuring approximately 0.115 hectares and the house of PW2 was in it making the evidence of DW1 and DW2 to be unbelievable that the land

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the plaintiff purchased from the defendants did not include the house yet the same land had been fenced off and construction of a petrol station was stated to have been almost complete. Indeed the plaintiff's director who testified as PW1 said that the plaintiff had purchased the land in question which included part of the house which belonged to Aida Nakabonge (PW2) yet PW2 testified uncontroverted that she had interest in the suit land and that the house she was being denied to was part of the land in question and she had a right to the house which had been decreed to her by court.

From the testimony of PW1, it is clear to me that the plaintiff was not aware of any third party claims with the defendants opting not to disclose to it that indeed at the time when the sale of the land was being made, there were ongoing proceedings at court to resolve the distribution of the estate of the late Mpokota, a fact which was not disclosed to the plaintiff by the defendants who insisted that they had the right to sell having acquired letters of administration to the estate of the late Mpokota.

From the evidence adduced before this court, it is clear to me that the plaintiff was a bonafide purchaser value without notice and since the title of PW2 was indefeasible the defendants could not purport to pass to the plaintiff good title as they knew that Aida Nakabonge had a claim to the suit land and thus the doctrine of indemnity which is a creature of equity can apply in the instant matter for the

plaintiff to claim full compensation as against the defendants who were clearly in ***9: Judgment for indemnity on additional expenses incurred by a plaintiff upon the purchase of property which was illicitly sold to it by the defendants: per Hon. Justice Henry Peter Adonyo: February, 2015.***

breach when they sold to the plaintiff land which was still under dispute without disclosing to it all the issues surrounding the same thus exposed the plaintiff to unnecessary double payment over the suit land. My finding therefore is that since the defendants chose to hide the fact of adverse claims on the suit land to the plaintiff who eventually was forced to make additional payments then the defendants are liable to indemnify the plaintiff for such additional payments for even they contracted to do so through the sale agreement they voluntarily entered into with the plaintiff. I therefore answer this issue in the positive as against the defendants.

6. Whether the plaintiff is entitled to indemnity from the defendants as claimed in the suit.

From the above finding and my reading of the agreement between the parties, it is clear to me that the plaintiff is entitled to indemnity from the defendants as Clause 3(b) of the agreement creates the said undertaking by the defendants whereby the defendants made it known to the plaintiff that they had the authority to sell the suit land with no person or authority having a claim thereon yet they knew that at the time of entering such agreement there was a dispute on the suit land still unresolved in court. My perusal of the various documents tendered in this matter including oral evidence received in court through the testimony of PW2, it is clear that right from 2007, PW2 was in dispute with the defendants in the Chief *10: Judgment for indemnity on additional expenses incurred by a plaintiff upon the purchase of property which was illicitly sold to it by the defendants: per Hon. Justice Henry Peter Adonyo: February, 2015.*

Magistrates Court at Mpigi and the matter even went on appeal to the High Court at Nakawa showing that at the time the defendants sold the land to the plaintiff they were aware of this dispute which was under litigation the fact of which they decided to hide from the plaintiff in this matter for had it been brought to the attention of the plaintiff, it is likely that the plaintiff would have made such dispute to form part of the agreement with the defendants to secure its interest before the execution came up.

The plaintiff is a company dealing in the supply of petroleum products and the defendants knew the purpose for which the land was to be used and PW1 told this court that the plaintiff commenced construction of a petrol station by time of the execution of the court order came on the 21st day of August 2012 work of construction of the petrol station had gone to nearly 90 percent and when the plaintiff was faced with the order of court which decreed the land in question to PW2, it appears that it had no option but pay off PW2's interest which was prudent thing to do. Indeed I find from the evidence of DW2 that on the day question when the plaintiff was faced with eviction, the Managing Director of the plaintiff Kasozi Muwanga (PW1) called her and informed her of what had taken place but she could not help the plaintiff and so the plaintiff having got no help from the very people who sold to him the suit land had to pay off PW2 and thus

is entitled to indemnification from the defendants who clearly failed in their duty to
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disclose PW2's claims to it at the time of the sale since Clause 3 of the sale of land agreement between the plaintiff and defendants read as that **"...the vendors hereby warrants that the land belongs to them and that he has passed good title to the purchaser and undertakes to indemnify the purchaser in case of any defect in title"**.

And so when the orders of the High Court came out and it was clearly for vacant possession of the property of the deceased which Aida Nakabonge (PW2) was entitled to live in with her children irrespective of whether she an appropriate marriage or not, then the defendants had the duty to make good any extra costs met by the plaintiff since Aida Nakabonge had acquired equitable interest in the property having resided in the same and issues with the late in terms of a number children who had rights in that respect thus I find no contradiction in this respect between Section 36 of the Marriage Act Cap 251 and the fact that PW2 was customarily married to DW3 Kyewalyanga Michael as she testified in both cross examination and re examination since got the said land from the deceased father in law as was the undisputed finding of the High Court at Nakawa.

