

2that it's customer the registered owner has voluntarily consented to the sell of the said property. The date of sale was stated to be 11th May, 1999. The auction was duly held and the Plaintiff emerged the highest bidder offering Shs. 92,000,000fr which he paid with two cheques. A sale agreement [Exhibit P.3] was signed between the Plaintiff as purchaser and Express Factors Ltd as agents appointed by Gold Trust Bank before it was purchased by the current Defendant. It was provided in clause three thereof that:

“Upon receipt of the full consideration of Shs.92,000,000/- the vendor shall hand over the Duplicate Certificate of Title to the Bank of Uganda for the purpose of securing the loan from the Bank of Uganda and the Purchaser hereby undertakes to deposit the title with the Bank of Uganda.”

Clause 4 stated that:

“The vendor hereby undertakes to indemnify the Purchaser and Bank of Uganda against any loss arising from any defect in title or in the power of sale.”

Clause 5 provided as follows:

“The vendor undertakes to hand over possession to the purchaser on receipt of the full payment of Shs 92,000, 000/=

The last clause provided that:

“The Vendor further undertakes to execute transfers in favour of the Purchaser on receipt of the full purchase price and to release the mortgage”

The Plaintiff as I stated earlier paid the purchase price and when he took the documents of title for registration he found a caveat which had been lodged by the registered proprietor one Victor Kobel. The reason for lodging the caveat as stated in the caveat itself and the accompanying affidavit was that the Defendant was threatening to sell or had sold the suit property contrary to the terms of the mortgage deed. It was further stated that the suit property had become a subject of litigation under High Court Civil Suit No.1325/99. The action was filed by Nagongera Millers Ltd together with Victor Kobel who were the mortgagors against the former Gold Trust Bank

Ltd. The Plaintiff was however registered subject to the caveat. He was also put in possession of the suit property until he lost the same after the sale was nullified by court on the 26th July, 2000 [as per the Judgement Okumu Wengi .J.] After the nullification of the sale the Plaintiff wrote to the Defendant on the 8th August, 2000 [Exhibit P.14] demanding payment of certain sums of money whose particulars are set out in the body of that letter. On receipt of this letter the Head of Legal Services in the Defendant Bank [D.W.1] wrote to one Abid Alam a letter [Exhibit.P.15] dated the 23rd August, 2000 stating among other things that the Plaintiff had lost the suit property and was asking for a refund of the purchase price. The letter also stated that the Defendant bank was considering a refund of the money by Monday unless Mr. Alam gave contrary instructions. The next day Mr. Alam wrote to the Defendant [Exhibit P.16] in which he stated that they were dissatisfied with the Judgement and were commencing appeal proceedings and that they had applied for stay of execution. He instructed the Defendant not to pay any money to the Plaintiff until he said so. At the time of the trial of this case there was no concrete evidence that any steps were taken to appeal or stay execution. The Plaintiff did not get a refund of his money- hence this suit.

At the scheduling conference held before the trial, the following were the agreed facts:

1. The Defendant advertised for sale the suit property by public auction on the 3rd May, 1999 and the sale was stated to be with the consent of the registered proprietor. The auction was to held on the 11th May 1999.
2. The auction was duly held and the Plaintiff was the highest bidder at Ug. Shs.92,000,000/-. A sale agreement between the Plaintiff and the Defendant was executed on the May, 1999.
3. The whole purchase price was duly paid by the Plaintiff and the Defendant executed a transfer of the suit property in favour of the Plaintiff and handed to the Plaintiff the transfer together with the duplicate Certificate of title.
4. The plaintiff could not register the transfer because of a caveat on the suit property registered by Victor Kobel the Mortgagor. The Plaintiff advised the Defendant of this.

