

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT MBARARA  
HCT-05-CV-CS-0071-2012**

**KAGAIGA GRACE ::: PLAINTIFF**

**VERSUS**

**HOPE TUMWEBAZE ::: DEFENDANT**

**BEFORE: HON LADY JUSTICE JOYCE KAVUMA**

**JUDGMENT**

**Background.**

[1] This Civil Suit No. 137 of 2012 was first filed in the High Court Civil Division holden at Kampala on 7/5/2012 owing to the fact that the matter arose in Nakasero, Kampala but was later transferred to this court.

The Plaintiff brought this case against the Defendant for recovery of UGX. 70,000,000/= being money had and received by the Defendant, interest, general damages and costs of the suit owing to the Defendant's breach of a contract dated **11<sup>th</sup> January 2011**.

The brief facts of the case are that on **11<sup>th</sup> January 2011**, the Plaintiff and Defendant executed an agreement for the sale of land comprised in **FRV no. 581 Folio 24 Plot 206 Isingiro Block 2 at Kagando VII (herein after referred to as the "suit land")** at a consideration of **UGX 80,000,000/=** payable in two instalments. According to the said agreement, **UGX 50,000,000/=** was paid at the signing of the agreement leaving a balance of UGX 30,000,000/= to be paid on **25<sup>th</sup> January 2011**.

It was asserted by the Plaintiff that upon execution of the agreement, she discovered that the land was encumbered by a caveat lodged by Post Bank (U) Limited on **10<sup>th</sup> March 2010**, a caveat lodged by Centenary Bank Limited on **27<sup>th</sup> April 2010** and a mortgage in favour of Bank of Baroda registered on **14<sup>th</sup> October 2008**.

The Plaintiff further asserted that upon discovery of the said incumbrances, she duly notified the Defendant of the failure of consideration and demanded a refund of her money. She pleaded that the Defendant had misrepresented to her that the land was free from incumbrances whereas not. She wanted this court to declare that the Defendant misrepresented to her, special damages of UGX 70,000,000/=, interest on the special damages at 20% pa from **25<sup>th</sup> January 2011** till payment in full, general damages and costs of the suit.

On her part, the Defendant admitted that she indeed executed a land sale agreement with the Plaintiff for the sum of UGX 80,000,000/= and that she agreed to hand over the suit land free of any third party claims together with the duplicate certificate of title and duly executed transfers upon being paid the full purchase price.

She however asserted that at the time of entering into the agreement, the Plaintiff was fully aware that the suit land was encumbered. That she had told the Plaintiff the reason as to why she was selling the suit land was to raise funds to clear the bank loans she had been advanced by the said banks. That she had used the suit land as collateral for the loans. That the Plaintiff's failure to clear the full purchase price led her into loss in terms of interest which accumulated as a result of late pay.

The Defendant set up a counterclaim against the Plaintiff. In the counterclaim, she claimed the balance on the land sale agreement to a tune of UGX 10,000,000/=, UGX 24,000,000 being interest she had to pay to the banks as a result of the delay of the Plaintiff to pay the aforementioned balance. She also claimed general damages against the Plaintiff.

In her response, the Plaintiff denied every allegation in the counterclaim. She averred that the terms of payment under the agreement were varied by the conduct of both parties when the Defendant received the UGX 50,000,000/= without complaint or demur. That the loan in Bank of Baroda which had the certificate of title was at the tune of UGX 19,000,000/= at the time of execution of

the agreement but the Defendant failed or refused to pay it off leading to its accumulation to over UGX 49,000,000/=. That the Defendant did not have authority in the first place to sell the suit property since it already had a mortgage in favour of Bank of Baroda. That despite sending the Defendant various notices to come receive his balance of UGX 10,000,00/= and handover the land title, she paid a deaf ear prompting the Plaintiff to make a search on the suit land. This led to the discovery of the various incumbrances. That even when the Plaintiff offered to top up on the UGX 10,000,000/= so that she could obtain the land title from the Bank, the Defendant failed to negotiate with the Bank.

