

KEMIGISA SANDRA :::::::::::::::::::: APPELLANT

WAMANI HUSSEIN :::::::::::::::::::: RESPONDENT

Before: Hon. Justice Byaruhanga Jesse Rugyema

[2] It was the Respondent's case that on the 17/8/2016, he bought a plot of land from the Appellant and took possession. The sale agreement was witnessed by the 3rd defendant who previously owned the land.

- [3] Without the Respondent's knowledge and consent, the 3rd defendant sold the suit land again to the 1st Defendant and the sale was witnessed by the 4th Defendant in his capacity as the L.C1 chairperson of the area and yet he knew of the Respondent's prior interest in the suit land.
- [4] In their joint written statement of Defence, the Defendants denied the Respondent's allegations and contended that the Appellant sold the suit land to the Respondent at a total consideration of the Ugx 7,500,000/= and the Respondent paid Ugx 4,000,000/= remaining with a balance of Ugx 3,500,000/=. It is however the finding of the trial Magistrate that later, the Respondent on 14/1/2017 paid the Appellant Ugx 2,500,000/= leaving a balance of Ugx 1,000,000/= which was to be paid in June 2017.
- [5] That the Respondent refused or failed to pay the full purchase price as had been agreed and in the presence of the chairman L.C1 of the area, they agreed that the Appellant refunds to the Respondent, the money she had already received from the Respondent.
- [6] The Appellant refunded to the Respondent Ugx 2,500,000/= and remained with a balance of Ugx 4,000,000/=. That however, when the Appellant came to pay the balance as agreed, the Respondent refused to accept the money and instead claimed for the suit land/property. The land had already been sold to the 1st Defendant who contends that he rightfully purchased the suit property since the Respondent had accepted a refund of the purchase price.
- [7] Upon evaluation of the evidence before him, the trial Magistrate found that the Appellant agreed to refund the Respondent's balance of the purchase price amounting to Ugx 6,500,000/= upon the Respondent's failure to pay the full purchase price and the Appellant refunded Ugx 2,500,000/= remaining with the balance of Ugx 4,000,000/= as per D.Exhs.1&2. He concluded that the Appellant should pay the balance of the refund of the purchase price amounting to Ugx 4,000,000/= and declared that by the Respondent accepting the refund, he surrendered his interest over the suit land back to the 2nd Defendant/Appellant who assumed lawful ownership

with power to deal with the same in whatsoever manner she wished including selling it to the 1st Defendant.

[8] Judgment was therefore delivered partly in favour of the Respondent with the following orders;

- a) A declaration that the 1st Defendant is the lawful owner of the suit plot of land having lawfully bought the same from the Appellant.
- b) An order of specific performance for refund of Ugx 4,000,000/= owing to the plaintiff being part of the Ugx 6,500,000/= the Appellant received from the Respondent.
- c) The Appellant to pay general damages of Ugx 3,000,000/= to the Respondent for the stress, inconvenience and mental anguish suffered out of the Appellant's actions of not refunding the Ugx 4,000,000/=.
- d) The Appellant to pay the costs of the suit.

[9] The Appellant was not satisfied with the judgment and orders of the learned trial Magistrate and preferred this appeal on the following grounds as contained in her memorandum of appeal.

1. *The learned trial Magistrate erred in law and fact when he failed to evaluate the evidence on record as a whole thereby reaching a wrong conclusion which occasioned a miscarriage of justice.*
2. *The learned trial Magistrate erred in law and fact when he;*
 - a) *Wrongly awarded general damages of Ugx 3,000,000/= and costs to the respondent against the appellant without proper justification.*
 - b) *Wrongly held that the Respondent is entitled to shillings 4,000,000/= from the Appellant when it was not prayed for by the Respondent.*
 - c) *Did not find and hold that the Respondent was guilty of breach of the agreement between the appellant and the Respondent.*

Counsel legal representation

[10] The Appellant was represented by **Mr. Robert Hatega** of **Ms. Baryabanza & Co. Advocates, Hoima** while the Respondent was represented by **Mr.**

Amanya Joseph of Ms. Moriah Advocates, Kampala. Both counsel filed their respective submissions as permitted by this court for consideration in the determination of this appeal.

