

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

HIGH COURT CIVIL SUIT NO. 102 OF 2012

**5 NUWE AMANYA MUSHEGA
 PLAINTIFF**

VS

**CHARLES ODERE
 DEFENDANT**

10 BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

JUDGMENT

The Plaintiff brought this suit against the Defendant seeking to recover US Dollars \$25,000 together with interest thereon from the date of filing the suit, general damages for inconvenience and costs of the suit.

The Plaintiff's claim arises out of a contract of sale of properties known as Kyadondo Block 261, Plot 427 and 428, at Makindye.

It is the contention of the Plaintiff that the Defendant held himself out as the Vendors Agent / Attorney with powers to sell the properties vide a sale agreement dated 18.01.12.

The properties are registered in the names of Mowm Construction Ltd and Owulla's Home Investments Trust (EA) Ltd respectively.

The agreed purchase price for the properties was US Dollars \$215,000. A copy of the sale agreement is Annexure "A" to the plaint.

Of the agreed purchase price US Dollars \$50,000 was payable
5 in part on the execution of the contract by deposit of US Dollars \$25,000 on the DFCU Bank Account No. 0200333047589 in the names of Mowm Construction Ltd and the other US Dollars \$25,000 by cheque already drawn by the Plaintiff (Purchaser) in favor of the vendor.

10 US Dollars \$100,000 was payable to DFCU upon handover of vacant possession of the properties and removal of the mortgage on Plot 428. And the US Dollars \$65,000 was payable to the vendor (Defendant) less the amount outstanding on the mortgage account with DFCU upon obtaining the
15 duplicate certificate of title for Plot 427.

The Defendant retained the sum of US Dollars \$25,000 paid to him by the Plaintiff and did not pass on the cheque to DFCU Bank. Subsequently, the Plaintiff refused to pay the other US Dollar \$25,000 and terminated the contract on the grounds that
20 the money was misapplied by the Defendant. Further that the Defendant lacked the requisite authority to enter into the transaction on behalf of the registered proprietors of the properties and the Plaintiff could not therefore conclude a contract which was unenforceable.

25 The Plaintiff demanded for refund of the US Dollars \$25,000 from the Defendant, which the Defendant declined to do contending that the said sum paid to him was costs for vacant

possession; and that it was the Plaintiff who breached the contract when he failed to pay US Dollars \$25,000 to DFCU Bank.

5 The Defendant required the Plaintiff to complete performance of the contract, which the Plaintiff refused to do and hence filed this suit.

In his defence, the Defendant denied the claim and filed a counter claim. The counter claim was later withdrawn by consent.

10 At the scheduling conference, the following issues were framed by the parties for determination by court.

I. Whether the Plaintiff has a cause of action against the Defendant.

15 **II. Whether the Plaintiff's claim is maintainable against the Defendant.**

III. If so, whether the Defendant is liable.

IV. What are the remedies available if any.

The Plaintiff led evidence of two witnesses, while the Defendant did not testify. Both parties filed written submissions.

20 **Whether the Plaintiff has a cause of action against the Defendant.**

Decided cases have established that a cause of action is established if the ***“plaint shows that the plaintiff enjoyed a right, that the right has been violated and that the***

Defendant is liable...” – See Auto Garage and Others vs. Motokov (No3) [1991] EA 514 at page 519D Spry V.P and Tororo Cement Co. Ltd vs. Frokina International Ltd SCCA No. 2/2001 where Oder JSC emphasized that “....in
5 ***order to determine whether the plaint discloses a cause of action, it is important to look at the plaint in its entirety vis-à-vis the elements of the cause of action stated in the Auto Garage case.” (Supra).***

The plaint shows in the present case that the parties entered
10 into a contract for purchase of the properties already described earlier in this judgment. The purchase price was US Dollars \$215,000. The Defendant held himself out as an Attorney /agent of the registered proprietors of the said properties based on a power of Attorney granted by a person other than the
15 registered proprietors.

The Plaintiff issued a cheque for US Dollars \$25,000 as advance payment for the purchase price to be applied to settle the mortgage debt with DFCU, which the Defendant failed to do. The Plaintiff terminated the contract as he did not wish to
20 continue with a contract which was unenforceable.