5. On the 8th November, 1999 Victor Kobel filed a suit in the High Court against the Defendant contesting the sale of the suit property. The Plaintiff was subsequently registered by the Defendant's lawyers as the registered proprietor of the suit property subject to the caveat which was lodged by Kobel.
6. On 26th July 2000 the court ruled that the sale was no sale and it reinstated the parties to **status quo**. The Plaintiff's registration was reversed.
7. On 8th August 2000 the Plaintiff demanded a refund of the purchase price and other reliefs.
8. Prior to the events stated above, on the 18th March 1996 the Defendant and Bank of Uganda entered into a loan agreement for an advance by Bank of Uganda to the Defendant of Ug. Shs. 80,000,000/= to refinance the monies the Defendant had lent to Nagongera Mills Ltd , the principal debtor [a copy of the loan agreement was marked as Exhibit P.17)
9. The loan was serviced by the Defendant and finally paid on the 21st June, 1999 - a copy of the statement was marked as Exhibit P.18.
10. Payment by the Defendant to Bank of Uganda is evidenced by a batch of letters and these were marked as Exhibit D.1

The following were the agreed issues:

1. Whether the contract of sale between the Plaintiff and the Defendant is valid.
2. Whether the Plaintiff is entitled to the refund of the purchase price.
3. Whether the Plaintiff is entitled to the other reliefs.

In order to prove the issues as framed the Plaintiff called three witnesses namely, himself as P.W.1, Richard Apire [P.W.2) the Director of Finance in Bank of Uganda, and David Byokusheka [P.W.3j, a Valuer. The Defendant called one witness Willie Ogule the head of Legal Services.

The testimony of Kasozi more or less tallied with the facts as outlined at the beginning of this Judgement and the agreed facts and therefore it not necessary to reproduce it. The testimony of Apire was that Bank of Uganda lends money to banking institutions and not their customers. He also stated that it was the responsibility of the Defendant Bank to repay back the loan. The last witness was David Byokusheka a chartered surveyor who testified that on the August, 2001, he visited the suit property. He inspected it, evaluated it and compiled a report [Exhibit P.31]

The Defendant on its part called one witness Willie Ogule. The gist of his testimony was that in May last year the Defendant bought Gold Trust Bank from the original owners the Alam family. He stated that one of the terms of the agreement was that the Alam family would be responsible for the conduct of all legal cases that were in progress for a period of six months. He further stated the responsibility of the Defendant was to cooperate with the Alam family in the conduct of litigation. On the matter now before court, the witness stated that Nagongera Millers Ltd whose managing director was Victor Kobel sued the bank and obtained judgement in which the court ordered the cancellation of the Plaintiff's name from the certificate of title which was the subject of property sold by public auction to the Plaintiff. He stated that he came in contact with the case at that point. He further stated that he wrote to the Alam family [Exhibit P.15] asking them whether it had any objection to its account being debited with the amount which was being claimed by the Plaintiff. The family wrote back instructing the Defendant not to pay as it was dissatisfied with the Judgement and were preparing to appeal. The witness stated that as a bank it did not seek any remedy against the judgement because it was the responsibility of the Alam family to pursue the court case and secondly the judgement did not hold Gold Trust Bank accountable as a reason for cancellation of the title. On the agreement of sale [Exhibit P.31 the witness stated that the Defendant complied with all the conditions contained in it. In cross-examination the witness stated that the Defendant is the same as Gold Trust Bank, and there was a mere change of name. He further stated that the registration of the Plaintiff was subject to the caveat which had been lodged by Victor Kobel and the Defendant made no effort to remove it. He admitted that at no time did the Defendant give title to the Plaintiff which was not subject to some other person's interest.

Turning to the issues as framed, the first was whether the contract of sale was valid. In order for a contract to be valid and enforceable the following prerequisites must exist:-

- (a) Capacity to contract;
- (b) Intention to contract;
- (c) **Consensus ad idem;**
- (d) Valuable consideration;
- (e) Legality of purpose;
- (f) Sufficient certainty of terms.

Once a contract is valid, it creates reciprocal rights and obligations between the parties to it. I think it is the law that when a document containing contractual terms is signed, then in absence of fraud, or misrepresentation the party signing it, is bound by its terms. This is in line with the provisions of **section 91** of the **Evidence Act** which provides that: -

“When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from its terms:

Provided that-

(a) Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law;”

In the matter now before court, it was submitted by counsel for the Plaintiff that there was an offer at an auction by the Plaintiff to purchase the suit property which offer was accepted by the Defendant. He further submitted that the agreement was reduced into writing. The Defendant took the consideration of Shs. 92,000,000/= but failed to pass title of the purchased property to the Plaintiff. He concluded his submissions by stating that a valid contract of sale is clearly made out in this case and no evidence has been led which would negate the validity of the contract.