The following issues were framed in the joint scheduling memorandum for resolution by this court:

1. Whether the Plaintiff is entitled to a refund of the sum of UGX 70,000,000/= paid to the Defendant.
2. Whether the Defendant is entitled to the balance of UGX 10,000,000/=.
3. Whether the Defendant is entitled to the payment of UGX 24,000,000/= claimed as accrued interest.
4. Other remedies available to the parties.

### **The burden of proof.**

[2] It is settled law that whoever desires any 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. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. (**See Section 101 of the Evidence Act**).

The standard of proof in civil cases as the instant one is proof on a balance of probabilities. (**See Miller vs Minister of Pensions [1947] 2 ALL ER 372**).

### **Evidence adduced.**

[3] To prove her case, the Plaintiff led evidence through one witness, herself by witness statement. She exhibited various documents

in support of her case in her statement. These were **PExh 1** a land sale agreement executed with the Defendant. **PExh 2** a receipt she was issued by her lawyers for facilitation when they travelled to Mbarara on the day they were supposed to meet the Defendant at Bank of Baroda. **PExh 3** a receipt for legal fees she paid to her lawyers when they drafted the land sale agreement. **PExh 4** an agreement of purchase of the suit land from Bank of Baroda following a successful bid for it. **PExh 5** an acknowledgement of receipt of the land title to the suit land from Bank of Baroda. All these documents were consented to by the Defence.

In her witness statement the Plaintiff told court that sometime in 2011, she was looking for land to purchase in the areas of Isingiro and some brokers took her to the Defendant's land. That upon inspection, she found the land occupied by a gentleman that she came to know was the Defendant's husband who gave her the Defendant's number and she contacted her. That the Defendant confirmed that she was selling the suit land and that the certificate of title was with Bank of Baroda owing to an existing mortgage. That the Plaintiff instructed her lawyer to carry out a search with the land registry to establish whether the suit land belonged to the Defendant. That she was informed by her lawyer that the file at the land office could not be traced and therefore he could not establish proprietorship of the land. That it was her lawyer's advise to her not to proceed with the transaction until she had made a proper search. That considering the prevailing circumstances at the time and the fact that she had liked the land, she instructed her lawyer to prepare an agreement of sale **PExh 1** which was signed on **11<sup>th</sup> January 2011**. That to draft the said agreement she paid the lawyer a sum of UGX 5,000,000/= in **PExh 3**.

That prior to signing the said agreement, it was agreed that the balance of UGX 30,000,000/= be guaranteed with post-dated cheques which the Plaintiff did. That the Defendant told the Plaintiff that she would use the first instalment to clear the loan and the time of payment of the balance she would have obtained the land title from the Bank. That she subsequently paid the Defendant another UGX 20,000,000/=. When she demanded the Defendant to produce

the certificate of title so that she would pay the balance, the Defendant started acting busy which made her suspicious. She instructed her advocates to conduct a search and found the land incumbered. That it was at this point that she demanded the Defendant to perform her obligations in relation to the agreement and he pays the balance or she returns of her money. That the Defendant invited her to Mbarara to try settle the matter with the Bank and obtain the certificate of title but she did not show up leading to expenses of UGX 1,000,000/= as shown in **PExh 2**.

That later, the property was advertised, she bided for the property since she was in occupation thereof and was successful. **PExh 4** was executed with the bank to evidence the purchase from the bank and the title was released to her vide **PExh 5**.

In her **cross-examination**, the Plaintiff told this court that at the time she purchased the suit land she knew the land was mortgaged and that the Defendant had told her she needed money to clear in the Bank. That when the agreement for sale was made, she took possession.

To rebut the Plaintiff's case, the Defendant led evidence by herself. She proceeded by witness statement for her evidence in chief. In which she exhibited **DExh 1** a land sale agreement and **DExh 2** a copy of a judgment from the Chief Magistrate's court of Kampala at Buganda Road. All these documents were never objected to.