Duty of the 1st Appellate court

[11] This is an appeal from the Magistrate Grade 1, Hoima. This court therefore being the 1st Appellate court, it is duty bound to review the evidence of the case and reconsider the materials before the trial Magistrate and make its own mind not disregarding the judgment appealed from but carefully weighing and considering it, **Kifamunte Henry Vs Uganda, S.C.Crim. Appeal No.10/1997.**

[12] This court therefore, as 1st appellate court has the legal obligation to re-appraise the evidence as adduced before the trial Magistrate and come out with its own decision on the issues of fact as well as of law.

[13] The grounds of appeal in this appeal appear inter related. They all revolve around how the trial Magistrate evaluated the evidence before him. In the premises, they are to be dealt with together.

Grounds 1 & 2: Evaluation of evidence

[14] Counsel for the Appellant submitted that after the Respondent and the Appellant agreed that the Appellant refunds the **Ugx 6,500,000/=** to the Respondent and take back the land in question. The Appellant did not default to refund the money to the Respondent. That instead, it is the Respondent who refused the balance of the refund amounting to **Ugx 4,000,000/=** when he had received **Ugx 2,500,000/=**. He concluded that there was no evidence adduced from the Respondent showing that the Appellant refused to pay the balance of the refund of the purchase price of the suit land. That the trial Magistrate ignored the evidence of the Appellant which was never challenged in cross examination that the Respondent refused the money and preferred the appeal and as a result, erroneously ordered for specific performance of payment of **Ugx 4,000,000/=** which the Respondent did not plead and claim and payment

of Ugx 3,000,000/= as general damages with costs when it is the Respondent who had breached the agreement with the Appellant by failing to pay the full purchase price of the suit land.

[15] Counsel for the Respondent on the other hand submitted that the trial Magistrate properly evaluated the evidence on the record as a whole and arrived at a fair determination. The Appellant declined to receive her balance of the purchase price amounting to Ugx 1,000,000/=.

[16] As to whether the Respondent failed to pay the full purchase price of the suit land, the Respondent himself during cross examination admitted that he did not pay the last instalment of Ugx 1,000,000/= in June 2017 as agreed "due to some reasons". The reasons he gave in re-examination is that the Respondent told him to first keep the money for her because the previously paid sum of Ugx 2,5,000,000/= was used by her own husband for the funeral of his mother.

[17] I do not find any evidence to support the above claims by the Respondent that the Appellant told her to first keep the money for her because her husband had used the previously paid money for the funeral of his mother as the reason for his failure to pay the balance of the purchase price or that the Appellant frustrated the final payment of the purchase price. The fact that he later agreed to be refunded the part of the purchase price he had paid already and received by the Appellant as per **D.Exhs.1 & 2** is proof that he had failed to pay the full purchase price of the suit land. If it were true that he had not failed to pay the full purchase price for the suit land, he would not have freely agreed to be refunded the part of the purchase price he had already committed to the purchase of the land.

[18] In **Sharif Osman Vs Haji Haruna Mulangira, SCCA No.38/1995**, Tsekooko JSC observed as follows:

"The principle at common law and equity is that in the absence of a contrary intention, time is essential even though it has not been expressly made for by the parties. Performance must be completed upon precise dates specified, otherwise an action lies for breach; Contract by Cheshire and Fifoot, 6th edition, page 466. However, in equity time is essential:-

1. If the parties expressly stipulate in the contract that it shall be so;
2. ...
3. If the nature of the surrounding circumstances or of the subject matter makes it imperative that the agreed date should be precisely observed, see *Cheshire (supra) page 467*".

The above clearly show that time fixed by the parties in a contract is essential in law. In my view, this applies more so in a contract of sale and purchase of land since prices of land tend to vary from time to time.

[19] In the instant case, the sale agreement expressly stipulated for when the purchase price was to be paid in full. As rightly found by the trial Magistrate, the suit property comprised of a residential house. A seller of such property does so for a reason. The proceeds must be for an intended purpose of which, if the money is not paid in time, the seller is likely to suffer a huge loss or injury.

