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**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL DIVISION)**

**HIGH COURT CIVIL SUIT NO. 0651 OF 2022**

**CHRISTINE NDAGIRE..... PLAINTIFF**

10

**VERSUS**

**1. JOHN MUGULA**

**2. FRED MAGERA**

**3. JACKSON BYENSI .....DEFENDANTS**

**BEFORE HON. LADY JUSTICE HARRIET GRACE MAGALA**

15

**JUDGEMENT**

**Background**

The first and second Defendants are administrators of the Estate of the Late Lutunda Kulistofa, where the Plaintiff is a beneficiary of the Estate. During the lifetime of Mr. Lutunda Kulistofa, he gave the Plaintiff approximately 0.08 hectares of a piece of land comprised in Block 207, Plot 2780, land at Kanyanya, Kawempe Division as a gift *inter vivos*. On the 14/12/2015, the 1<sup>st</sup> Defendant agreed to hand over transfer forms to enable the Plaintiff parcel and curve off her portion of land from the mother title. On the 26/02/2016, the Plaintiff paid the 1<sup>st</sup> Defendant Ugx. 1,000,000/= (Uganda shillings One million only) which he requested from the Plaintiff in order to give her all the necessary documents to enable her undertake the mutation process. However, the 1<sup>st</sup> Defendant only handed over transfer forms, identification cards, a mutation form and passport photos but deliberately refused to hand over the duplicate Certificate of Title. On the 20/02/2019, the Plaintiff; and the First and Second Defendants entered into a Memorandum of Understanding wherein it was stated that the Plaintiff was entitled to approximately 0.08 hectares of the land comprised in Block 207, Plot 2780, land in



5 Kanyanya, Kawempe Division. It was a term of the memorandum of understanding  
that the First and Second Defendants as Administrators to the Estate of the late  
Lutunda Kulistofa would avail a Duplicate Certificate of Title that was at the time  
of filing the suit in the custody of the 3<sup>rd</sup> Defendant, to KCCA Lands Office Registry  
to enable the Plaintiff curve off what was due to her , land measuring  
10 approximately 0.08 hectares from Block 207 Plot 2780 and that the Plaintiff would  
not lay any further claims to any other part of the land. On the 21/08/2019, the  
Plaintiff and the 3<sup>rd</sup> Defendant entered into a Memorandum of Understanding  
wherein the 3<sup>rd</sup> Defendant undertook to hand over the Certificate of Title of Block  
207 Plot 2780 land at Kanyanya that was in his custody, in two weeks from the  
15 21/08/2019 to the Plaintiff to enable her curve off her parcel of land from the  
mother title and the residue would be given back to the Administrators of the  
Estate. The 3<sup>rd</sup> Defendant did not deliver the title deed to the Plaintiff as  
undertaken. The Plaintiff through her lawyers at the time, M/s Kalikumutima &  
Co. Advocates and later M/s KSMO Advocates wrote several letters and  
20 complaints to try and urge the Defendants to make good of the different  
agreements signed but to no avail. This prompted the Plaintiff to file this suit. The  
Plaintiff's cause of action against the Defendants is for breach of contract  
wherefore she seeks a declaration that the Defendants are in breach of contract,  
an award of special and general damages; an order of specific performance and  
25 costs.

### **Representation**

The Plaintiff was represented by Mr. Jacob Kalaabi of M/s KSMO Advocates. The  
Defendants despite being effectively served did not file their written statements  
of defence with this honorable court. The Plaintiff filed her scheduling  
30 memorandum and trial bundle.

### **Scheduling and Hearing**

The court proceeded with the hearing of the matter *ex parte* under Order 17 rule  
4 of the Civil Procedure Rules as amended. The Plaintiff presented her case on the  
14<sup>th</sup> March 2023 and 5<sup>th</sup> April 2023.



5 At the scheduling, the following documents were exhibited and admitted in evidence:

- a) A copy of the Agreement dated 14/12/2015 and its English translation- marked as **PEXh. 1**;
- 10 b) A copy of the Acknowledgement of receipt dated 26/02/2016 and its English translation- marked as **PEXh. 2**;
- c) A copy of the Agreement dated 20/02/2019 – marked as **PEXh. 3**;
- d) A copy of the Agreement dated 21/08/2019 and its English Translation- marked as **PEXh. 4**;
- e) A copy of the letter dated 13<sup>th</sup> November 2020 – marked as **PEXh. 5**;
- 15 f) A copy of the letter dated 16<sup>th</sup> November 2020 – marked as **PEXh. 6**;
- g) A copy of the receipt from M/s Kalikumutima & Co. Advocates- marked as **PEXh. 7**; and
- h) Copies of the demand letters to the Defendants- collectively marked as **PEXh. 8**.

