

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(CIVIL DIVISION)**  
**HCT-00-CV-CS-0057-2008**

**ENOS JOHNS:..... PLAINTIFF**

**VERSUS**

**ALLAN SHEM KIRUMIRA :..... DEFENDANT**

**BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE**

**JUDGMENT**

The plaintiff's suit against the defendant is for recovery of money had and received, interest and costs of the suit.

From the evidence, the plaintiff is resident in the United Kingdom. He was desirous of buying land in Uganda. Through his father, Sezi Kigozi Gwayambadde, he approached the defendant, a land consultant and non-practicing lawyer to assist him to procure a plot of land in Kampala. Money in the sum of Shs.135,000,000/= was finally wired onto the defendant's account No. 0710002328 in Nile Bank to use for purchasing the land on behalf of the plaintiff.

It is an admitted fact that:

1. The plaintiff paid Shs.135m/= to the defendant and the defendant acknowledged receipt of it.
2. Out of the Shs.135m, Shs.35m was recovered from the defendant with the assistance of Police.
3. The plaintiff has not received the land, the subject matter of the sale.

**Issues:**

1. Whether the defendant is indebted to the plaintiff as claimed.

2. Reliefs, if any.

Mr. Kangaho Edward for the plaintiff.

Defendant represented himself.

The defendant has hyped up the alleged discrepancy in the names of the plaintiff at the hearing and in his written submissions. However, as the two issues framed for determination clearly show, the alleged discrepancy was not raised as a matter to be determined at the hearing. It is trite that a party is expected and bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of the pleadings: **Interfreight Forwarders (U) Ltd vs East African Development Bank [1994 – 95] HCB 54.**

Be that as it may, I find it necessary to first make a finding of fact in respect thereof and thereafter proceed to make a determination of the framed issues.

In the plaint, the plaintiff gave his names as ENOS JOHNS. At the hearing, Sezi Kigozi Gwayambadde said that the plaintiff was his son and that he is ENOS JOHNS. The three parties, the plaintiff, the defendant and the plaintiff's father are blood relatives. According to the plaintiff's father, the defendant is a son to his elder sister and therefore a grandson.

At the hearing, the plaintiff gave the following line up of names: ENOS KIGOZI JOHNS, Kigozi being his father's name. His British Passport indicates him as ENOS JOHNS and so does his Driving Licence. If his father's name, Kigozi, is dropped from the line-up of names above, he remains ENOS JOHNS, the plaintiff herein. In these circumstances, and with the greatest respect to the defendant, I have not seen any discrepancy in the names worth writing home about. I make a finding that the ENOS KIGOZI JOHNS who appeared as PW3 herein is the plaintiff in this case.

**Issue No. 1:** Whether the defendant is indebted to the plaintiff as claimed.

At the hearing, the plaintiff led evidence of three witnesses: PW1 Sezi Kigozi Gwayambadde, PW2 J. B. Ahimbisibwe and himself (as PW3).

In his testimony, PW1 Gwayambadde stated that his son, the plaintiff, was desirous of acquiring land at Muyenga and asked him to find a lawyer to assist him (the plaintiff) to acquire it. He informed the plaintiff about a grandson who is a lawyer and a land consultant. He (PW1) contacted the defendant and the defendant agreed to do the needful.

PW1 stated further that the defendant and the plaintiff negotiated the terms for processing the documents and making the payment. The land which the parties had first inspected was in Muyenga. In the end they found it unsuitable. Then the defendant found another piece of land, this time in Munyonyo. The witness (PW1), the defendant and J. B. Ahimbisibwe (PW3) inspected it and they liked it. The defendant was requested to take the necessary steps to ensure that the land documents were correct and that what was on the title was also on the ground and to ascertain ownership. According to Gwayambadde, the defendant assured him that he had done so and found the papers properly documented in the land office.

After consulting his son in U.K, he gave the defendant the necessary go ahead to acquire the land.

What followed later is very pertinent. According to the witness (PW1), after the defendant (whom he fondly referred to as ALLAN throughout the testimony) had got the papers, he (PW1) requested him to prepare a Sale Agreement so that the two could study it and arrange to pay. He agreed to this and requested the owner of the land to come to the defendant's office where they could meet, sign the sale agreement and have opportunity to see the seller. The appointment was to take place at Mid-day so that they could make the payment at 2.00 p.m., before the Bank closed. The defendant insisted

that the funds be transferred to his account. Upon that insistence, the two went to the Bank and had the money transferred to the defendant's account. I have already indicated that the fact of transfer is not disputed by the defendant. The transfer was on 12/05/2007. The meeting to sign the sale agreement was to take place on 14/05/07. The witness waited for a call from the defendant so that they go to study the Sale Agreement to no avail. Around 11 a.m., because the defendant's phone was off, the witness decided to go to his (the defendant's) office to find out what the problem was.

