

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

MISCELLANEOUS APPLICATION No. 0008 OF 2021

(Arising from Civil Suit No. 672 of 2005)

ERIDAD F. NTANDA APPLICANT

VERSUS

**1. DR. D. B. KYEGOMBE }
2. MRS. B. KYEYUNE }**

RESPONDENTS

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

The applicant sued the defendants jointly and severally seeking an order of specific performance of a contract of sale of a twenty three acre tea plantation out of 42.5 hectares comprised in Singo Block 185 plot 16, general and special damages for breach of contract, interest and costs. The contract was dated 24th October, 2004. The applicant was required to have paid the agreed purchase price in full by 31st December, 2004 whereupon the respondents would cause a transfer of the title deed into his names. The applicant made part payment in the sum of shs. 2,000,000/= leaving an outstanding balance of shs. 28,000,000/= to be paid upon the respondents producing a title free from encumbrances. In the meantime, the applicant continued as a lessee in possession of the land, under a ten year lease. On or about 29th December, 2004 the applicant tendered payment of the balance of the purchase price by way of a cheque payable to the estate of the late Eriya Ssajjabi, to which estate the respondents were joint administrators. The 2nd respondent rejected the cheque and instead the respondents repossessed the land on or about 19th February, 2005.

Judgment was on 8th April, 2013 entered in favour of the applicant. He was awarded general damages of shs. 9,000,000/= with interest thereon at the rate of 25% per annum. He was directed to pay the balance of the decretal sum within 60 days thereof, less the sum recoverable from the respondents as general damages and interest. The respondents were directed upon receipt of the balance to partition the 23 acres off the head title and transfer it into the names of the applicant.

b. The application.

The application is made under the provisions of Order 22 rules 84 and 85 and Order 52 rules 1 and 2 of *The Civil Procedure Rules*. The applicant seeks an order allowing him to take possession of the 23 acres decreed to him. He contends that on his part he could not comply with the terms of the decree strictly within the period specified by the decree because the court file went missing soon after that decision and was only retrieved on or about 31st March, 2014. On 18th July, 2014 he deposited in court, the cheque for the amount payable under the terms of the decree. The court on 21st July, 2014 notified the respondents to collect the cheque. The respondent refused to comply. The 1st respondent died on 5th February, 2016. To-date the decree remains unsatisfied.

c. Affidavit in reply

In her affidavit on reply, the 2nd respondent averred that although the applicant was required to comply with the decree within sixty days of the judgment, to-date the applicant has never complied. Consequently, she has never received the balance of the agreed purchase price. It was unjust for the applicant in his calculation of interest accruing due, to reckon the period beyond 60 days from 8th April, 2013 during which he was required to have complied.

20d. Submissions of counsel for the applicant.

M/s Sewankambo and Co. Advocates on behalf of the applicant submitted that the application is justified by the fact that the 2nd respondent has adamantly refused to comply with a decree of specific performance. The court is empowered to make the order sought where it is satisfied, after hearing the parties, that there is no just cause for the respondents' resistance or obstruction of execution of the decree.

e. Submissions of counsel for the respondent.

M/s Sam Kiwanuka and Co. Advocates on behalf of the respondent submitted that the applicant having failed to comply with the terms of the decree, he cannot seek equitable relief from court.

He cannot seek to execute the decree outside the period of time imposed by court. Delay rendered the decree ambiguous. The decree is no longer enforceable.

f. The decision.

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According to section 34 (1) of *The Civil Procedure Act*, all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit. The scope of this provision is very wide as exclusive jurisdiction is conferred on the executing court in respect of all matters relating to execution. For the provision to apply; (i) 10 the questions must have arisen between the parties to the suit or their representatives; (ii) they must arise in the suit in which the decree was passed; (iii) they must relate to the execution, discharge or satisfaction of the decree; and (iv) they must be determined by the execution court.

15 This provision is intended to provide an inexpensive and expeditious remedy for determination of certain questions that arise in the course of execution, so as to avoid a multiplicity of suits. Such questions usually include; whether a decree is executable? Whether the property attached is liable to be sold in execution of the decree? Whether a decree is fully satisfied? Whether a particular property is included or not in decree? Generally all questions regarding attachment, sale or delivery 20 of property.

The question arising in this application is whether or not the decree in the instant case is still enforceable. The most common reason courts grant specific performance is that the subject of the contract is unique and adequate just relief requires more than a transfer of money and / or where 25 the true amount of damages is unclear. Since monetary damages are awarded whenever possible, it is vital for the plaintiff to demonstrate that the unique nature of the asset at issue requires specific performance and that monetary damages would not suffice.

Specific performance is an equitable, discretionary remedy which, if granted, compels a party to 30 perform a contractual obligation. It is a remedy in performance as opposed to a claim sounding in damages. The jurisdiction to decree specific performance is discretionary, and the court is not

bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles. It is a discretionary and exceptional remedy, the basic requirements for which are: (i) there must be a valid, enforceable contract; and (ii) damages would not be an adequate remedy. There is a general principle though
5 that a contract for the grant of an interest in land will normally be specifically enforced.