20 The following issues were framed:

- a) Whether the 1<sup>st</sup> Defendant is in breach of the Contract dated 14/12/2015;
- b) Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are in breach of the Contract dated 20/02/2019;
- c) Whether the 3<sup>rd</sup> Defendant is in breach of the contract dated 21/08/2019;
- 25 d) Whether the Plaintiff is entitled to specific performance; and
- e) What other remedies are available to the Parties?

The following witnesses presented their evidence through witness statements:

- a) The Plaintiff – PW1;
- b) Nakanwagi Margaret – PW3; and
- 30 c) Matovu Rose- The LC 1 Chairperson – PW 3

*K. N. Nakanwagi*

5 It was the evidence of PW 1 that her late father gifted her a piece of land measuring 0.08 hectares *inter vivos*. That said piece of land was part of the parcel of land comprised in Block 207 Plot 2780, land at Kanyanya, Kawempe. On 14<sup>th</sup> December 2015, a memorandum of understanding was executed between the Plaintiff and the 1<sup>st</sup> Defendant also an administrator to the estate of the PW1's  
10 late father wherein it was agreed on how the property of their late father would be shared. The details of the location and dimensions of the portion which the Plaintiff was entitled to were clearly spelt out in the said memorandum of understanding. It was also a term in exhibit PEhx. 1 that PW1 would contract a surveyor to carry out the mutation process.

15 On the 26<sup>th</sup> February 2016, the Plaintiff paid the 1<sup>st</sup> Defendant Ugx. 1,000,000/= to facilitate the implementation of the terms of the memorandum of understanding (PEhx. 1) . The 1<sup>st</sup> Defendant stated in exhibit PExh. 2 that the Ugx. 1,000,000/= was all that he needed from PW1 to enable him execute the terms of exhibit PExh. 1. The 1<sup>st</sup> Defendant only availed PW1 with all other instruments of transfer less  
20 the Duplicate Certificate of Title to Block 207 Plot 2780.

On the 20<sup>th</sup> February 2019, exhibit PExh. 3 was executed amongst the PW1, the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant, Miiro Stuart and Magera Fred wherein it was agreed that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants would avail the Duplicate Certificate of title that was in the custody of the 3<sup>rd</sup> Defendant to the KCCA land registry to enable  
25 PW1 parcel off her 0.08 hectares and PW 1 would in turn withdraw all court proceedings against the administrators to her late father's estate once she got a title to her parcel of land in her name.

On 21<sup>st</sup> August 2019, exhibit PExh. 4 was executed between PW1 and the 3<sup>rd</sup> Defendant wherein the latter agreed and undertook to deliver the duplicate certificate of title within a period of two weeks from 21/08/2018 to PW3 to  
30 enable PW1 proceed with the mutation process.

It was the testimony of PW1 that the Defendants never honored the terms of all the memorandum of understanding signed despite the complaints and several reminders from her lawyers. (see exhibits PExh.6 and 8)

35 PW2, a daughter of PW1 and who stayed with her largely corroborated her evidence and confirmed to court that PW1 also confided in her about the troubles

5 and difficulties she had encountered in trying to get a title deed to the gift given to her by her later father.

PW3, the LC1 Chairperson was a witness to exhibit PExh. 4 testified that she knew PW1 and the Defendants who were all under her jurisdiction. She testified that the 3<sup>rd</sup> Defendant had never honored the terms of memorandum of understanding.

After the Plaintiff closed her case, her legal counsel was given a timeline within which to file written submissions after which the Court would render its judgement.

### **Determination on a preliminary point of law**

15 Before I delve into the merits of the case, there is need for this court to consider whether the suit is not time barred or not.

This is a cause of action that was founded on memorandum of understanding marked as exhibit PExh.1 executed on 14/12/2015, exhibit PExh. 2 executed on 26/02/2016, exhibit PExh. 3 executed on 20/02/2019 and exhibit PExh.4 executed on 21/08/2019. This suit was filed in this honorable court on the 8<sup>th</sup> August 2022.

This then begs the question as to whether a memorandum of understanding is a contract.