The Defendant told court that in 2011, a broker called Mutebi whom she had told to find a buyer for her land gave the Plaintiff her contact who called her with an offer for the suit land. That the following day on **11<sup>th</sup> January 2011**, she met with the Plaintiff at the chambers of her advocate where she gave her a photocopy of the land title to the suit land. That she told them that she had mortgaged the land to Bank of Baroda where she had obtained a loan of UGX 20,000,000/=. And further that she was selling the suit land to raise money to pay off loans which she had in banks and other financial institutions. That on the same day when she called the Plaintiff, she told her she had done due diligence and her lawyer had drafted the sale agreement and

wanted to pay her UGX 50,000,000/=. That she took the UGX 50,000,000/= and signed the land sale agreement, **DExh 1**. That when she insisted on full payment, the Plaintiff requested her friend Florence to issue two post-dated cheques of UGX 20,000,000/= and UGX 10,000,000/= to her. That the Plaintiff stopped picking the Defendant's calls when she demanded for payment of the balance until when she went to suit land and told the Plaintiff's workers that she was going to take back possession of the suit land if the Plaintiff did not pay. That two days after, the Plaintiff caused her arrest and she was charged of fraudulent sale of land a case for which she was later acquitted vide the judgment **DExh 2**.

That later in the same year, the Plaintiff's friend Florence demanded for the return of the post-dated cheques and UGX 20,000,000/= was paid to the Defendant. That she only learnt about the purchase of the suit land from the bank by the Plaintiff when she came to court.

In her **cross-examination**, the Defendant told court that she did not give the Plaintiff the land title because she had not paid the full sum for the land. That she paid interest of UGX 28,000,000/= to the bank.

### **Representation.**

[4] At trial, the Plaintiff was represented by *M/s KGN Advocates* while the Defendant was represented by *M/s Ngaruye Ruhindi, Spencer & Co. Advocates*.

Both counsel filed written submissions in the matter which I have considered.

### **Analysis and decision.**

**Issue 1: Whether the Plaintiff is entitled to a refund of the sum of UGX 70,000,000/=.**

[5] In the case before me, the Plaintiff by her plaint sought for a refund of UGX 70,000,000/= from the Defendant as money had and received.

It is undisputed by the Defendant that she received UGX 70,000,000/= from the Plaintiff. The Defendant admitted having received the money in **paragraphs 4 and 5** of her Written statement of Defence. She went ahead in her evidence in chief under **paragraphs 7 and 11** of her witness statement and admitted to receiving the said money from the Plaintiff.

An action for money had and received is an action used by claimants who are, for example, seeking to recover from the defendant money which has been paid to the defendant: (1) by mistake; (2) upon a consideration which has totally failed; (3) as a result of imposition, extortion or oppression; or (4) as the result of an undue advantage which has been taken of the claimant's situation, contrary to the laws made for the protection of persons under those circumstances. (See Halsbury's Laws of England; Restitution- Volume 40(1) (2007 Reissue), Sheno and another vs Maximov [2005] EA 280 and Moses ds Macferlen (1760) 2 Burr 1005 per Lord Mansfield).

The action for money hand and received is founded upon the principle of unjust enrichment. (See the Indian case of Mahabir Kishore & Madhya Pradesh 1990 AIR 313). All the Plaintiff has to show on such an action is that the Defendant holds money which in equity and good conscience belongs to him. There are three elements that the Plaintiff ought to prove in order to succeed on such a claim;

1. *That the Defendant received money belonging to the Plaintiff.*
2. *That the Defendant benefited from the receipt of the money.*
3. *Under the principles of good conscience, the Defendant should not be allowed to retain that money.*

[6] In relation to the first element, as I have already pointed out, it is not in dispute that the Defendant in this case received UGX 70,000,000/= belonging to the Plaintiff. So, the first element is answered in the positive. Equally the second element is not denied by the Defendant in this suit. However, she counterclaimed saying that though she was paid the UGX 70,000,000/=:, it was not paid in

accordance with the contract leading to loss on her part for which she sought damages. This court can not be precluded from making a finding that at least she derived some benefit from the money from the Plaintiff. The second element is also not in dispute to that end.

The next question, which is the gist of this issue is whether under the principles of good conscience the Defendant should be allowed to retain the UGX 70,000,000/= she received from the Plaintiff.

It should be noted from the Plaintiff's pleadings, the reason why she wanted restitution of her money was because according to **paragraph 4(e)** of the Plaint there was a failure of consideration of the land sale agreement executed by the parties on **11<sup>th</sup> January 2011**.

