



THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT MBARARA  
HCT-05-CV-CA-0079-2020  
(ARISING FROM MBR-00-CV-CS-NO.093 OF 2010)

OJANGOLE PEACE ----- APPELLANT

VERSUS

KAYOMBYA GODFREY ----- RESPONDENT

Before : Hon. Justice Nshimye Allan Paul M.

**JUDGEMENT**

**REPRESENTATION**

The Appellant was represented by M/s Twinamatsiko & Agaba Advocates, while the Respondent was represented by M/s Mugisha, Balinda & Company Advocates.

**PREAMBLE**

The respondent herein first filed a suit against the appellant Vide MBR – OO-CV-93 -2010, it was heard by the Magistrate Grade one who made a judgement on 26<sup>th</sup> April 2013. The Appellant herein being dissatisfied with the decision of the magistrate Grade 1 filed an appeal in the High court vide HCT-05-cv-ca-035-2013. The then Trial Judge His Lordship Justice David Matovu in a judgement dated 24<sup>th</sup> September 2015 noted that the Magistrate grade one who heard the matter did not have pecuniary jurisdiction to hear the matter and ordered the case is heard by the Chief Magistrate. The case was then heard by the learned Chief Magistrate His Worship Twakyire Samuel who delivered his judgement on 22<sup>nd</sup> September 2020, which is the basis of this appeal.

**BACKGROUND**

The facts as stated by the learned trial Chief Magistrate of the Chief Magistrates Court of Mbarara at Mbarara are that the Respondent/Plaintiff instituted Civil Suit No.093 of 2010 against the Appellant/Defendant seeking an order of

specific performance, breach of contract, mesne profits, eviction order and costs of the suit. The Respondent stated that he bought a plot of land with buildings thereon from the Appellant on 17<sup>th</sup> November, 2008 at UGX32,000,000/= only but the Appellant refused to give vacant possession which occasioned him great loss and damage. The Appellant denied the claim and stated that the Respondent lent her money worth UGX1,500,000/= and interest of UGX300,000/= per month. That she paid the Respondent for 11 months after which she added more UGX800,000/= leaving an outstanding sum of UGX500,000/=.

The issues for determination in the Chief Magistrate's Court were;

1. Whether the Plaintiff lent money to the Defendant?
2. Whether there was a false/valid sale of land agreement between the Defendant and the Plaintiff?
3. What remedies are available to the Parties?

In a judgment delivered on 22<sup>nd</sup> September 2020 the learned Chief Magistrate His Worship Twakyire Samuel held that the parties signed a sale agreement, and dismissed the contention that it as a money lending agreement. Judgment was entered for the Respondent herein and the Appellant was ordered to pay

1. UG shillings 32,000,000/= only as money paid to her while selling the suit property,
2. UG shillings 3,000,000/= only as general damages and
3. costs of the suit.

Being dissatisfied with that decision, the Appellant lodged this appeal.

## **GROUND**

The grounds as stated in the memorandum of appeal are that;

1. The learned Chief Magistrate erred in law and fact when he held that there was no proof/exhibit of money lending or payment of UGX1,500,000/=.
2. The learned Chief Magistrate erred in law and fact when he held that the transaction was not money lending but sale of plot with buildings.
3. The learned Chief Magistrate erred in law and fact when he held that the contradictions and inconsistencies in the Plaintiff's evidence were not grave thus holding that the Defendant was not coerced into signing the so-called sale agreement.



4. The learned Chief Magistrate erred in law and fact when he held and ordered that the Defendant refunds money indicated in the agreement plus general damages, mesne profits and costs.

5 Wherefore the Appellant prayed for the following;

- i. The appeal be allowed with costs
- ii. The judgment of the lower Court be set aside
- iii. Judgment be entered in favour of the Appellant/Defendant.

10 **SUBMISSIONS**

**Appellant's submissions**

On ground one, counsel submitted that exhibit DE4 proved that the Appellant was remaining to pay an outstanding sum of UGX 500,000/= only to the Respondent so as to secure the sale agreement and land, which efforts the Respondent frustrated. And that the Respondent did not deny this evidence at cross-examination implying that the Appellant was facilitating a loan from the Respondent.

