

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

CIVIL SUIT NO. 0070 OF 2017

PADDY BERNARD TWESIGYE ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

CAIRO BANK LIMITED ::::::::::::::::::::::::::::::::::: DEFENDANT

(Before: Hon. Lady Justice Patricia Mutesi)

JUDGMENT

Introduction

1. The Plaintiff brought this suit against the defendant for a declaration that the defendant breached the contract of sale for the land comprised in KCCA LRV 118 Folio 15 (Kyadondo Block 244 Plot 3696) situate at Kisugu, Makindye Ssaabagabo (hereinafter the “suit land”), special damages of UGX 60,000,000, general damages, interest and costs of the suit.
2. The background to this suit is that on 30th September 2016, Kanu Auctioneers and Court Bailiffs published an advertisement in the New Vision newspaper for the sale of the suit land that had been mortgaged to the defendant and which was then owned by a one Ezekiel Benedette Aniebietabasi. The plaintiff became interested in the suit land and he inspected it. He was informed that the land was then occupied by a one Kakooza Musa who was an agent of the mortgagor and that Kakooza would vacate upon completion of the sale.
3. On 24th November 2016, the plaintiff purchased the suit land from Kanu Auctioneers and Court Bailiffs as agents of the defendant at a price of UGX 270,000,000 which he later paid. The defendant handed over the certificate of title, a release of mortgage and a transfer form which the plaintiff then used to transfer the land into his names on 21st December 2016.

4. After Kanu Auctioneers and Court Bailiffs failed to deliver vacant possession of the suit land to the plaintiff, he filed this suit on 1st February 2017 seeking, among other orders, vacant possession of the suit land. The defendant also filed Civil Suit No. 004 of 2017 against the mortgagor and Kakooza also seeking a vacant possession order which it secured in July 2017. With the help of his own bailiffs, the plaintiff obtained vacant possession of the suit land on 4th September 2017. He continued pursuing this suit with a view to getting compensation from the defendant for its alleged breach of the contract of sale.

Issues arising

5. At the scheduling conference, the parties framed the following issues for Court's determination:
 1. Whether the defendant breached the contract of sale of the suit land dated 24th November 2016.
 2. Whether the plaintiff borrowed money from the bank to purchase the suit land.
 3. Whether the defendant is liable to the plaintiff for the expenses incurred arising from the contracts between the plaintiff and 3rd parties.
 4. What remedies are available to the parties.

Representation and hearing

6. When this suit was called on for hearing, the plaintiff was represented by Ms. Nabukenya Sarah of M/S Nabukenya, Mulalira & Co. Advocates while the defendant was represented by Mr. Ronald Aine of M/S Tumusiime, Kabega & Co. Advocates. The plaintiff brought 2 witnesses through whom 16 documents were admitted into evidence and exhibited as P.Ex.1 – P.Ex.16. The defendant brought 1 witness through whom 6 documents were admitted into evidence and exhibited as D.Ex.1 – D.Ex.6.
7. PW1 was the plaintiff himself. He testified that on 30th September 2016, Kanu Auctioneers and Court Bailiffs published an advertisement in the New Vision

newspaper for the sale of the suit land. He stated that he inspected the suit land and was informed that the same was occupied by Kakooza Musa, an agent of the mortgagor, who would vacate upon its sale. He stated that on 24th November 2016, he purchased the suit land from Kanu Auctioneers and Court Bailiffs as agents of the defendant at a price of UGX 270,000,000 which he paid. He confirmed that the defendant gave him all relevant documents which he used to transfer the suit land into his names on 21st December 2016.