Specific performance of a contract cannot be enforced in favour to the person who fails to prove that he has already performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than the terms of which, the performance
10 has been prevented or waived by the other party. It mandatory for the applicant to prove that he or she has already performed or was always ready and willing to perform the essential terms of the decree which were to be performed by him or her.

The mode of enforcement of decrees for specific performance is provided for by Order 22 rule 29
15 of *The Civil Procedure Rules* as follows;

29. Decree for specific performance...

- (1) Where the party against whom a decree for the specific performance of a contract... has been passed, has had an opportunity of obeying the decree, and has wilfully failed to obey it, the decree may be enforced by his or her detention in the civil prison, or by the attachment of his or her property, or by both detention and attachment.
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- (2)
- (3) Where any attachment under sub-rule (1)of this rule has remained in force for six months, if the judgment debtor has not obeyed the decree and the decree holder has applied to have the attached property sold, the property may be sold; and out of the proceeds the court may award to the decree holder such compensation as it thinks fit, and shall pay the balance, if any, to the judgment debtor on his or her application.
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- (4) Where the judgment debtor has obeyed the decree and paid all costs of executing the decree which he or she is bound to pay, or where at the end of six months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease.
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(5) Where a decree for the specific performance of a contract.....has not been obeyed, the court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree holder, or some other person appointed by the court, at the cost of the judgment debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the court may direct and may be recovered as if they were included in the decree.

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10 The rule requires that the judgment debtor must have had “an opportunity of obeying the decree, and has wilfully failed to obey it.” This is the *sine qua non* for exercise of jurisdiction to enforce a decree of specific performance. The decree may be not enforced by directing the act to be done so far as practicable by the decree holder, or by the detention in the civil prison of the judgment debtor, or by the attachment of his or her property, or by both detention and attachment, unless it is shown that the judgment debtor had an opportunity for not disobeying the order and had disobeyed.

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It is trite that any person seeking benefit of the specific performance of a contract must manifest that his or her conduct has been without blemish throughout, entitling him or her to the specific relief (see *Australian Hardwood v. Commissioner for Railways* [1961J 1 All ER 737; *Sydney Consumers’ Milk and Ice Co v. Hawksbury Dairy and Ice Co. (1931)* 31 SR (NSW) 458 and *King v. Pigioli (1923)* 32 CLR 222.). The requirement imposes a personal bar. The Court is to grant relief on the basis of the conduct of the person seeking relief. A plaintiff who seeks specific performance must come with clean hands. It is necessary that the applicant’s conduct in performance of the contract or attempting to fulfil the same shows an unwavering intention of wanting to perform.

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If the facts manifest that the conduct of the plaintiff entitles him or her to get the relief he or she should not be denied the relief. It is for the applicant to establish that he or she was, since the date of the contract, continuously ready and willing to perform his or her part of the contract. In order to prove himself or herself ready and willing, a purchaser has not necessarily to produce the money or to vouch a concluded scheme for financing the transaction (see *The Bank of India Ltd. and Others (Reasons) v. Jamsetji A. H. Chinoy and Messrs Chinoy and Co. and Others (Bombay)*,

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[1949] UKPC 82). It is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money, except when so directed by the court. However, having been ordered, if he or she fails to do so, his or her claim for specific performance must fail.

5 Similarly, a judgment creditor who seeks to enforce an order of specific performance must come with clean hands. A judgment creditor is said not to come with clean hands if he or she has not completed all conditions precedent and performed, or at least tendered performance, of all the conditions of the decree. The judgment creditor seeking to enforce equitable relief must be prepared to do equity i.e. to perform all his or her obligations under the decree.

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When a decree for specific performance of a contract imposes certain obligation on one or both parties, it cannot be said to be final. The Court retains the power to enlarge the time in favour of the decree-holder to pay the amount or to perform the conditions mentioned in the decree for specific performance (see *Kumar Dhirendra Mullick and others v. Tivoli Park Apartments (P) Ltd*,
15 *2005 (5) ALL MR 180 (S.C.)*). A decree for specific performance is in the nature of a preliminary decree and the suit is deemed to be pending even after the decree. The applicant should have sought an order enlarging time for compliance with the terms of the decree before seeking its execution. Not having done implies that the judgment creditor seeking to enforce an order of specific performance has not come with clean hands.

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The question, therefore is whether in a case like the present, the Court is competent to deliver possession of the 23 acres in execution of the decree. The nature of the relief granted by the decree in a suit for specific performance of a contract for sale of land is such that everything which is necessary for the contract to be specifically performed should be held to be comprised in it. The
25 applicant not having made timely compliance with the terms of the decree cannot seek its enforcement before correction of that irregularity. For that reason the application fails and is dismissed with costs to the respondent.

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Dated at Kampala this 27th day of May, 2021

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Stephen Mubiru
Judge,
27th May, 2021.