**Section 2 of the Contracts Act** defines an agreement as:

*“a promise or set of promises forming consideration for each other”*

25 **Section 10 (1), (2) and (5) of the Contracts Act** defines a contract as:

*(1) A contract is an agreement made with the free consent of the parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound.*

*(2) A contract may be oral or written or partly oral and partly written or may be implied from the conduct of the parties.*

**The Black’s Law Dictionary 11<sup>th</sup> Edition at page 1088 and 1180** defines a memorandum of understanding as:

*McDiagane*

5           *“A written statement detailing the preliminary understanding of parties who plan to enter into a contract or some other agreement; a non-committal writing preliminary to a contract”.*

The definition of a memorandum of understanding notwithstanding, in the case of **Olanya Hannington vs. Acullu Hellen High Court Civil Appeal No. 0038/2016**  
10 Stephen Mubiru, J stated that:

*“For a contract to come into existence on the basis of a memorandum of understanding, there must be an intention to create legal relations (see vol.1 Chitty on Contracts at 198-H.G Beale 29<sup>th</sup> ed.,2004 and Balfour vs Balfour [1919]2 KB 571 at 579). The test is an objective one; if a reasonable person would consider that there was an intention so to contract, then the promisor will be bound (see Ermogenous vs Greek Orthodox Community of SA Inc. [2002] HCA 8, 209 CLR 95 at 25). The parties’ manifest intent is a question of fact to be answered by looking at the totality of circumstances. Each case is to be determined on its facts. These circumstances can include  
15           the type of agreement, the completeness and specificity of the terms, the nature of the parties’ relationship as well as more general consideration of the parties’ reasonable background beliefs.*

*In order to be enforceable, a memorandum of understanding must reflect the parties’ agreement on all material terms, leaving none of them for future consideration. All terms must be identified with such certainty and definitiveness that the court can clearly ascertain the precise act which is to be done”.*  
25

In the Kenyan case of **Eldo City Ltd vs. Corn Products Kenya Ltd & Anor [2013] e KLR**, it was stated that:

30           *“as to the question of whether memorandum of understanding are legally binding, I would state that the same is partly a matter of construction of the particular document and partly a question of legal analysis”.*

*McCracken*

5 A reading of exhibits PExh. 1 to PExh. 2 in my considered opinion can only lead to one conclusion, that they were valid contracts amongst PW1 and the Defendants.

Having therefore established that exhibits PExh. 1 to PExh. 4 were contracts, I find that this this suit is time barred according to section 3(1)(a) of the Limitations Act.

**Section 3 (1)(a) of the Limitations Act states that:**

10 *“(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action arose—  
(a) actions founded on contract or on tort;*

15 *except that in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under an enactment or independently of any such contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years”.*

25 **Exhibit PExh. 1** was executed on the 14<sup>th</sup> December 2015. A computation of six (6) years from then puts us at 13<sup>th</sup> December 2021. By the time PExh. 4 was executed on the 21<sup>st</sup> August 2019, there was a clear indication in my view that the Defendants were stringing the PW1 around with no intention and willingness on their part to avail her with the duplicate certificate of title to Block 207 Plot 2780. The 3<sup>rd</sup> Defendant according to exhibit PExh. 4, undertook to avail PW1 with the Title deed to Block 207 Plot 2780 within a period of two weeks from the date of execution of exhibit PExh. 4. That was, by or on 4<sup>th</sup> September 2019. Between 4<sup>th</sup> 30 September 2019 and 13<sup>th</sup> December 2021, PW1 had a period of about two years and three months to commence legal action against the Defendants in this honorable court. But this was never done. According to exhibit PExh. 8, the law firm of M/s KSMO was instructed July 2022 more than six years the 14<sup>th</sup> December 2015.

35 A reading of the pleadings shows that the legal counsel for the Plaintiff was not alive to the provisions of section 3(1)(a) of the Limitation Act, otherwise, they would have taken advantage of Order 7 rule 6 of the Civil Procedure Rules as



5 amended and specifically pleaded why this Court should not apply section 3(1)(a) of the Limitation Act. The claim against the Defendants was presented as if the Plaintiff was within the six years' period.

**Order 7 rule 6 of the Civil Procedure Act states that:**

10 *“Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the grounds upon which exemption from that law is claimed”.*

That courts have emphasized the need to rely on the plaint only to determine whether or not a suit is barred (see ***Okeng Washington Vs Attorney General HCCS No. 16 of 2004***) and ***Iga Vs Makerere University [1972] EA 65***) and held further that if a suit is brought after the expiration of the period of limitation and no ground of exemption from the law of limitation is pleaded in the plaint, the plaint must be rejected (see ***Uganda Railways Corporation Vs Ekwere D .O [2008] HCB 64***).

20 In the circumstances, I find that this suit is time barred, the plaint is hereby rejected and the suit is struck out.

I shall make no order as to costs.

25 ***Obiter dictum*** – As a beneficiary of the Estate of the late Lutunda Kulistofa, the Plaintiff may consider seeking redress before the High Court, Family Division against the Administrators of the Estate of the late Lutunda. That is if she is not barred by section 20 of the Limitations Act.

Dated and signed at Kampala this 22<sup>nd</sup> day of January 2024.



**Harriet Grace MAGALA**

**Judge**

30 Delivered online (via ECCMIS) this 25th day of **January 2024**.