8. PW1 further testified that after the purchase, Kanu Auctioneers and Court Bailiffs failed to give him vacant possession. That this prompted him to contact the defendant's officials who became evasive, intimating to him that it was not the defendant's duty to deliver vacant possession to him. He later filed this suit seeking vacant possession. The defendant then also filed Civil Suit No. 004 of 2017 in the High Court (Civil Division) against the mortgagor and Kakooza. It obtained a court order for vacant possession in July 2017.
9. PW1 also told Court that Kanu Auctioneers and Court Bailiffs tried to evict Kakooza Musa but he overpowered them and caused the arrest of their employees. PW1 then hired Watts International Auctioneers and Bailiffs for purposes of executing the court order. PW1 stated that he had taken a bank loan repayable with interest at 25% p.a. to raise the purchase price. Finally, he told Court that since he did not get vacant possession in time, he had to pay additional rent to his landlord for the house where his family was staying, yet his intention all along was to shift them into the premises on the suit land after the purchase.
10. PW2 was Mulindwa Moses Karuma, a director in Watts International Auctioneers and Bailiffs. He testified that on 30th September 2016, he saw an advert in the New Vision newspaper for the sale of the suit land. He visited the suit land and found that it was occupied. He became interested in the suit land and told the plaintiff, who was one of his clients, about it. He then took the plaintiff to visit the suit land. The plaintiff liked the suit land and asked PW2 to negotiate the terms of sale with Kanu Auctioneers.

11. PW2 further stated that he approached Kanu Auctioneers (the defendant's agents) and submitted to them a bid of UGX 270,000,000 for the land on the plaintiff's behalf. Kanu Auctioneers soon called him and told him to make payment since the plaintiff was the highest bidder. He got the money from the plaintiff and paid it.
12. PW2 also informed Court that Kanu Auctioneers asked the plaintiff to give them UGX 10,000,000 so that they can get him vacant possession of the suit land which he provided. However, when Kanu Auctioneers went to the suit land on 5th December 2016 to evict Kakooza Musa, 11 of their agents were arrested by police on Kakooza's complaint. The plaintiff was forced to sue the defendant in February 2017 for the vacant possession. The defendant later secured a vacant possession order from Court in July 2017 but it failed or neglected to execute the same prompting the plaintiff to spend more money to facilitate the execution process. Subsequently the plaintiff secured vacant possession of the suit land on 4th September 2017.
13. DW1 was Henry Kyasanku, the defendant's Recovery Manager. He testified that the plaintiff bought the suit land well aware that there was an occupant there who needed to be removed. He stated that the defendant's officials have never been evasive to the plaintiff. He also refuted the plaintiff's allegation the defendant's agents told him that it was not the defendant's duty to deliver to him vacant possession of the suit land. He confirmed that the defendant through its agents Kanu Auctioneers and Court Bailiffs, notified Kakooza Musa and his family on 4th October 2016 to vacate the premises, but all in vain.
14. DW1 further informed Court that the defendant did all that was reasonable, lawful and expeditious to secure vacant possession. That at one point, the defendant had even obtained vacant possession but Kakooza used armed guards and to regain possession. The defendant had to institute legal proceedings against Kakooza and the mortgagor. Eventually, the defendant obtained vacant possession of the suit land which it immediately handed over to the plaintiff. DW1 finally contested the plaintiff's claim that he took

out a bank loan to raise the purchase price. He maintained that the defendant did not cause any loss to the plaintiff.

15. At the conclusion of the hearing, both counsel filed written submissions to argue their respective cases. I have carefully considered all the materials on record, the submissions of counsel and the laws and authorities they cited.

Resolution of Issues

Issue 1: Whether the defendant breached the contract of sale of the suit land dated 24th November 2016.

16. 'Breach of contract' means *'the breaking of an obligation that a contract imposes which confers a right of action for damages on the injured party'* (See **Mogas Uganda Limited V Benzina Uganda Ltd, HCCS No. 88 of 2013**). Breach of contract occurs when one or both of the parties fail to fulfil the obligations imposed on them by the contract (See **Mwesigye Warren V Kiiza Ben, HCCS No. 320 of 2015**).
17. Section 101(1) of the Evidence Act Cap 6 provides that whoever desires a court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist. Additionally, Section 103 of the Evidence Act provides that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. In all civil cases of this nature, the burden lies on the plaintiff to prove the existence of his or her rights and the liability of the defendant for breach of those rights on a balance of probabilities (See **Miller V Minister of Pensions [1947]2 All ER 372.**)
18. It is not disputed that the plaintiff purchased the suit land through a written contract dated 24th November 2016 (Exhibit P.Ex.5) In the said contract, the vendor of the suit land was Kanu Auctioneers and Court Bailiffs on behalf of the defendant while the purchaser was the plaintiff. Clause 7 of the contract provided that:

“The vendor undertakes to handover vacant possession to the purchaser immediately at the payment of the first installment.”
(Emphasis mine.)