Failure of consideration occurs where the payer has not enjoyed the benefit of any part of what he or she bargained for. (See **Chitty, Joseph, -1838. (1994). Chitty on contracts. London: Sweet & Maxwell at 29-034**). In **Chitty (supra)** the learned authors had more to say on failure of consideration which I believe is helpful in the case at hand:

*“...the failure is judged from the payer's point of view and when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is generally speaking, not the promise which is referred to as the consideration, but the performance of the promise. The failure has to be total because the consideration is whole and indivisible, and courts will not divide or apportion it unless the parties have done so...any performance of the actual thing promised, as determined by the contract is fatal to recovery under [money had and received] ...the concept of total failure of consideration can ignore real benefits received by the payer if they are not the benefit received.” [Emphasis mine]*

In the instant case, the Plaintiff told court under **paragraph 5** of her written witness statement that the Defendant delivered to her a photocopy of the certificate of title which clearly indicated that the Defendant was the registered proprietor of the suit land. That she



instructed her lawyer to conduct a search on the land and establish the particulars of the title. That the lawyer told her that the physical file in relation to the land could not be traced at the land registry so she was told not to purchase the suit land before a proper search could be done. The Plaintiff states under paragraph 9 of her statement that she went ahead and instructed her lawyer to prepare a sale agreement for the land despite this advice. The agreement was executed by the parties on 11<sup>th</sup> January 2011. It was only later that she conducted a search that she found various incumbrances on the land.

The above shows laxity in the way the Plaintiff handled the land transaction. Following the decision of the Court of Appeal in **Sir John Bageire vs. Ausi Matovu, CACA No.07 of 1996**, the need for parties dealing in land to conduct due diligence prior to purchase cannot be over emphasized. Lands are not vegetables that are bought from unknown sellers. Lands are valuable properties and buyers are expected to make thorough investigations; not only of the land but of the sellers before purchase. A party that fails on their part in this responsibility can not be allowed to run to court either in law or in equity for a remedy.

In **Allen vs Richardson (1879) 13 Ch. D. 524**, the purchaser of an estate negligently failed to discover an error in the title until after execution of the contract of purchase. In an action for restitution based on a claim for money had and received, the learned judge Malins VC held at page 541 of the decision that;

*"I do not think there is a more important principle than that a purchaser investigating a title must know that when he accepts the title, takes the conveyance, pays his purchase-money and is put into possession, there is an end to all as between him and the vendor on that purchase. If it were otherwise, what would be the consequence? A man sells an estate generally because he wants the money; if this were not the rule, he must keep the money at his bankers, and there never would be an end to the question; whereas by adhering to the rule, the purchaser is put into possession at once of his land, and the vendor has the*

*purchase money to dispose of as he thinks fit the moment after receiving it."*

[7] In the case before me the Plaintiff stated under **paragraph 25** of her witness statement that she was in occupation of the suit land. The Defendant in her witness statement under **paragraph 8** told court that she handed over possession to the Plaintiff one month after the execution of the agreement based on the request of the Plaintiff who told her that she did not have where to graze her cattle from. These facts were uncontroverted by the Plaintiff. I have not seen any evidence to suggest that the Defendant ever tried to remove the Plaintiff from possession of the suit land save for threatening to do so if the Plaintiff did not pay the balance.

It is therefore the finding of this court that when the Plaintiff failed to do proper due diligence in relation to the suit land, paid to the Defendant part of the purchase sum for the suit land which was almost 95% of it, and was placed in possession thereof, there was an end to any issue of failure of consideration.

The Plaintiff pleaded that the Defendant misrepresented to her the nature of the suit land. It was her averment that the Defendant misrepresented to her by purporting to sell land which was heavily encumbered and undertaking to handover the suit land free of any incumbrances with full knowledge that it is impossible.

Misrepresentation which is fraudulent and gives rise to error in *substantialibus* can operate after the execution of a contract of sale of land to vitiate the contract. (**See for example in Redican vs Nesbitt [1924] 1 DLR 536** per Duff J).

