

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO.115 OF 1994

MANASSEH KAMUGISHA.....PLAINTIFF

VERSUS

UGANDA PREFABRICATED BUILDING

INDUSTRY LTD.....DEFENDANT

BEFORE: THE HON. MR. JUSTICE G.M OKELLO

JUDGMENT

In this action, the Plaintiff's claim against the defendant was for recovery of the Plaintiff's title deed monies due under an agreement with the defendant and general damages for breach of contract. He also prayed for interest on the general damages at 4% per annum and cost of the suit.

The Plaintiff (PW1) testified, that in 1992, he had entered into an agreement with the defendant company whereby the plaintiff agreed to lend his Title Deed in respect of plot 703 Kyehando Gayaza Road for the Defendant to use for 30 days as security to secure a loan of not exceeding 28m/= from Bank of Baroda.

According to the Plaintiff, under the agreement, the defendant agreed to pay the Plaintiff a commission of 5% of the amount borrowed and to return the plaintiff's Title Deed after 30 days. The plaintiff testified further that the agreement was reduced into writing and was on 24/12/92 signed by the Plaintiff and by Fred Ruhakan the Managing Director of the defendant Company for the defendant company. The agreement was at the trial, received in evidence and was marked (Exh.P1). According to the Plaintiffs to implement the agreement, he executed a Power of Attorney in favour of the defendant. In the Power of Attorney, he allowed, the defendant to use

the Plaintiff's said Title Deed as security for loan from any lending Institution. At the trial, the power of Attorney was received in evidence and was marked Exh 12. According to the testimony of PW1, the defendant took the power of Attorney together with the Title Deed to Bank of Baroda but, that after the expiry of the 30 days the defendant did not return the plaintiff's Title Deed. When the Plaintiff later made several vain demands for the return of his Title Deed, he instituted this suit. He prayed for the return of his Title Deed more commission of 5% of the amount borrowed in case the defendant again borrowed more money on the security of the Plaintiff's Title Deeds. He further prayed for interest.

The Plaintiff admitted in cross examination that he understood that once a title deed was mortgaged, it could not be released until the Loan was repaid. According to the Plaintiff, he understood that at the time he executed the power of Attorney in favour of the defendant. He further admitted that he went to the Bank with the Defendant's Managing Director at the time when the defendant borrowed money from the Bank on the security of the Plaintiff's Title. While in the Bank, he signed some documents.

The defendant in their W.S.D denied, that the Plaintiff lent to the defendant the Plaintiff's Title deed for use as security for loan for only 30 days. They contended that the Plaintiff did lend the defendant the plaintiff's Title to remain mortgaged until the loan was fully repaid.

According to Fred Ruhakana (DW1) the Plaintiff had in 1992 agreed to lend to the defendant his title deed for the defendant to use as security to secure the loan from Bank of Baroda. Under that agreement (1) the defendant were to use the Title deed only for 30 days. (2) The defendant was to pay the Plaintiff a commission of 5% of the amount borrowed. The amount to be borrowed was 28m/=. According to DW1 when he went to the Bank, he found that the Bank could give them only 20m/=. the application would take long to process the bank could not accept a limitation of 30 days of the Mortgage and required the person giving security to execute with them a guarantee for the repayment of the loan. When he informed the Plaintiff about those conditions, the latter accepted to give his title for the defendant's use despite that bottle neck. DWI further testified, that the Plaintiff later executed a power of Attorney in favour of the defendant and executed with the Bank & memorandum of Deposit of Title Deed and an Individual Guarantee for the repayment of the loan by the defendant. According to DWI, these documents were

executed by the Plaintiff In his presence in the Bank on 13/1/93, from the testimony of DW1, after the Plaintiff had executed those documents (Exh.D1 and Exh.D2) the defendant obtained a loan of 20m/= on the security of the Plaintiff's Title deed and paid the plaintiff his agreed commission. DW1 admitted in his testimony that the plaintiff demanded for his Title deed. According to DW1, they could not return the Title deed because they still had outstanding amount of 2m/= on the loan.

Under cross-examination, DW1 admitted that the varied conditions of their agreement (Exh.P1) were not reduced into writing. He confirmed that the power of Attorney was executed by the Plaintiff before the Bank documents (Memorandum of Deposit of Title Deed Exh.D1 and individual Guarantee Exh. D2) were executed by the plaintiff.

Jimmy Ringtho (DW2) testified that he was a Banking officer with Bank of Baroda He was in charge of credit Department of that Bank. He confirmed, that the Defendant was their customer and that an overdraft of 20m/= was extended to it by the Bank on the security of property on plot 703 block 210 Kyebando Mengo registered in the name of Manasseh Kamugisha. According to him, in accordance with the Bank procedure, Manasseh Kamugisha as the owner of the security had to sign Memorandum of deposit of his Title with the Bank and a letter of Guarantee to guarantee the repayment of the loan. DW2 testified, that the plaintiff signed those documents on 13/1/93. These documents were at the trial admitted in evidence but after comparison, their originals were returned to the witness. Only their photo copies were retained and marked thus:- Memorandum of Deposit of Title Deed Exh. D1; and Individual Guarantee form 1 Exh.D2. DW2 further testified that it was not practice in their Bank to return the security before the loan was fully repaid. He confirmed that in the instant case, there was an outstanding balance of 596,499/= on the loan as shown in the Bank statement of the defendant's A/C as at 28/2/93. The Bank statement was at the trial received in evidence and was marked Exh.D.3.