On his part counsel for the Defendant stated that the contract of sale is not valid as long as the judgement of this court [Exhibit P.13] still stands. He claimed that for this court to enforce the agreement nullified by the same court would tantamount to the same court enforcing an illegality. He claimed that although the parties would be different, the evidence which Okumu Wengi J. considered would not vary from the evidence before this court. In other words counsel was claiming that the findings of Okumu-Wengi J. to the effect that the sale in which the Plaintiff took part was no sale at all and therefore a nullity should be used as evidence to declare the agreement of sale also as a nullity.

Since the Defendant relied on the judgement of this court as a defence, I took opportunity to peruse the record of the proceedings so that I ascertain for myself what the dispute between the Defendant on one hand and Nagongera Millers Ltd and Victor Kobel on the other, was all about. Generally the Plaintiffs according to the pleadings filed, the evidence adduced and the submissions filed therein were complaining that they were denied a chance to participate in the sale of the property or recovery of the same contrary to paragraph 7 of the mortgage deed. They were also complaining that no notice of sale under the mortgage was given. It was conceded that the property could be sold but there was a condition to give notice. Another complaint was that the Defendant was varying the interest rate without the consent of the Plaintiffs as borrowers. Other allegations of fraud and misrepresentations were leveled against the Defendant. The Plaintiff's name was mentioned as the purchaser and an employee of Bank of Uganda. However, the decision of the court on the issues raised implicated the Plaintiff quite extensively as having participated in the sale together with his employer which was contrary to the law governing mortgages and the sale of mortgaged properties. In other words the court was of the view that because the source of the money which the Defendant lent to Nagongera Millers came from the Plaintiff's employer the Plaintiff should not have participated in the purchase of the mortgaged property. Whereas I respect the decision of my learned brother I have found myself unable to use his decision and apply it to the facts of this case. The judgement itself is not binding on this court. The Plaintiff was not a party to that case and therefore did not put his side of the story to court and be subjected to cross - examination. Although the learned Judge in his judgement stated that he did not want to condemn the Plaintiff and Bank of Uganda unheard, he ended up doing just that. Jam therefore not persuaded that the judgement in question should be used as

evidence to show that the agreement of sale is invalid. If the Defendant had wanted me to do so, it should have adduced the same evidence which was adduced before Okumu - Wengi J. It chose not to do so. The Plaintiff testified that he was an adult human being thus capable of entering into a valid contract. The Defendant is a limited liability company which can enter into a valid contract. It has not been suggested to me that the law governing Financial Institutions prohibits such contracts and no authorities have been cited to show that this is the case. For a contract to be declared invalid, such a contract must be prohibited by the law governing it. On the evidence available, no law was cited to me except the judgement in H.C.C.S. No1329/1999. The existence of the judgement alone is not conclusive proof of what it states.

Counsel for the Defendant also submitted that the agreement of sale did not indicate who drew it. He stated that this offends **section 66** of the Advocates Act. He referred to some authorities to support his submissions. I agree with counsel for the defendant that the agreement of sale does not state who drew it. **Section 65 of** the Act requires that any person who draws up any document relating to moveable or immovable property and is not an Advocate with a valid practicing certificate unless he/she proves that the act was not done for, or in expectation of any fee, gain or reward is guilty of an offence. There is no doubt in my mind that the sale agreement is a document relating to immovable property and it should have been endorsed in accordance with the provisions of **Section 66** above. The Plaintiff testified that he is the one who drew up the agreement. I consider the plaintiff's failure to endorse the agreement as a technicality which should not be used to defeat the ends of justice. Moreover the Agreement was not presented anywhere for registration. I find on the evidence before me that there was an offer to enter into legal relationship on definite terms and that offer was accepted by the person who was offered the terms, therefore a valid contract was made. The first issue will be answered in the affirmative.