The Defendant refused to refund the moneys paid by the Plaintiff which the Plaintiff contends caused him to suffer serious damage and inconvenience and further that the Defendant who unjustly enriched himself is liable to refund the
25 money and also pay damages together with interest and costs.

After careful consideration of the averments of the Plaintiff, I find that the Plaintiff discloses as a cause of action as it

establishes all the three elements that have been established by decided cases as necessary.

The next two issues that is **whether the Plaintiff's claim is maintainable against the Defendant, and if so, whether**
5 **the Defendant is liable**, will be dealt with together.

The Plaintiff in this case terminated the contract on the ground that the money paid to the Defendant was misapplied and that the Defendant lacked the requisite authority to enter into the transaction on behalf of the registered proprietors and
10 therefore the Plaintiff could not conclude a contract which was unenforceable.

Counsel for the Plaintiff submitted that the Defendant sold the property to the Plaintiff as the agent of the vendors. The doctrine of agency presupposes that the agent is duly
15 appointed by the principal, but that in the present case the agent lacked proper appointment by the principal under the Registration of Titles Act. The registered proprietor of Block 261 Plot 428 is Mowm Construction Ltd yet the power of Attorney Exhibit B dated 26.05.11 was given by Mudebo James,
20 who is not the registered proprietor. Though a Manager of the Mowm Construction Company, the two are distinct persons. Counsel relied upon S.146 (1) Registration of Titles Act –
“which empowers the proprietor of the landowner the act to appoint an attorney to act for him/her to deal with
25 ***the land.”***

And on the case of **Fredrick Zaabwe vs. Orient Bank Ltd and 5 Others SCCA 04/2006** for the holding that ***“a donee of a power of Attorney acts as an agent of the donor.”***

It was asserted the Donor not having been the legal owner of the suit property, the Defendant lacked locus to sell the property to the Plaintiff and doing so was a misrepresentation within the meaning of clause 4 of the agreement.

Further that, the US Dollars \$25,000 paid to the Defendant was never passed on to DFCU Bank to clear part of the mortgage debt and it is trite law that ***“a donee of a power of Attorney cannot use the power of Attorney for his own benefit.”***

Alternatively that, if the Defendant had authority to sell both properties to have turned the proceeds of sale to himself, his actions were outside the scope of the Power of Attorney and cannot therefore be ratified by the Donor. The case of **Imperial Bank of Canada vs. Begley [1936] 2 AU ER 367** was cited in support.

It was emphasized in that case that ***“the principle of ratification by the donor of the acts of the agent cannot be relied on by the Defendant to avoid liability for money received and not passed on to the bank.”***

However, the Defendant insisted that as an agent of the vendors, he is not liable for the obligations of the principal.

Relying on S.90 of the Registration of Titles Act, and the evidence of PW2, Counsel stated that the Defendant was an agent acting on behalf of the two registered proprietors of the

property. And that the term “**vendor**” referred to the two companies under clause 4 of the agreement, and they were the ones to transfer their interests to the Plaintiff in exchange for the purchase price.

- 5 The case of **Lloyd vs. Grace Smith and Co [1911 - 1913]**
ALL ER 51 cited in the case of **Attorney General vs. Niko**
Insurance Uganda HCCS No. 240/2012 was relied upon for
the holding that “*the principal is liable for the fraud of the*
agent committed in the course of the agent’s
10 *employment and not beyond the scope of his agency*
whether fraud is committed for the principals benefit or
not.”

It was then contended that in the present case, if the Defendant acted fraudulently, which is denied, it would be the
15 principal liable to indemnify the Plaintiff and therefore the Plaintiff cannot maintain the suit against the Defendant by virtue of the provision.

Commenting about the case of **Frederick Zaabwe vs. Orient Bank (Supra)**, Counsel claimed that it was not applicable to
20 the facts of the present case as the Plaintiff never had evidence to show that the Defendant acted for his own benefit to the detriment of the donor, as it was a lie for the Plaintiff to state that the funds were to be remitted to the Bank.

There was also no evidence from the two companies to indicate
25 that they were defrauded in anyway by the Defendant. Counsel argued that **Zaabwe’s case (Supra)** is distinguishable from the present case, where the Defendant

was at all material times acting for the benefit of the principals and would have continued to further their interests if the Plaintiff had not committed a fundamental breach.