Regarding the second ground, counsel submitted that the transaction between the parties was an equitable mortgage. That through the evidence of the Appellant and her other witnesses, she went to the Respondent looking for a money lender to pay for her children's school fees, and not a buyer. Counsel contended that the Appellant's intention was to secure a loan from the Respondent, despite executing a land sale agreement, and he relied on **WAKANYIRA GEORGE DAVID VS BEN KAVUYA AND 2 OTHERS CIVIL APPEAL NO.36 OF 2010**. Counsel further argued that the sake of land agreement was fraudulent and illegal given that his client was induced into signing a sale of land agreement by the respondent yet he knew that it was a loan transaction.

On ground 3, counsel cited inconsistencies in the Respondents evidence before the trial Court including where the Respondent testified that he visited the suit property before executing the sale agreement, yet his witnesses PW2 and PW3 testified that the agreement was signed before inspecting the land. Secondly that the Respondent at first testified that the land contained a commercial building, but later changed to a residential house, and that the Respondent testified that the agreement was got from Post Bank but DW3 stated that he handed over the agreement to the Respondent at the time of sale. Counsel

contended that these were grave inconsistencies as to render the Respondent's evidence unworthy (see **ORYEM DAVID VS OMORY PHILIP HCCS NO.100 OF 2018**).

5 On ground 4, it was submitted that what the trial Court awarded was contrary to what the Respondent sought for in his suit. Counsel further faulted the trial Court for awarding the Respondent the purchase price of the suit land after declaring that the land belongs to the Respondent. Counsel prayed for the appeal to be allowed.

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#### **Respondent's submissions**

On ground 1 of the appeal, counsel contended that Exhibit DE4 mentioned by the Appellant's counsel cannot be sufficient to prove payment of the alleged loan. That it is a letter written by the Respondent's lawyer based on allegations  
15 of payment of the alleged loan and is not tenable evidence under Section 91 of the Evidence Act.

For ground 2, counsel contended that the testimonies of PW1 and PW2 corroborated each other while exhibits DE1 and DE2 show the Respondent  
20 serviced the loan with Post Bank. Counsel argued that the Appellant did not discharge her burden of proof in proving that it was not a sale transaction.

On ground 3, counsel submitted that PW1, the Respondent consistently stated that he purchased a residential house with 3 rooms; and on ground 4, counsel  
25 contended that the trial Magistrate exercised his discretion to make the judgment. Counsel prayed for the appeal to be dismissed with costs.

#### **DUTY OF APPELLANT COURT**

The duty of a first appellate court was laid out in the case of **FR. NARSENSIO  
30 BEGUMISA AND 3 ORS V. ERIC KIBEBAGA SCCA NO. 17 OF 2002** that;

*"The legal obligation of the 1st appellate court to reappraise the evidence is founded in the common law rather than rules of procedure. It is a well settled principle that on a 1st appeal, the parties are entitled to obtain  
35 from the appeal court its own decision on issues of fact as well as of law. Although in case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses."*



The above principles will guide this court in the determination of the grounds of appeal that will be determined together.

5 **DETERMINATION**

It is trite law that the party that alleges has duty to prove the same as stipulated in section 101 – 103 of the Evidence Act and was also held in **KARAMIRA V KIGGUNDU. HIGH COURT CIVIL APPEAL 93 OF 2018.**

10 The appeal at hand and indeed the case that led to this appeal is hinged on the validity or otherwise of an agreement exhibited on court record as PEX1 , that was made on 17<sup>th</sup> day of November 2008 between Ojangole Peace (Appellant herein) and Kayombya Godfrey (Respondent herein). The conflicting contentions in respect to the said by both parties are;

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1. It is the respondent's contention while in the lower court as a plaintiff that he executed an agreement for sale of property at a consideration of 32,000,000/=, paid but the appellant refused to hand over the property. He prayed for specific performance, but the lower court ordered a refund of the money among other orders.
2. On the other while it is the appellants consternation that the agreement was not for sale of property but in respect of a money lending agreement

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I will handle the grounds together because of they are interrelated and all connected to the opposing contentions stated above about the agreement made on 17<sup>th</sup> day of November 2008 between Ojangole Peace (Appellant herein) and Kayombya Godfrey (Respondent herein)

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Section 10 of the Contracts Act 2010 defines a contract as is an agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound.