As regards the second issue of whether the consideration should be refunded, there is no doubt that the Plaintiff did not get what he paid for. There was specific expression as to title in the agreement. But even if there was no such an expression, a contract for the sale of land implies an agreement on the part of the vendor to make a good title to the property he/she/it is selling.

In the matter now before court, the evidence which has been adduced and accepted by both sides is that the Plaintiff did not get a good title to the property. The property had adverse third party claims. He was registered subject to those interests. D.W.1 confirmed in his evidence in court that the Defendant made no effort to remove the caveat. In my view this was a case of total failure of consideration. Under the law the Plaintiff would be entitled to a refund of the purchase price. But the refund of the consideration is being opposed with vigour by the Defendant contending that the agreement was void and that money paid under an illegal contract is irrecoverable. He was of course relying on the judgement whose particulars are already on record. But as I stated earlier, the judgement is not relevant to the matter now in controversy. It was admitted to show that the Plaintiff lost the suit property but not to prove that the reasons given for cancellation are correct. The onus was on the Defendant to adduce such evidence on which I could also make similar findings. I cannot read a judgement and conclude that what is stated therein is true. Cases are won or lost on evidence. Furthermore the Judgement was exhibited to show that the Plaintiff lost the property. P.W.1 and D.W.1 testified to this fact. The certificate of title was also exhibited to show that the Plaintiff's name was cancelled. No evidence was adduced before me to show that Bank of Uganda was the mortgagee of the suit property and as such its employee William Kasozi should not have participated in the auction. The Defendant is estopped from raising matters not based on pleadings and on which no evidence has been led. The Judgement was a judgement **in rem** as opposed to a judgement **in personam**. In my view the judgement did not take away the Plaintiff's rights under the agreement. The Defendant was at liberty to insert clauses in the agreement to protect itself against such eventualities. Documentary evidence was led to show that the Defendant was ready and willing to refund the money after the judgement. It is therefore my finding that the Plaintiff is entitled to the refund of the money being claimed in the plaint. The second issue is answered in affirmative.

The last issue is whether the Plaintiff is entitled to the other reliefs being claimed in the plaint. It was agreed in **clause 4** of the agreement that the vendor would indemnify the purchaser against any loss arising out of any defect in title or power of sale. An indemnity by its very nature is a collateral contract which enables the person in whose favour it is made to be compensated for any loss arising out of some default. The Plaintiff gave evidence that when he was put in

possession he carried out some renovations and in the process incurred expenses. It is these expenses that he is claiming from the Defendant. He testified that the suit property was painted and he put the cost of this expense at Shs. 5,000,000/=. The Defendant did not dispute this figure and I will therefore allow it. The second expense being claimed is the cost of plumbing which he claimed and calculated at Shs. 12,000,000/=. The documentary proof adduced to prove this item was not challenged in cross-examination and I will therefore allow it. The other item claimed was the cost of the aborted registration. This was put at Shs. 3,430,000/=. I think this one will be allowed. The last claim presented was loss of bargain. While submitting on this issue counsel for the Plaintiff referred court to some authorities in support of this type of claim. He stated that where there is total to transfer the purchased property the purchaser would be awarded damages assessed as the difference between the market value of the property and the purchase price.

Counsel for the Defendant submitted that such damages are awarded against a party in default. He stated that there was no defect in the title of the vendor. He was again relying on (exhibit P. 13). I think the authorities which have been cited to me by counsel for the Plaintiff are quite persuasive and I will follow them to award the Plaintiff the sum of Shs. 118,000,000/= as damages.

Consequently judgement will be entered for the Plaintiff against the Defendant in the sum of shs. 92,000,000/ = which will carry interest at the rate of 25 % p.a. from the 11th May 1999 till payment in full. He is also awarded the total sum of Ug. Shs. 138,430,000/= as various damages claimed in the plaint. The sum will carry interest at the rate of 6% p.a. from the date of judgement till payment in full. He is awarded the taxed costs of the suit.

C.K. Byamugisha

Judge.

09/03/02