Also that there was no evidence to indicate that the Defendant
5 has obligations under the agreement to remit funds to the bank. The agreement, Counsel asserted, required the Plaintiff to pay US Dollars \$25,000 into the Bank Account which the Plaintiff failed to do, thereby breaching the agreement. Therefore that, the Defendant is not liable under clause 4 of the
10 agreement.

Further that, the cheque of US Dollars \$25,000 paid to the Defendant was to ensure vacant possession of the property. While the cheque referred to in Exhibit E – the email of 19.01.12, was to be deposited with the Bank immediately
15 before or after execution. Therefore that, the cheque of US Dollars \$25,000 received by the Defendant and which has been drawn before execution of the agreement could not be referred to in the Defendant's email. That this position is corroborated by the admission of PW₂ who said that she did not know who
20 was to deposit the Us Dollar \$25,000 in the bank.

Exhibit "G" dated 17.01.12, from the bank also confirms the position that the money was required to secure vacant possession and was to be deducted from the money derived from the sale. The mortgage facility secured by the property
25 was to be cleared prior to all claims, save for the costs that may be incurred to render vacant possession of the property.

And that the Defendant failed to secure vacant possession of the property after the Plaintiff's refusal to fulfill his obligations to pay the remainder of the US Dollars \$25,000 to the bank.

As to the power of Attorney Exhibit "B", Counsel insisted that it
5 was valid as it indicates that Mudebo James was acting in his capacity as Managing Director of Mowm Construction Ltd – the registered proprietors of the property. The Defendant was given the power of Attorney to among other things, sell the property. The power of Attorney was duly registered and the
10 Plaintiff's claim that it was invalid is a mere technicality which should be disregarded under Article 126 (2) (e) of the Constitution.

Invoking the principle of estoppels, Counsel argued that the Plaintiff cannot turn around and claim that the Defendant had
15 no authority, yet the Plaintiff did all the negotiations and executed the sale agreement with the vendors through the Defendant. And that, the Plaintiff cannot avoid the agreement after agreeing to be bound by the terms there of drawn by his lawyers and then seek indemnity.

20 Upon giving the evidence and the submissions of Counsel the best consideration, I can in the circumstances, it is apparent that the Defendant insists that the power of Attorney he had was validly executed, while the Plaintiff contends that the same was not validly executed and did not give the Defendant
25 authority to deal with the suit property on behalf of the registered proprietors.

S.146 (1) and (2) of the Registration of Titles Act ***“empowers a proprietor of any land under the operation of the Act or of any lease or mortgage to grant a power of Attorney to any person to act for him/her in dealing with the land.***

5 ***The power of Attorney has to be registered.”***

The evidence before court indicates that the power of Attorney Exhibit “B” was duly registered with the Registrar of Documents. However, decided cases have established that ***“a power of Attorney should be construed strictly and the***
10 ***instrument will not bind the parties unless it complies with SS 146 and 148 of the Registration of Titles Act.”*** – See **Frederick J.K. Zaabwe vs. Orient Bank Ltd and Others SCCA 04/2006.**

In the present case, the power of Attorney was given by one
15 Mudebo James, a Managing Director of MOWM Construction Ltd – the registered owner of the property in issue, to the Defendant, authorizing him to :-

- 1) Sell, mortgage, pledge, lease, or otherwise deal with the property.
- 20 2) To sign, execute, deliver all instruments and documents and do any other act or thing that may be necessary or incidental to the purposes aforesaid as my attorney shall think necessary or proper.

The donor undertook to at all times verify and confirm all
25 things lawfully done by the Defendant (Attorney) under the power of Attorney.

However, S.146 (1) Registration of Titles Act only authorizes
“a proprietor of the land to give such power of Attorney to deal with the land.”

5 The agreement for sale executed by the parties in this case and the power of Attorney show that the registered proprietor of the properties the Plaintiff was to buy are Mowm Construction Ltd and Owalla Home Investments Trust (EA) Ltd and not Mudebo James, the Donor of the power of Attorney.

10 Mudebo James executed the power of Attorney in respect of the property comprised in Block 261 Plot 428- as Managing Director of Mowm Construction Ltd and not for or on behalf of the said company. The Power of Attorney did not comply with the provisions of S.146 (1) of the Registration of Titles
15 Act and therefore was not validly executed. It did not therefore give the Defendant lawful authority to deal with the land; although it was registered with the Registrar of Documents.