Clause 6 of the contract described the agreed mode of payment of the purchase price of UGX 270,000,000. Therein, the parties agreed that the plaintiff would pay UGX 200,000,000 as a down payment and then pay the balance within a period of 14 days thereafter.

19. Clause 6 of the contract did specify the date by which the plaintiff was supposed to have paid the down payment. Nonetheless, according to the payment receipts (Exhibit P.Ex.6), the plaintiff, through 4 installments, paid a total of UGX 216,000,000 between 25th November 2016 and 1st December 2016. This implies that, in accordance with Clause 7 of the contract, the defendant was supposed to hand over vacant possession of the suit land on 1st December 2016.
20. In the contract, the defendant, through its agent Kanu Auctioneers and Court Bailiffs, made an unequivocal and legally-binding promise that it would deliver vacant possession of the suit land to the plaintiff upon his payment of the down payment of UGX 200,000,000. Both parties were aware that there was an occupant on the suit land, but the defendant still went ahead to make the promise. The only condition attached to that promise was that the plaintiff makes the down payment and the plaintiff fulfilled this condition. According to the contract, there was no justifiable and permissible excuse for the defendant's failure to deliver vacant possession of the suit land once the plaintiff made the down payment.
21. I do not accept DW1's testimony in paragraph 5 of his witness statement that *“the plaintiff bought the property subject to the person in occupation, a fact that he was aware of”*. The plaintiff's title to the land and the attendant rights thereto were not obtained subject to Kakooza Musa's rights on the land, if any, in any way. The plaintiff bought the suit land on the promise that if he pays the down payment, he would immediately get vacant possession thereof. If the defendant or its agent, Kanu Auctioneers and Court Bailiffs,

were not sure that they could deliver on that promise, they should either never have made it or they should have further conditioned it on their success in evicting Kakooza Musa from the suit land.

22. According to paragraph 7 of DW1's witness statement, the defendant had already written to Kakooza Musa to vacate the suit land on 4th October 2016 but all in vain. In his cross examination, DW1 conceded that the defendant promised vacant possession in the contract of sale even when it was "*aware of the ups and downs of such transactions*". Therefore, it is not true that the parties signed the contract on 24th November 2016 and then Kakooza Musa became a problem. There were clear signs already that he was definitely going to be a problem because he had already ignored the defendant's notice to vacate since 4th October 2016.
23. This suggests that while negotiating the contract of sale with the plaintiff, the defendant had the opportunity to ensure that the animosity and challenges it was facing from Kakooza Musa were expressly noted and dealt with in the contract of sale so that vacant possession becomes deliverable as and when Kakooza Musa was evicted. Instead of pursuing this more cautious course of negotiation, the defendant, through its agent, gave an unequivocal promise in Clause 7 of the contract that as long as the plaintiff pays up, he would immediately get vacant possession.
24. Both the plaintiff and PW2 testified that the plaintiff was only able to secure vacant possession of the suit land on 4th September 2017 (9 months and 4 days after it should have been delivered to him by the defendant). DW1 falsely testified that vacant possession was handed over to the plaintiff by the defendant immediately upon securing the order in Civil Suit No. 004 of 2017. Although DW1 did not state the date when this was done, the "*Handover of premises of the plaintiff*" (Exhibit D.Ex.4) clearly shows that the plaintiff got vacant possession on 4th September 2017 yet the court order for vacant possession was issued in July 2017.
25. This Court concludes that the defendant breached Clause 7 of the contract of sale of the suit land dated 24th November 2016 when it failed to deliver

vacant possession to the plaintiff immediately after he completed paying the down payment on the purchase price.

Issue 2: Whether the plaintiff borrowed money from the bank to purchase the suit land.