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The law in section 91 of the Evidence Act provides that when the terms of a contract have been reduced to the form of a document, no evidence, except as mentioned in section 79, shall be given in proof of the terms of that contract, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore

contained. The evidence in respect to whether an agreement was reduced into writing that can be deduced from the evidence on court record is summarised as follows;

1. The agreement made on 17<sup>th</sup> day of November 2008 between Ojangole Peace (Appellant herein) and Kayombya Godfrey (Respondent herein) was put on court record an exhibit marked PEX1.
2. DW1 Ojangole peace (Appellant herein) admits in paragraph 8 and 11 of her Witness statement that she agreed to sign the agreement of 17<sup>th</sup> day of November 2008 and even her husband signed on the same agreement.
3. PW2 Mugisha Dominic testified in paragraph 3 of his witness statement that the plaintiff (Respondent herein) paid cash for the House, both parties signed the agreement and he witnessed it, along with Asaph Mukundane Ojangole John (appellant's husband and Counsel Bezire D'bango.
4. Pw3 Deogratias Bango Bezire an advocate of the High court stated in paragraph 3 to 6 of his witness statement that he drew up an agreement for purchase of a plot with buildings, the contents of the agreement were explained to the parties who signed in his presence.

The evidence above points to one conclusion that an agreement was reduced into writing on 17<sup>th</sup> day of November 2008 between Ojangole Peace (Appellant herein) and Kayombya Godfrey (Respondent herein). It therefore implies that the appellant herein had a duty to produce evidence during the trial before the Chief Magistrate to invalidate the agreement which she claims was a money lending transaction.

I have considered the appellants evidence on court record and I find that it is not sufficient to show that 17<sup>th</sup> day of November 2008 between Ojangole Peace (Appellant herein) and Kayombya Godfrey (Respondent herein) was for other reasons other than what is stated in the agreement, that is sale of a plot with a house on it. I am fortified in this thought by the testimony of Pw3 Deogratias Bango Bezire an Advocate of the High Court who stated in paragraphs 3 to 6 of his witness statement that he drew up an agreement for purchase of a plot with buildings, the contents of the agreement were explained to the parties who signed in his presence. He further stated that the plaintiff (respondent herein) even instructed him to write a notice to the people in the house to vacate.

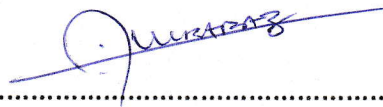


Lastly, I also took note of the fact that it was the Respondent herein that brought a suit in the lower court seeking redress to enforce the agreement. If the appellant herein believed that the true purpose of the agreement was different, she could have filed a suit any time from 2008 in court to get an order that the agreement be invalidated. This she did not do, which makes it plausible that the money lending narrative is an afterthought, be as it may the evidence on record by several witnesses that include an Advocate of the High Court all confirm that the agreement was for purchase of land and consideration was paid.

I therefore find that the Learned Chief Magistrate His Worship Twakyire Samuel correctly evaluated the evidence on court record and reached a correct decision. The respondent was rightly entitled to a refund and damages for the actions of the appellant frustrating the performance of the agreement. I have no reason to change his orders save of the fact that this case has delayed in court and the time value of money given to the appellant in 2008 has now since been affected, as such it is fair to award interest at the court rate of 6% per annum on the amount to be refunded from 2008 when it was given to the appellant until payment in full.

In conclusion, in order to avoid any confusion, I substitute the orders of the Chief Magistrate with the following orders;

1. The appeal is dismissed.
2. The appellant shall pay shillings 32,000,000/= only to the respondent as a refund of money she received pursuant to the agreement of 17<sup>th</sup> day of November 2008.
3. The appellant shall pay interest of 6% per annum on the money in (2) above from 2008 up to payment in full.
4. The appellant shall pay shillings 3,000,000/= only as general damages.
5. The appellant shall pay costs of the respondent in the Chief Magistrate's court.
6. The appellant shall pay costs of the respondent in the High court in this appeal.



**NSHIMYE ALLAN PAUL M.**

**JUDGE**

**29.01.2024**