Under cross-examination, DW2 admitted, that he could not remember by heart the duration of the defendant's overdraft as he did not have relevant application which contained the necessary information. According DW2, the overdraft was being serviced. That the last payment was 100,000/= which was made on 30/9/94.

At the commencement of the hearing the following four issues were framed for determination of the court:-

- (1) Whether the agreement between the parties was limited to the period of 30 days.
- (2) Whether the terms of the contract were modified.
- (3) Whether there was a breach of contract.
- (4) Whether the plaintiff is entitled to his Title deed before the repayment of the loan by the Defendant.

Counsel for the defendant submitted that the contract (Exh. P1 envisaged that the Bank would grant a loan of 28m/= for a period of 30 days as from 30/12/92. He contended that after execution of the agreement, the terms were subsequently varied by agreement of the parties as the Bank could only lend 20m/= and had rejected the limitation of 30 days of the security. For the plaintiff it was submitted that a written contract could not be varied by a verbal agreement.

The above argument raised the question whether a written agreement can be varied by a subsequent verbal agreement of the parties. It is crystal clear that the law does not allow a written contract to be varied by a verbal agreement of the parties but, as from the time of **Birmingham and District land Co. Vs. London and North Western Rail Cc. (1888) 4Och. D 268.** it was established, that if a party by his voluntary concession led, the other party on the faith of that concession to shape his conduct court shall estop him from retracting that concession to the detriment of the other party. The concession will remain in force until he gives a clear notice of his intention to withdraw it. This is a-n equitable remedy.

In the instant case, DW1), testified that after executing the agreement (Exh. P1), the defendant encountered difficulty at the Bank, because the later could only lend 20m/= instead of 28m/=, it could not agree on the 30 days limitation on the security and it required the owner of the property for security to sign memorandum of deposit of the property with the Bank and an individual guarantee to guarantee the loan repayment. In the view of DW1, the refusal of the Bank to accept the 30 days limitation on the security could have frustrated the contract as it contradicted its

terms. According to DWI, he communicated those facts to the plaintiff who accepted to allow the defendant to use the plaintiff's Title Deed despite that bottle neck. This piece of evidence had not been refuted or challenged in cross examination. The effect is that the plaintiff is deemed to have accepted it. In my view the acceptance of the plaintiff to go ahead with the contract when he was clearly informed of the new terms, was an implied acceptance on his part of the new conditions of the contract. His execution of Exh.D1 and Exh.D2 further reinforced his acceptance of the new terms. These conducts led the defendant to believe, that the plaintiff accepted the new terms. That the defendant would return the plaintiff's Title Deed after the loan was fully repaid.

It was argued for the Plaintiff, that the plaintiff signed Exh.D1 and Exh.D2, because he knew that the defendant would repay the loan within 30 days. This is not valid in the face of the fact that the Plaintiff admitted in his testimony that he was informed he was executing the power of Attorney in favour of the defendant. Despite the knowledge of the new terms, he executed the power of Attorney giving to the defendant authority to use the plaintiff's Title Deed without setting any time limit. He must be taken to have tacitly accepted the new terms. In those circumstances the Plaintiff is estopped from insisting on the terms of the original contract (Exh. P1). For those reasons my answer to issues No. 1 is in the negative and to issue No. 2 is in the affirmative.

Following my answers to issues No. 1 and 2 above, my answer to issue No. 3 is also in the negative. Under the varied terms of the contract, the defendant was to pay the plaintiff a commission of 5% of the amount of money borrowed on the security of the Plaintiff's title deed, and to return the Plaintiff's Title Deed after the loan was fully repaid. The Plaintiff himself admitted in his testimony, that the defendant had paid him the agreed commission of 5% of the 20m/=. Both DWI and DW2 testified that the defendant had not yet fully repaid the loan. There was still an amount outstanding. According to DW2, the Banking officer in charge of the credit facilities in Bank of Baroda, the defendant still had an outstanding balance of 596,499/= on the loan. DW2 further testified that it was not a normal practice for the Bank to release security before the loan was fully repaid. The Plaintiff himself is aware of that, for he testified that he understood a property once mortgaged would not be released until the loan was fully repaid. As shown above, the defendant has not yet fully paid the loan. The security therefore cannot be released before the loan was fully repaid. In that case in accordance with the now terms of the

contract, the defendant cannot return the Plaintiff's title as yet. There was therefore no breach of the contract as yet.

On whether the plaintiff is entitled to his title deed before the defendant fully repaid the loan, Mr. Kato submitted in the affirmative • He argued that the agreement (Exh.P1) was clear.

According to him, as between the Plaintiff and the Defendant, the latter was to deliver the Plaintiff's Title deed to the Plaintiff after 30 days as from 30/12/92. In the view of the learned counsel, that contract was binding between the plaintiff and the defendant.

As I had pointed out earlier when I argued issue No.1 above the Plaintiff by his conduct led the defendant who believed him to act on the belief that the Plaintiff had agreed that his Title deed would not be returned until when the loan was fully repaid. He is estopped from insisting on the old term of 30 days as expressed in Exh. P1. For that reason, the Plaintiff is not entitled to his Title Deed before the defendant fully repaid the loan.

The Plaintiff also claimed a further commission of 5% of any other amount which the defendant might have again borrowed on the security of the Plaintiff's Title Deed. This claim too must fail because the Plaintiff did not lead any evidence to establish that the defendant again borrowed some monies on the strength of the Plaintiff's Title Deed besides the 20m/=. He alleged it so the burden to prove it was on him. As there was no such proof, the claim must fail. In the whole the suit is dismissed with cost.

G.M. OKELLO

JUDGE

5/12/95