

KAYEMBA EDWARD **PLAINTIFF**

VERSUS

KALAGALA JANE **DEFENDANT**

JUDGEMENT

The plaintiff instituted this suit against the defendant seeking an order of specific performance of the contract, recovery of UGX 80,000,000/= as the

balance on the purchase price of the property, mesne profits, plus general damages, interest and costs of the suit.

The defendant did not file a defence notwithstanding being served with court summons on the 6th May 2021 as reflected in the affidavit of service sworn by Kiseka Deo which was filed on the court record on the 2nd June 2021.

Validity of the interlocutory judgment

I take note that on 25th May 2021 the plaintiff applied for an interlocutory judgement to be entered against the defendant under Order 9 Rules 10 and 11 of the Civil Procedure Rules. On 27th August 2021 the Registrar entered an interlocutory judgment and set down the suit for formal proof of damages.

Order 9 Rules 10 and 11 of the Civil Procedure Rules provide as follows;

10. General rule where no defence filed.

In all suits not by the rules of this Order otherwise specifically provided for, in case the party does not file a defence on or before the day fixed therein and upon a compliance with rule 5 of this Order, the suit may proceed as if that party had filed a defence.

11. Setting down suit for hearing.

(1) At any time after the defence or, in a suit in which there is more than one defendant, the last of the defences has been filed, the plaintiff may, upon giving notice to the defendant or defendants, as the case may be, set down the suit for hearing.

(2) Where the time allowed for filing a defence or, in a suit in which there is more than one defendant, the time allowed for filing the last of the defences has expired and the defendant or defendants, as the case may be, has or have failed to file his or her their defences, the plaintiff may set down the suit for hearing ex parte

Clearly the above rules which were cited by the plaintiff and relied on by the Registrar do not deal with interlocutory judgment or assessment of damages.

The relevant rule for interlocutory judgment is Order 9 rule 8 which provides as follows;

8. Assessment of damages.

Where the plaintiff is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and the defendant fails or all defendants, if more than one, fail to file a defence on or before the day fixed in the summons, the plaintiff may, subject to rule 5 of this Order, enter an interlocutory judgment against the defendant or defendants and set down the suit for assessment by the court of the value of the goods and damages or the damages only, as the case may be, in respect of the amount found to be due in the course of the assessment.

From the foregoing Order 9 Rule 8 is restricted in application to plaintiffs which contain a claim for pecuniary damages only or for the detention of goods, which is not the case before me. Where the plaintiff contains other claims or if it has the above claims coupled with other claims, as in the present case, it cannot fall within the operation of rule 8. (See **Dembe Trading Enterprises Limited v Uganda Confidential Ltd & Another HCCS No. 0612 of 2006.**) Accordingly the interlocutory judgement entered by the Registrar on the 27th August 2021 was entered in error and is hereby set aside.

Notwithstanding the foregoing, for all intents and purposes the suit proceeded *ex parte* as provided for under Order 11 rule 2, as reflected in the issues framed for determination. I will therefore proceed to consider the pleadings and evidence in determining the suit.

Representation and hearing.

The plaintiff was represented by Mr. Mukiibi Andrew of M/s A.N Kigozi & Co. Advocates. The plaintiff filed his trial bundle, witness statement and scheduling notes, and he adduced evidence through a witness statement which I have considered together with the pleadings.

Issues.

The following issues were framed for determination of the dispute in this suit.

1. Whether the defendant breached the contract of sale of a house and plot of land made on 22/12/2015.
2. What remedies are available to the parties.

Determination by Court.

Issue No. 1: Whether the defendant breached the contract of sale of a house and plot of land made on 22/12/2015?

The plaintiff adduced evidence to show that the parties entered into a sale agreement (**Ex P1**) for the purchase of a plot and a house at Gayaza B Kasangati Town Council Wakiso District at UGX 85,000,000. He also adduced evidence that the defendant paid a deposit of UGX 5,000,000/= and when the plaintiff demanded for payment of the outstanding balance of UGX 80,000,000/=: the defendant instituted a suit against him in the Chief Magistrates Court of Kasangati (Land Civil Suit No. 28 of 2019) for recovery of the deposit of UGX 5,000,000/=. The plaintiff adduced photocopies of the court pleadings (**Ex P2**) to prove the same. The plaintiff further adduced evidence to show that even after the said suit against him was dismissed for want of prosecution, the defendant again instituted small claim proceedings (Small Claim No. 10 of 2021) in the Chief Magistrates Court of Kasangati (**Ex P4**) against the plaintiff for recovery of the deposit. On questioning by the court as to who was in possession of the suit property the plaintiff admitted that he had remained in occupation of the property.

In the case of **Dada Cycles Ltd v Sofitra S.P.R.L Ltd; HCCS No. 656 of 2005** Lady Justice Hellen Obura (as she then was) while citing the case of **Ronald Kasibante v Shell Uganda Ltd HCCS No. 542 of 2006 [2008] ULR 690**, defined breach of contract as follows;

“Breach of contract is the breaking of the obligation which a contract imposes which confers a right of action for damages on the injured party. It entitles him to treat the contract as discharged if the other Party renounces the contract or makes the performance impossible or substantially fails to perform his promise, the victim is left suing for damages, treating the contract as discharged or seeking a discretionary remedy”

For all intents and purposes, from the evidence adduced by the plaintiff, one cannot say that there is still a contract to be enforced between the parties. I agree with the above definition of breach of contract in the above highlighted case and in the context of the instant case, the actions of the defendant in repeatedly suing for recovery of her UGX 5,000,000/= deposit on the purchase of the property effectively discharged the contract. This should have put the plaintiff on notice that the Defendant had failed to and did not intend to perform her promise under the agreement between them hence breaching the contract. The Plaintiff ought to have sued for damages if any arising out of the breach instead of the prayers for specific performance and the outstanding balance, more so since he remained in possession of the property.

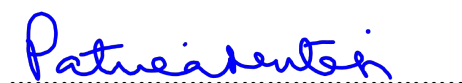
Issue No. 2: What remedies are available to the parties.

The plaintiff sought for an order of specific performance of the contract, recovery of UGX 80,000,000/= as the balance on the purchase price of the property, mesne profits, plus general damages, interest and costs of the suit. However when I questioned him as to why he was demanding for the purchase price and mesne profits yet he remained in possession of the property, the plaintiff stated in a clear departure from his pleadings that he no longer wants the purchase price but instead he wanted the agreement between the parties cancelled so that he can sell the property.

From the foregoing, the case before me with the prayers sought from court is not tenable and this court is not inclined to grant the same but to dismiss it.

In the result, I dismiss this suit. Since the defendant never entered appearance, no costs are awarded.

Delivered via ECCMIS this 28th day of April 2023



Patricia Mutesi
(JUDGE)

28/04/2023