Misrepresentation is concerned solely with misrepresentations made before the contract is entered into which induce a party into a contract and not misrepresentations which actually constitute contractual terms. It is therefore the case that where the misrepresentation is later incorporated into a term of a contract, then the doctrine of misrepresentation is not applicable.

From the foregoing, it was a term of the agreement that the Defendant would hand over the certificate of title with no incumbrances, this cannot in law constitute a misrepresentation. Furthermore, given the fact that the Plaintiff, according to her own statement, entered into the sale agreement of her own accord because she “*had liked the land and did not want to lose the opportunity to acquire it*” further rules out a misrepresentation. I therefore find the doctrine of misrepresentation inapplicable to the case at hand.

**In essence, issue one is therefore answered in the negative.**

**Issue 2: Whether the Defendant is entitled to the balance of UGX 10,000,000/=**

**[8]** It is an agreed fact that of the total consideration in the land sale agreement of UGX 80,000,000/=, the Defendant was paid a total sum of UGX 70,000,000/=. Therefore, there was a balance of UGX 10,000,000/=.

It was the Plaintiff's evidence in chief that when she went to the Defendant's bankers, she was informed that the Defendant's debt arrears were to the tune of UGX 42,000,000/=. That the bank threatened to sale the property while she was in occupation of it which prompted her to bid and buy the property from the bank vide an agreement **PExh 4** dated 3<sup>rd</sup> September 2016. The document was unchallenged in court.

It was also the Defendant's evidence that she had to incur a loss of UGX 24,000,000/= in form of interest which she had to pay to bankers owing to the Plaintiff's default in payment of the balance. When cross examined, the Defendant told court that after payment of this sum, she did not get a receipt for it and also did not know how much she was owing the bank.

On a balance of probabilities, I find the Plaintiff's story believable, that she bought the land from the bank owing to the evidence she tendered into court in corroboration thereof. However, the evidence

contradicts her story that the loan of the Defendant according to what she was told when she visited the Bank was UGX 42,000,000/=.

According to her, she bought the suit land from the Bank at a sum of UGX 36,000,000/= a sum at variance with her evidence that the loan sum at the time she visited the bank was UGX 42,000,000/=.

I would have expected the sum to have increased further upwards from the initial UGX 46,000,000/= that the Plaintiff alleges that she was told by the bank when she inquired about the loan before the purchase. This is a major contradiction in the Plaintiff's evidence.

How else would the loan arrears of the Defendant reduce from UGX 42,000,000/= to UGX 36,000,000/= the sum at which the Plaintiff purchased the suit land from the bank? There are only two plausible conclusions I can draw from this; the first being that someone paid the bank money to reduce the arrears and the second being that the Plaintiff was not giving true facts.

In the case before me, the Defendant made a case of having paid the bank a sum she could not readily prove, I find the first conclusion supported by the Defendant's assertions on a balance of probabilities.

I am in agreement with counsel for the Defendant's submission that the subsequent agreement of purchase from the bank by the Plaintiff was her own private venture not involving the registered proprietor who was the Defendant at the time. This is so owing to the Defendant's uncontroverted evidence on cross examination that whereas she got to know from court that the suit land was bought from the bank by the Plaintiff, the bank never notified her of any pending sale.

The equity of this case would demand that the Plaintiff pays the balance of the UGX 10,000,000/= that remained un paid on the original sale agreement.

**Issue 2 is therefore answered in the positive.**

**Issue 3: Whether the Defendant is entitled to the payment of UGX 24,000,000/= claimed as accrued interest.**

[9] In her counterclaim, the Defendant sought for an award of UGX 24,000,000/= that she paid to her bankers as accrued interest.

In her evidence in chief, the Defendant told this court that she specifically informed the Plaintiff that she needed money paid in accordance with the terms of the land sale agreement so that she could pay her bankers. That the Plaintiff's failure to pay the balance in time led her to incur a loss of over UGX 24,000,000/= in terms of interest to the banks.

When cross-examined the Defendant told court that she owed the bank UGX 20,000,000/=:, that she paid the bank 28,000,000/= because interest had accumulated. That she didn't have a statement from the bank to show how much she owed the bank. That even after payment, she did not have the statement from the bank to show how much she owed the bank.