20 While Block 261 Plot 427 was also being sold as per Exhibit “A” the power of Attorney in respect hereto, granted to the Defendant to obtain a special certificate of title and to execute any agreement of sale of the property, this power of Attorney in respect of this property was validly executed. It was signed for and on behalf of Owalla’s Home investments
25 Trust (EA) Ltd by the Secretary / Director of the Company.

However, Exhibit “B” – the power of Attorney that was not validly executed greatly affected the Defendant’s powers

that were being exercised under the agreement for being invalid and therefore affected the entire transaction since the Defendant who purported to sign the agreement of sale had no powers to do so, the agreement was void abinitio.

5 The suit is maintainable against the Defendant.

The argument by the Defendant that he was an agent of the proprietors (vendors) and therefore the principals are liable cannot be sustained after finding that the agreement was void abinitio and that the power of Attorney was not valid.

10 The registered proprietors of the properties cannot therefore be held liable for any acts of the Defendant committed under the invalid powers of Attorney, and cannot be the ones to indemnify the Plaintiff.

15 Without a valid power of Attorney from the registered proprietor of Plot 428 the Defendant cannot be said to have been their agent. There was no legally recognized principal and agent in the transaction.

20 The Plaintiffs evidence which was admitted by the Defendant is that US Dollars \$25,000 was paid by cheque to the Defendant and was cashed. The money was not passed on to the DFCU the intended beneficiary of the loan repayment. While the Defendant claims that the money was for the purpose of effecting vacant possession of the property, the money was received prior to the signing of the agreement
25 and it was not part of clause 1 (a) of the agreement.

The court has found that the Defendant held himself out as the authorized agent of the registered proprietors of the

property whereas he was not and induced the Plaintiff to deal with him as an agent, he is therefore liable to compensate the Plaintiff in respect of the loss incurred by the Plaintiff under S.167 of the Contracts Act.

- 5 There is no evidence to indicate that the alleged principal ratified the acts of the Defendant as there was no principal to begin with in any case.

10 The requirement to deposit US Dollars \$25,000 for the purpose of vacant possession as per Exhibit "E" was not brought to the attention of the Plaintiff before execution of the agreement- According to the case of **Laceys Foot Wear vs. Bowler Insurance [1997] 2 LLOYDS - "a condition will be incorporated into a contract only if the latter party knew the document contained it or reasonable notice of it was given."** Neither was the requirement
15 contained in Exhibit "A".

Exhibit "G" from DFCU Bank to the Plaintiff's Advocates - paragraph 2, the priority payment was the loan amount, save for from the costs that may be incurred to render
20 vacant possession of the property.

The costs to be incurred by the Plaintiff stated in paragraph 11 of the Exhibit "A" did not include handing over vacant possession of the property. The Defendant wrongly held on to the money after the Plaintiff rescinded the contract.

The Defendant admits in his pleadings and submissions that he received US Dollars \$25,000 from the Plaintiff prior to signing of the agreement.

Under S.167 of the Contracts Act, a person who fraudulently represents himself/herself as an authorized agent of another person and induces a third person to deal with him/her as the agent is liable to compensate the third person in respect of any loss or damage incurred, where the alleged principal does not ratify the acts.

The Defendant in the present case held out as an agent of Mowm Construction Ltd yet he was not; and there is no evidence that the Defendant's alleged principals ratified his acts. He is therefore liable to compensate the Plaintiff for the US Dollars \$25,000.

In any case, under paragraph 4 Exhibit "A" - (the agreement), it is provided that ***"without prejudice to the principal's obligations to ratify the vendor's actions, the vendor undertakes personally to fully indemnify the purchaser in the event of want of title and or any misrepresentation of all the sums paid herein with interest at the prevailing Standard Chartered Bank rate per pre-estimated damages."***

Since there was no valid powers of Attorney, the Defendant is personally liable to indemnify the Plaintiff.

Court has also noted that the Defendant neither testified nor called any other witness to support his case. After the close

of the Plaintiff's case, the matter was adjourned to 12.03.15, but on that day court was informed that the Defendant was in Nairobi as he had no flight back.