26. In their written submissions, counsel for the plaintiff acknowledged that the plaintiff did not adduce evidence on this issue and they abandoned it. Accordingly, Court will also not address the issue.

Issue 3: Whether the defendant is liable to the plaintiff for the expenses incurred arising from the contracts between the plaintiff and 3rd parties.

27. The plaintiff seeks to recover UGX 10,000,000 being the monthly rent he allegedly paid for his family's extended stay in rented premises following the defendant's delay to give him vacant possession of the suit land, plus UGX 30,000,000 which he allegedly paid to his auctioneers and bailiffs, Watts International Auctioneers and Bailiffs, to execute the court order for vacant possession. The plaintiff also seeks to recover UGX 20,000,000 which he paid to his former lawyers as instruction fees for filing this suit.
28. **Section 61(1) of the Contracts Act, 2010** provides that where there is breach of contract, the party who suffers the breach is entitled to receive from the party who breaches the contract, compensation for any loss or damage caused to him or her. Counsel for the plaintiff submitted that the compensation recoverable under Section 61(1) of the Contracts Act includes expenses incurred and paid by the injured party to third parties as a result of the breach. On the other hand, counsel for the defendant maintained that the claimed sums arise from contracts between the plaintiff and 3rd parties which the defendant is not privy to and which it cannot be liable under.
29. I find the defendant's argument on privity of contract to be misconceived. As submitted by counsel for the plaintiff, Section 61(1) of the Contracts Act allows a party aggrieved by a contractual breach to recover compensation for any loss or damage caused to him as a result of the breach. In this case, the plaintiff is not seeking an order making the defendant liable to 3rd parties

for his contracts with them. It is such an order that would have been in contravention of the law on privity of contract.

30. The plaintiff is seeking an order determining that the defendant is liable to him for expenses he has incurred and already paid to third parties as a result of the defendant's breach. The plaintiff has cleared these expenses to the said third parties and all the contracts with them are now fully discharged. He simply wants to be compensated for his expenses in those contracts because he would never have entered into them if the defendant had not breached the contract of sale of the suit land in the first place. The plaintiff's case is that when the defendant delayed to give him vacant possession, he had no option but to enter into other contracts with third parties to deal with the repercussions of that breach, like extending his family's stay in rented premises. Such recovery is, in principle, permissible and it does not contravene the law on privity of contract in any way.
31. I will now deal with the evidence adduced by the plaintiff in proof of the said claims arising from contracts with 3rd parties. In cross examination, the plaintiff stated that his family now stays in the premises on the suit land but he admitted he could not remember when they moved there. While I appreciate the defendant's argument that the purpose for which the plaintiff purchased the suit land was not stated in the contract, I do not think that there is any rule of law or practice that enjoins purchasers of land to specify the reasons for which they purchase land or their projected land uses in the purchase agreements. The fact that the plaintiff's family is now staying on the suit land makes it more probable than not that his intention all along was to shift his family to the suit land as soon as he paid the agreed down payment.
32. The defendant's breach of contract delayed the plaintiff's family from shifting to the premises on the suit land. They had to wait an extra nine months and four days before the land was available, contrary to the defendant's unequivocal promise in Clause 7 of the contract of sale. The plaintiff had to pay extra rent which he never thought he would have to pay,

and which he should never have had to pay, after he signed the contract of sale on 24th November 2016 and completed the agreed down payment on 1st December 2016. I am satisfied that the plaintiff is entitled to recover the rent he paid for his family's extended stay in rented premises.