As I have already noted at the beginning of this judgment, in civil cases as this one, the burden lies on the party who desires court to give judgment in his or her favour on any legal right to lead evidence in proof, on a balance of probabilities, the existence of his or her assertions failure of which would disentitle him or her to a decision in their favour.

In the instant case, I find no evidence led by the Defendant in proof of the payment of the UGX 24,000,000/= she asserts to have paid to the Bank or any of her other creditors save for assertions made in her pleadings and evidence in chief. Production of statements from the bank or the creditors to show deposits and how much was owed could have gone a long way in proof of these assertions.

The Defendant's failure to produce such important evidence therefore follows that she has failed to discharge the *onus probandi* imposed on her by the rules of evidence and therefore her claim of UGX 24,000,000/= must fail.

The above notwithstanding, this court already found in the preceding issue, that on the balance of probabilities the Defendant paid a sum of UGX 6,000,000/= to reduce the loan amount that was told to the Plaintiff of by the bank from 42,000,000/= to UGX 36,000,000/= which the Plaintiff finally bought the suit land. The Defendant has failed to show this court that this was accrued interest or she was merely paying part of her loan as per her loan obligations.

**This issue is answered in the negative.**

**Issue 4: Other remedies available to the parties.**

- [10] In her pleadings, the Plaintiff sought for the following remedies;
1. A declaration that the Defendant misrepresented the Plaintiff.
  2. Special damages of UGX 70,000,000/=.
  3. Interest on 2 above at 20% p.a from the 25<sup>th</sup> January 2011 till payment in full.
  4. General damages.
  5. Costs of the suit.

[11] My findings on the issues raised herein above have a bearing on some of the remedies being sought by the Plaintiff. Having found that the Defendant did not misrepresent the Plaintiff, the first remedy fails.

*Special damages of UGX 70,000,000/=*

The facts and evidence led by both parties to this case point to the fact that after the Plaintiff paid the UGX 70,000,000/= which was part of the purchase price for the suit land, she entered into possession of the suit land. She remained into possession and even went ahead and bought the suit land from the Defendant's bankers at a fee of UGX 36,000,000/=.

I find an award of the sum of UGX 70,000,000/= to have no justification given the circumstances of the case. it would amount to an unjust enrichment to the Plaintiff who already derived benefit from the suit land. It is therefore denied.

*General damages.*

General damages as I understand the term, are such as the law will presume to be the direct natural or probable consequence of the act complained of. These are implied by the law and would naturally include compensation for pain and suffering and the like.

As I have already observed herein above, the Plaintiff's failure to conduct due diligence before purchasing the suit land and entering into the land sale agreement even when her advocate told her not to, made her the orchestrator of her own loss if any which cannot be seen as a result of the Defendant's acts. I therefore cannot award her general damages as prayed for.

[12] The Defendant in her counter-claim sought for:

1. An order that the Counter-Respondent pays the Counter-Claimant UGX 10,000,000/= being the balance of the purchase price.

Following my finding on the second issue, the Plaintiff is ordered to pay to the Defendant/Counter-Claimant a sum of UGX 10,000,000/= that remained un paid on the original land sale agreement.

2. An order that the Counter-Respondent pays the Counterclaimant UGX 24,000,000/= paid to the banks as interest as special damages.

Following my finding on issue three that the Defendant/Counterclaimant failed to prove the UGX 24,000,000/=, it is denied.

3. An order that the counter-respondent pays general damages.

I find no reason to award the defendant the above damages given that the Plaintiff was willing to pay the balance and even sent various notices for her to come receive the balance

of UGX 10,000,000/= and handover the land title and she did not comply.

*Costs of the suit and the counter-claim.*

A successful party is entitled to costs unless for good cause, Court orders otherwise. **(See Section 27(2) of the Civil Procedure Act)**. In the instant suit each party will bear its own costs.

I so order.

Dated, delivered and signed at Mbarara this <sup>30<sup>th</sup></sup> day of <sup>9</sup> 2022.



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**Joyce Kavuma**  
**Judge**