The case was then adjourned to 25.05.15, but again on that date, court was informed that the Defendant was again in Nairobi attending to an emergency. Counsel for the Defendant sought further adjournment for one week or alternatively to close of the defence case and the defence be allowed to submit on points of law only.

Court agreed with the submissions of Counsel for the Plaintiff that the Defendant appeared to be unwilling to appear and testify. The parties were accordingly directed to file written submissions. However, this court still took cognizance of the fact that despite the failure of the Defendant to testify, the burden of proof still remained on the Plaintiff to prove his case on the balance of probabilities.

Remedies available to the Plaintiff if any:

The Plaintiff brought this suit to recover US Dollar \$25,000, interest thereon from the date of filing the suit, general damages for inconvenience and costs of the suit.

Counsel for the Plaintiff prayed court to note that the Defendant had withdrawn his counter claim subject to the payment of costs of the Plaintiff. However, Counsel for the Defendant sought the suit to be dismissed with costs.

US Dollars \$25,000: The court having found that the Plaintiff is entitled to recover the US Dollars \$25,000 it is accordingly awarded to him.

General Damages: Decided cases have established that
5 ***“general damages are meant to compensate a plaintiff for loss of use, loss of profit and injury suffered. And that such damage must be the direct probable consequence of the act complained of”*** -

Refer to **Robert Coussens vs. Attorney General SCCA**
10 **08/99** and **Haji Asuman Mutekanga vs. Equator Growers (U) Ltd SCCA 07/95.**

The Plaintiff in the present case paid US Dollars \$25,000 to the Defendant which court has directed should be refunded to him. However, the Plaintiff did not get the expected
15 benefit from the payment that is, the properties that he intended to buy. He has also been greatly inconvenienced by the Defendant’s refusal to pay him back the said sum of money and is therefore entitled to general damages.

In assessing the general damages, court takes into account
20 the principle that ***“the claimant should be fully compensated for the loss. He is entitled to be restored to the position that he would have been in had the wrong not been committed in so far as this can be done by payment of money.”*** - See **Livingstone vs. Rawyards Coal Co. Ltd (1880) 5 APLL CAS 25 at page 39.**
25

Counsel for the Plaintiff did not propose any figure to be awarded as general damages. Considering the inconvenience that has been occasioned to the Plaintiff by the refusal of the Defendant to refund his money since 2012,
5 the sum of Shs. 10,000,000/- will suffice as general damages. This is taking into consideration that the agreement between the parties provided for payment of interest on the sums received by the Defendant.

Interest: Interest in the present case was provided for by
10 the agreement between the parties: Clause 4 Exhibit "A".
".....with interest at the prevailing Standard Chartered Bank rate per annum as pre-estimated damages."

The Plaintiff is accordingly allowed interest on the sum of US Dollars \$25,000 at the agreed rate from the date of filing the
15 suit until payment in full.

Interest on the general damages is allowed at the rate of 12% per annum from the date of this judgment until payment in full.

Costs: It is trite law that ***"costs of any cause, action or matter shall follow the event unless for good cause, court orders otherwise and a successful party should not be deprived of costs"***. – Refer to **Francis Butagira vs. Deborah Namukasa [1992 - 1993] HCB98** and **Jenifer Rwanyindo Aureha and Another vs. School Outfitters (U) Ltd CACA 53/1999 and S.27 (2) CPA.**
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Having found that the Plaintiff has proved his claim against the Defendant, the court allows him the costs of the suit.

Judgment is entered for the Plaintiff against the Defendant in the following terms:-

- 5 I. The Defendant to refund to the Plaintiff the sum of US Dollars \$25,000 being the sum paid to him by the Plaintiff as part payment for the purchase of the property.
- II. The Plaintiff is granted general damages of Shs. 10,000,000/-.
- 10 III. Interest is granted on the US Dollars \$25,000 at the prevailing commercial rate of Standard Chartered Bank as agreed by the parties, from the date of filing the suit until payment in full.
- IV. Interest is granted on the general damages from the date
15 of judgment until payment in full at the rate of 12% per annum.
- V. Costs of the suit are also granted to the Plaintiff.

20 **Flavia Senoga Anglin**
JUDGE
04.08.16