33. The plaintiff adduced the proof of payment of the extra rent which was exhibited as P.Ex.11. This was in the form of 3 receipts and an extract from his Stanbic Bank account statement. The statement reflected transfers which were acknowledged by the landlord (Pascal Properties) through signed and stamped receipts. However, the relevant receipts availed are only in respect of December 2016 – July 2017 (8 months).
34. While the extract from the plaintiff's account statement indicates a rent payment of UGX 1,000,000 for the month of September 2017, I am unable to find the rent payment for August 2017. Additionally, the said rent payment for September 2017 is not acknowledged by any receipt from the landlord like other earlier payments. The Court remains unconvinced that the plaintiff paid extra rent for August and September 2017. Accordingly, the Court finds that the plaintiff is entitled to only recover UGX 8,000,000 in respect of the extra rent.
35. The other item under this issue is the recovery of UGX 30,000,000 allegedly paid by the plaintiff to his auctioneers and bailiffs, Watts International Auctioneers and Bailiffs, for their assistance in the purchase of the suit land and in the eviction of Kakooza Musa therefrom. In cross examination, PW1 admitted that he did not employ the services of any broker or commission agent in the transaction. Accordingly the first arm of this claim for the fees said to have been paid to PW2 for facilitating the transaction fails.
36. The plaintiff's claim for recovery of the monies said to have been paid for the execution of the court order in Civil Suit No. 004 of 2017 must also fail. Clause 7 of the contract of sale categorically placed the duty of delivering vacant possession on the defendant through its agent, Kanu Auctioneers and Court Bailiffs. The plaintiff did not have the duty to secure for himself vacant possession.

37. Even when the defendant breached the contract of sale by failing to deliver vacant possession on 1st December 2016, the plaintiff's true recourse was to remind the defendant of its duty and, or, to sue for breach of contract as he eventually did when he brought this suit. It was never up to him to resort to *self-help measures*, like hiring his own bailiffs, to secure for him vacant possession of the suit land. PW2 also admitted in cross examination that the court order he allegedly executed was never addressed to him by Court. At best, PW2 was simply volunteering if and when he assisted Kanu Auctioneers to do their work. However, it is concerning that a licensed bailiff who is an officer of the court can take it upon himself to execute court orders and warrants which are not issued in his name and, as such, without due instructions from Court. For these reasons, all the money that the plaintiff could have spent to hire his own bailiffs to do the work of another bailiff cannot be recovered.
38. Finally, the plaintiff's prayer for the fees he paid to his lawyers to file this suit is noted. Those fees are recoverable in accordance with the principles governing the award of litigation costs which I will elaborate upon later in this judgment. The instruction fees paid to an advocate to file a suit are not recoverable as a separate remedy from the costs of the suit. They form part of a party's litigation expenses and as such, the Court's determination on which party shall bear the costs of this suit will effectively settle this claim.

Issue 4: What remedies are available to the parties.

Declaration

39. In view of the findings on Issue 1, the Court accepts to issue a declaration to the effect that the defendant breached Clause 7 of the contract for the sale of the suit land dated 24th November 2016.

Special damages

40. The Plaintiff prayed for special damages totalling to UGX 60,000,000 as particularised in paragraph 27 above. In the case of **Stanbic Bank (U) Ltd V Hajji Yahaya Sekalega t/a Sekalega Enterprises, HCCS No. 185 of 2009**, this

Court restated the law on the award of special damages to an aggrieved plaintiff. The Court reiterated that special damages must be specifically pleaded and proved, but that strict proof does not mean that that proof must always be documentary evidence.

41. I reiterate my findings in Issue 3 above. The plaintiff is not entitled to recover the claimed UGX 30,000,000 which he allegedly paid to PW2 since he conceded in cross examination that he conducted the purchase of the suit land himself and did not employ any agents for that purpose. The plaintiff's claim for auctioneers' fees allegedly paid to PW2 to execute the court order for vacant possession is also not maintainable. Securing vacant possession was a duty which the parties had categorically assigned to the defendant in Clause 7 of the contract and the plaintiff had no business hiring his own bailiffs to handle it.
42. Furthermore, the Court has found that the legal fees of UGX 20,000,000 alleged to have been paid by the plaintiff to his former lawyers to file this suit are recoverable as costs of the suit and not as special damages. The only item under special damages which the Court allowed, in substantial part, is rent. The Court found that the plaintiff had provided clear and specific proof of rent payment for 8 months only (December 2016 – July 2017). For these reasons, the plaintiff is entitled to an award of special damages to the tune of UGX 8,000,000 being the extra rent he paid to his landlord as a result of his family's extended stay in a rented house following the defendant's breach of the contract of sale.