On reaching there, the defendant's Secretary told him that the defendant was out. So the witness proceeded to the Bank. On reaching there, he saw the defendant's car parked outside, the driver waiting for him. As the witness was approaching the Bank gate, the defendant came out. He told him that the transaction had been completed, the vendor paid and he gave him documents to that effect. He sent those documents to U.K. Then the plaintiff detailed one J. B. Ahimbisibwe to go and fence off the land. The said Ahimbisibwe then went back to him with the bad news, the person who had allegedly sold the land was not the owner thereof. He (PW1) turned to the defendant and the defendant told him that they had been conned. From his evidence, therefore, PW1 Gwayambadde has never seen the alleged seller of the land. This in essence is the substance of the evidence of the person who parted with Shs.135m on behalf of the plaintiff.

The evidence of PW2 John Bosco Ahimbisibwe is not any different from that of PW1 Gwayambadde. He went to the suit land with instructions from the plaintiff to ascertain the boundaries. In the process of doing so, a man claiming to be the caretaker of the land told them that he was not aware about the sale; that the owner of the land was out of the country.

The witness went and reported the matter to the Police. In the company of CID officers, he went to the Bank and got confirmation that out of the Shs.135m banked on the defendant's account, only Shs.35m was remaining. Police then took over the case for investigations.

The defendant appeared as the sole witness for his side. He admitted that money was wired onto his account in Nile Bank and that he met the supposed vendor at his office with PW1 Gwayambadde and proceeded to pay out the money still in the absence of PW1. He testified that he identified the vendor using a Driving Permit. He also testified that he got a certified copy of the Certificate (Exh. D2). According to him, he agreed with the vendor that he would only receive money for one Plot (Block 255 Plot 733) and he (the defendant) would retain Shs.35m until title for Block 255 Plot 734 had been found.

According to him, he told PW1 Gwayambadde all this but because he was of ill-health, he left the defendant to proceed with the transaction.

It is his case that he went with the vendor to the site and the vendor introduced him to the area Chairman (LCI) who informed him that the suit land belonged to the man he was with, Alex Rusita. He also said that he talked to a passerby who also confirmed that the land belonged to Alex Rusita. He admitted drafting the sale agreement which he signed with the said Rusita. According to him, the vendor passed onto him two certificates of Title for both plots (733 and 734) and that he handed all the documents to PW1 Gwayambadde.

He stated finally that after realizing that they had been conned, he reported the matter to Police. He was given time to produce witnesses but on the date the case was adjourned to, he never turned up. The court proceeded under O.17 r.4 of the Civil Procedure Rules to close the hearing.

I have very carefully addressed my mind to the evidence on record and the arguments of both parties.

It is an agreed fact that the plaintiff wired money in the sum of Shs.135m onto the account of PW1 Sezi Kigozi Gwayambadde. It is also an admitted fact that the same amount was transferred to the defendant's account.

The defendant avers in paragraph 16 of his Written Statement of Defence that after the plaintiff gave him authority to transact on his behalf, he (the defendant) promptly called the purported owner of the land, Alex Rusita, witnessed the signing of the conveyance agreement and transfers, obtained the duplicate certificates of title from him and paid him Shs.100m as arranged and further re-affirmed to him that upon tracing of the original title for the other parcel of land, he would get the balance of Shs.35m.

This position is contradicted by the Sale Agreement itself, Exh. P2, which states at p.2 thereof that the vendor had sold the entire plot for a sum of Shs.135m which the buyer had paid. However, in his testimony, the defendant claimed that he had only paid for one Plot and retained Shs.35m till the white page for the second Plot would be found. There is no mention of any such reservation in the sale agreement itself, Exh. P2. If anything, the parties agreed:

***“That the purchaser shall pay the full purchase price stated above to the vendor, receipt whereof the vendor hereby acknowledges by signing this agreement.”***

Clearly the defendant's evidence on this point offends against the parol evidence rule. This rule is to the effect that evidence cannot be admitted (or that even if admitted, it cannot be used) to add, vary or contradict a written instrument. In relation to contracts, the rule means that where a contract has been reduced to writing, neither party can rely on evidence of terms alleged to have been agreed, which is extrinsic document, i.e. not contained in it.

Now if the white page for the 2<sup>nd</sup> Plot was missing, why would an agreement be concluded in respect of it as well?

I have addressed my mind to the nature of the plaintiff's claim. It is for money had and received. My understanding of the law is that money which is paid by one person which rightfully belongs to another, as where money is paid by X to Y on a consideration which has wholly failed, is said to be money had and received by Y to the use of X. Such money is recoverable through an action by X.