It is also not true not true that Bernard Sserwadda DW1) does not have good command of English so that he could claim that he did not understand the import of the indemnification clause in the agreement for sale of the suit land for he stated

in his evidence that he held a university degree in education and that he properly
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understood the English language though he preferred to testify in the Luganda language while giving his evidence.

A lot of arguments dwelt on the issue of the order of court at Nakawa from which the warrant to give vacant possession was made with the issue of the relationship between Aidah Nakabonge Kyewalyanga (DW2) with the family of the late Yakobo Mpokota almost taking centre stage with the insinuations that Aida Nakabonge (DW2) was not actually married to Michael Kyewalyanga (PW3). I find that these arguments were besides the point for which this Honourable Court had to contend with for this court's duty was not to examine the lawfully obtained order of the court with equivalent jurisdictions but to examine the fact of whether there was an agreement between the parties and whether such agreement led to certain actions to be undertaken by the plaintiff which led to loss by the plaintiff thus to find out whether the plaintiff was entitled to indemnity based on the sale agreement of the sale of the suit land. My finding thus is that it is not in dispute that there was an order of court for which execution orders issued which affected the plaintiff's interests in the land bought the land from the defendants arising from the fact that there was before the sale agreement for the land was executed there was in court a dispute over that land which fact of dispute was clearly never brought to the attention of the plaintiff for that information cannot be garnered

from land the sale agreement with the plaintiff finding it prudent to pay the decree
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holder the amount it did to salvage its property and investments for which I find the defendants liable and thus I also resolved this issue in the positive in the favour of the plaintiff.

7. What remedies are available to the parties:

The plaintiff in its pleadings claims an indemnity in the sum of Uganda Shillings One Hundred Twenty Million Shillings Only (Ug. Shs. 120,000,000/=). In addition, the plaintiff claims general damages, interest and costs of the suit.

The claim of Uganda Shillings One Hundred Twenty Million Shillings Only (Ug. Shs. 120,000,000/=) is the amount of money the plaintiff is said to have paid to Aida Nakabonge (PW2) who had court order and had been put in possession and control of the property over on which the plaintiff had developed a petrol station. Aida Nakabonge did agree that she received the said amount of money duly proving the claim of the plaintiff that it did by a sale agreement between it and Aida Nakabonge Kyewalyanga dated the 22nd day of August 2002 (Annexure “F”) such payment was made. This proves the fact that the said payment was received and since I have found that the defendants were liable to indemnify the plaintiff, my finding is that the amount has been specifically proved pleaded and proved.

The plaintiff also claims general damages based on the following;

- i. Inconvenience and delay on its construction works, which were occasioned by the eviction in execution of the order of court.

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- ii. Damages to its corporate image when its bailiff who sealed off the construction site to the exclusion of its employees servant and agents
- iii. Loss of time by its directors and employees trying to bring the situation back to normality at the site.

An award of general damages is at the discretion of court. I find that the Plaintiff continued to use of the suit land even after the failure of the defendants to disclose the fact of PW2's interest which the plaintiff paid for and continued to use the said land and I find that the call for general damages is unwarranted for which I decline to grant the same as the plaintiff did not adversely suffer to warrant court to grant it such an award.

The plaintiff made a claim to be granted of interest on both the Uganda Shillings One Hundred Twenty Million Shillings Only (Ug. Shs. 120,000,000/=) and on the general damages that would have been awarded from the date of filing till payment in full and on the date of judgment till payment in full respectively. Considering the time this matter has taken this court finds that on the issue of the proven special damages , an award of interest would be in the interest of the justice of this case since the plaintiff has have no use of its money for a long period of time. I would thus grant interest at the commercial rate of 18% per annum on the proven special damages from the date this matter was filed till payment in full.

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It is also clear to me that the plaintiff had to seek and instruct legal counsel in this matter meaning that it paid legal fees and has met expenses during the conduct of this suit. It is therefore proper that the plaintiff is awarded costs of this suit.

8. Orders:

This court finds in the favour of the plaintiff this suit and makes the following orders;

- a. The defendants are ordered to compensate the Plaintiff with due amount of Uganda Shillings One Hundred Twenty Million Shillings Only (Ug. Shs. 120,000,000/=) with interest at the rate of 18% per annum from the date of filing this suit till payment in full.
- b. The defendants to meet the plaintiff's reasonable costs incurred in prosecuting this suit.

HENRY PETER ADONYO

JUDGE

16TH DAY OF FEBRUARY, 2015

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