General damages

43. The plaintiff prayed for an award of general damages of UGX 80,000,000. Counsel for the plaintiff submitted that the plaintiff endured psychological and emotional trauma as a result of the defendant's delay to deliver to him vacant possession of the suit land. I am mindful that general damages are what the law presumes to be the direct, natural or probable result of the defendant's breach of contract (see **Opia Moses V Chukia Lumago Roselyn & 5 Ors, HCCS No. 0022 of 2013**).

44. The law on general damages is that they are awarded at the discretion of the Court (See **Hadley V Baxendale (1894) 9 Exc. 341**). In assessing general damages, the Court should be guided by the value of the subject matter, the economic inconvenience that the plaintiff may have been put through and the nature and extent of the injury suffered (See **Uganda Commercial Bank V Kigozi [2002]1 EA 305**). The Court should look into the future so as to forecast what would have been likely to happen if the contract had not been entered into or breached by the defendant (See **Bank of Uganda V Fred William Masaba & 5 Ors, SCCA No. 3 of 1998**).
45. In the instant case, Court has found that the defendant breached the contract of sale when it failed to hand over vacant possession of the suit land upon the plaintiff's payment of the agreed down payment. The natural or probable consequence of this breach is that the plaintiff suffered mental and emotional distress in the 9 months that he did not have possession of his land despite complying with the payment terms.
46. Counsel for the plaintiff submitted that this injury should attract an award of general damages of UGX 80,000,000. However, this amount appears excessive. The delay by the defendant to deliver vacant possession was for 9 months and 4 days only. The plaintiff was aware of the hostility and aggression which the defendant was facing on the suit land and this is why he even hired his own bailiffs to "*work with*" the defendant's bailiffs. Additionally, the plaintiff was aware of the court case which the defendant had instituted seeking an order of vacant possession. Having analysed all these circumstances, I find that an award of general damages of UGX 20,000,000 to the plaintiff would be fair and just.

Interest

47. Under Section 26 of the Civil Procedure Act, the Court has power to award interest on damages. Ordinarily, a successful plaintiff is entitled to interest at a rate which would not neglect the prevailing economic value of money but which would also insulate him or her against further economic vagaries, like inflation and depreciation of the currency, in the event that the money

ordered to be recovered is not paid promptly (See **Mohanlal Kakubhai Radia V Warid Telecom Uganda Ltd, HCCS No. 0224 of 2011**).

48. Basing on the above principles, the Court shall award interest on the special damages at the rate of 18% p.a. from 1st August 2017 when the last rent that the plaintiff has proved (through P.Ex.11) to have paid lapsed. The Court shall also award interest on the general damages at the rate of 13% p.a. from the date of judgment until payment in full.

Costs

49. **Section 27(1)** of the **Civil Procedure Act** allows this Court the discretion to award the costs of a suit before it. The general rule is that costs must follow the event which means that an award of costs will generally flow with the result of litigation. A successful party is entitled to costs, unless the Court, for good reasons, orders otherwise (See **Kwizera Eddie V Attorney General, Supreme Court Constitutional Appeal No. 01 of 2008**). In this case, I have not found any reason to deny the plaintiff costs of this suit. I accordingly, award the costs of the suit to the plaintiff.

Reliefs

50. Consequently, I make the following orders:
- i. A declaration that the defendant breached the contract for the sale of the suit land dated 24th November 2016 doth issue.
 - ii. The defendant shall pay special damages of UGX 8,000,000/= (Uganda Shillings Eight million) to the plaintiff.
 - iii. The defendant shall pay general damages of UGX 20,000,000/= (Uganda Shillings Twenty million) to the plaintiff.
 - iv. The defendant shall pay interest to the plaintiff on the special damages at the rate of 18% p.a. from 1st August 2017 until payment in full and on the

general damages at the rate of 13% p.a. from the date of judgment until payment in full.

- v. Costs of the suit are awarded to the plaintiff.

.....

Patricia Mutesi

JUDGE

(31/01/2024)