The payment creates a quasi-contract, an obligation not arising by, but similar to contract. It is rooted in a quasi-contract on the footing of an implied promise to pay it back. It is applicable where the defendant has received money, as in the instant case, which in justice and equity, belongs to the plaintiff under circumstances which render the receipt of it by the defendant a receipt to the use of the plaintiff.

**See: Dr. James Kashugyera Tumwine & Anor vs Sr. Willie Magara & Anor HCCS No. 576/2004** (Commercial Court – unreported).

Relating the above principle to the instant case, the defendant received Shs.135m from the plaintiff. The money was for purchase of land.

From the evidence of PW1 Gwayambadde, he released the money to the defendant upon the defendant's insistence. He entrusted the hefty sum to him because he (the defendant) was personally known to him; he was a Consultant in land matters whom he had used before; and, he was a lawyer. The defendant does not deny all these attributes.

He has observed, quite correctly in my view, that Kampala is full of con men. In **Terrene Ltd vs Nelson [1937] 3 ALL E.R. 739**, Farwell, J. at p. 744 stated:

***“In the ordinary case (of a sale of real estate) a purchaser has to go for information to the vendor, but, bearing in mind the principle of caveat emptor, he is bound to make proper inquiries for himself....***

.....

*When a purchaser, with a possible view of making an offer for the property, seeks information from the vendor, the vendor, of course, is bound to the best of his ability to supply him with accurate information.....*

*If he makes a representation either knowingly – and in that sense fraudulently – or recklessly, without caring whether the statement made is true or false, which, again amounts to a fraudulent misrepresentation in law, the purchaser has his remedy in damages, and, in certain circumstances he may be entitled to be relieved from the contract into which he has entered, if it was induced by such misrepresentation. On the other hand, if the representations made prove to be wrong, but were made in good faith, and innocently, the purchaser has no claim to damages.”*

In the instant case, whereas the plaintiff had originally identified land in Muyenga, and had been, impliedly, in touch with the vendor, his attention was shifted to the land in Munyonyo. For the Munyonyo land, he did not see the vendor because he had already gone back to the U.K. He (the plaintiff) left the matter entirely in the hands of his father, PW1 Gwayambadde. For his part, PW1 Gwayambadde placed the matter in the hands of the defendant. He requested him to take the necessary steps to ensure that the land documents were correct and that what was on the title was also on the ground and to ascertain ownership. From PW1 Gwayambadde's evidence, and I have accepted it as truthful, the defendant assured him that he had made a search in the land office and found the papers properly documented thereat. He then requested the defendant, a lawyer, land consultant and relative, to prepare a Sale Agreement so that the two could study it and process payment. The defendant agreed to this and requested the purported owner of the land to come to his (defendant's) office where the three (PW1 Gwayambadde, the defendant and the land owner) could meet, sign the sale agreement and PW1 have opportunity to see him first time. The meeting was to be at 12 noon. I have already indicated that the defendant who knew that the funds were already on PW1



Gwayambadde's account insisted that the money be wired to his (defendant's) account. PW1 yielded to that demand.

From the evidence of PW1 Gwayambadde also, which evidence I have found credible, the two had agreed that the defendant would ring him up when time for them to meet came. He waited for the call in vain. Because the phone was off, he rushed to the defendant's office. The defendant was not there. He (PW1) then proceeded to Nile Bank (as it then was). On reaching there, he saw the defendant's car parked outside. And as he was entering the bank, the defendant was coming out. This is when the defendant told PW1 Gwayambadde that the deal was over, that the agreement had been signed, the seller paid and that the documents evidencing existence of the land were there for his taking. In the end, the whole deal turned out to be a hoax. Mr. Grayambadde who would have had the opportunity to see the purported vendor was never availed that chance.

Since the two had reportedly just clinched the deal in the Bank, the purported land owner was still around. As fate would have it, the defendant who was the only person known to the alleged con man did not show him to PW1 Gwayambadde. In all these circumstances, learned counsel for the plaintiff has submitted that either he (the defendant) conned the money with the so called vendor or he sat down and concocted a sale and '*ate*' the money. Considering the defendant's conduct right from inception to the end, I'm unable to fault counsel's submission. The conclusion of the transaction between the two people: the defendant and the so called vendor, to the exclusion of PW1 Gwayambadde in my view speaks volumes about the conduct of the defendant. It was not conduct of an innocent and honest man. This is regardless of the fact that the Police did not prefer charges against him. If PW1 Gwayambadde had seen the so called vendor and he (the so called vendor) had turned out to be a crook after all, one would be inclined to the view that the defendant may have also fallen prey to the con man. He (PW1) did not see him throughout the purported negotiations. The defendant simply shielded the con man, if any, from him.

The defendant also claims that he received a certified copy of the alleged vendor's Certificate of Title from the Land office. He claims further that he gave a copy to PW1 Gwayambadde. PW1 denies it. He contends that all he got from the defendant are the copies which he forwarded to his son in U.K.

The defendant also claims that when Police raided his place, they took that copy. He had promised to lead Police evidence on this point but as the record of the proceedings shows, he did not fulfill his promise. In fact, he told a lie to court that his prospective witnesses were out of the country for a course whereas not.

I noted the demeanours of PW1 Gwayambadde and DW1 Allan Shem Kirumira as they testified. PW1 impressed me as a truthful old man who had no axe to grind against his grand son. He sounded a truthful and credible witness. On the contrary, the defendant was irritable and abusive. I hardly saw any grain of truth in his testimony. For the above reasons, I have come to the conclusion that the defendant was not conned as he claims. On the balance of probabilities, he merely concocted a sale agreement and converted the cash to his personal use.

I have of course given considerable thought to his story of being conned. Even if I were to accept it, which I won't, I would still hold that his conduct fell short of conduct of a reasonably competent and diligent land consultant and lawyer.

The standard of care expected of a lawyer in such a transaction was set out in **The Insurance Company of North America vs Baerlein and James [1960] E A 993** at 997:

***“Standard of care. The standard of care and skill which can be demanded from a solicitor is that of a reasonably competent and diligent solicitor. Lord Ellenborough has said:***

***‘An Attorney is only liable for crassa negligentia.’***

*Again, Lord Campbell in discussing the essential elements to sustain an action for negligence has said:*

*‘What is necessary to maintain such an action? Most undoubtedly that the professional adviser should be guilty of some misconduct, some fraudulent proceeding, or should be chargeable with gross negligence or with gross ignorance. It is only upon one or other of those grounds that the client can maintain an action against the professional adviser.’*

*This, however, does not mean that the standard of care imposed upon a solicitor is below that imposed on other professional men; it only means that it is not enough to prove that the solicitor had made an error of judgment or shown ignorance of some particular part of the law, but it must be shown that the error or ignorance was such that an ordinary competent solicitor would not have made or shown it. It would be extremely difficult to define the exact limit by which the skill and diligence which appears to satisfy his undertaking, and that crassa negligentia or lata culpa mentioned in some of the cases, for which he is undoubtedly responsible. It is a question of degree and there is a border land within which it is difficult to say whether a breach of duty has or has not been committed.”*

The above is an extract from CHARLESWORTH ON NEGLIGENCE, Third Edition.

It illustrates a lawyer’s duty of care to a client. I agree with it. Relating it to the instant case, even if I were to accept the defendant’s explanation that the money was paid out to one Alex Rusita who turned out to be a con man, surely the act of releasing Shs.100,000,000= in cash and not a cheque that could easily have been countermanded in case of a problem as herein, to a person he did not know prior to the transaction and in the absence of any witness, is indefensible. It was an act of gross negligence and/or gross

ignorance which an ordinary competent lawyer would not have done or exhibited, especially so since PW1 Gwayambadde had requested that he be present when the money was being paid out so that he sees the vendor's identity. He (PW1) cannot be said to have contributed to the problem when to date the Buyer's part on the purported Sale Agreement is blank and the only signatories to it were the so called vendor and the defendant as a witness.

I have taken note of the defendant's optimism that one day he will get the person who conned him. If he ever gets him, he will be at liberty to recover the booty from him. However, in as far as the plaintiff is concerned, the person who defrauded him was the defendant. The consideration for which he had been advanced money wholly failed when the transaction flopped. The defendant received money which in justice and equity belonged to the plaintiff. The plaintiff is therefore not in any way precluded from recovering the amount from him as money had and received by him for the use of the plaintiff.

I would answer the first issue in the affirmative and I do so.

***Issue No. 2:*** Remedies, if any.

Having resolved the first issue in the affirmative, it follows therefore that the plaintiff is entitled to the remedies prayed in the plaint. The remedies include payment to him of Shs.100,000,000/= since Shs.35,000,000/= was restored to him by the Police. For the reasons advanced above, the said amount is decreed to him.

He has also prayed for interest on the decretal sum at a commercial rate. The justice of the case demands that I decree interest to the plaintiff on the decretal sum at court rate rather than commercial from the date of filing the suit till payment in full.

The plaintiff shall also have the costs of the suit.

Orders accordingly.

**Yorokamu Bamwine**

**JUDGE**

**12/10/2009**

**12/10/09**

Kangaho Edward for plaintiff

Defendant absent

**Court:**

Judgment delivered.

**Yorokamu Bamwine**

**JUDGE**

**12/10/09**