[20] I agree that where land is bought and any substantial amount is paid on the sale price whether possession has passed on the purchaser or not, the vendor is always entitled to the balance on the sale price and not repossession of the land even if the balance is not fully paid, **Osuman Vs Jaffer & Ors Vs Nandlalmak.H.Karia & Anor, SCCA No.53/95** reported in (1996) KALR 109, where it was held that in a deal of immovable property, upon payment of a deposit, property passes to the purchaser who acquires an equitable interest in the property and the vendor becomes the trustee who holds the property in trust for the purchaser. The legal title remain with the vendor until the final payment when the legal title passes to the purchaser.

[21] In the instant case, however, the Respondent refused or failed to pay the balance of the purchase price. Payment of the balance of the contractual price in an agreement to sale land cannot be held in perpetuity merely because one believes they have attained an equitable interest in land and hence should delay or never pay a balance of the contractual price, but there should be intent and commitment by the defaulting purchaser to complete the contractual price in a reasonable time. Otherwise, like in any other contract, the partly paid vendor retains the right to rescind the contract.

[22] Indeed, in this case, upon realising that he was not able to pay the balance of the purchase price, the Respondent agreed with the Appellant that he be refunded part of the purchase price the Appellant had received. The Respondent acknowledged having failed to complete payment of the purchase price on the suit land and having orally agreed to be refunded his contract price of which he acknowledged receipt of **Ugx 2,500,000/=** out of **Ugx 6,500,000/=**, it meant that he ceased to have any interest in the suit land and hence, the Appellant/vendor passed good title to the 1st Defendant upon sale to him since she was at this time at liberty to deal with the suit land in any manner she deemed fit.

[23] In **Nakana Trading Co.Ltd Vs Coffee Marketing Board**, HCCS No.137 of 1991 [1994] 11 KALR 15, Court defined a breach of contract as when one or both parties fail to fulfil the obligations imposed by the terms of the contract. In this case, I find that the Respondent breached the contract by failing to fulfil the essential obligation imposed by the term of the sale of the land agreement i.e, payment of the last instalment of the purchase price in the stipulated time. The Appellant would in the premises be entitled to damages for breach of the contract but since no counter claim was filed, it could and cannot be considered. Upon breach of the contract by the Respondent, the Appellant proceeded to rescind it. It was therefore an error on the part of the trial Magistrate, in the first place, failing to find that the Respondent was guilty of breach of an agreement and in the 2nd place, condemning the Appellant to pay general damages of **Ugx 3,000,000/=** for her alleged failure or delay to refund the received purchase price of **Ugx 4,000,000/=** which did not comprise the agreement that was the subject of the breach. The order of payment of general damages was without any justification as she was an innocent party.

[24] As regards whether the Appellant failed to pay the balance of the refund of the purchase price amounting to **Ugx 4,000,000/=** as the balance of the refund of the purchase price, the Respondent neither pleaded default of payment of this sum by the Appellant nor is there proof that the Appellant refused and or failed to pay it. Evidence of demand of the sum and default to pay by the Appellant would have sufficed. Instead, in his pleadings, the Respondent sought for vacant possession of the land as its rightful owner and or specific performance of the contract, implying that the Appellant

- should be ordered to fulfill her part of the bargain and receive the purchase price balance of **Ugx 1,000,000/=**. At this stage, since the parties had agreed that the Appellant refund to the Respondent a portion of the purchase price which she had received and the Respondent had accepted and acknowledged receipt of **Ugx 2,500,000/=** out the **Ugx 6,500,000/=** due for refund, specific performance of the initial agreement would not be possible. What was tenable was the refund of the purchase price by the Appellant to the Respondent as agreed upon by the parties. There is however no evidence that was adduced by the Respondent that the Appellant refused or failed to pay/refund the remaining balance of the purchase price.

[25] Therefore, as regards the claim by the Respondent for Specific performance of the contract, I find it not feasible for the simple reason that upon the Respondent failing to complete payment of the purchase price of the land and rescission of the contract by the vendor/Appellant, the Respondent ceased to have interest in the suit land upon which it was sold to the 1st Defendant. The Respondent agreed to be refunded the money he had paid on the purchase price of the land. Therefore, payment of the balance of the purchase price by the defaulting purchaser, the Respondent and vacant possession in his favour would be untenable. The trial Magistrate rightly found so.

[26] The claim by counsel for the Appellant that it was an error of law for the learned trial to award a remedy to the Respondent of specific performance for payment of **Ugx 4,000,000/=** remain valid. The Respondent's claim for specific performance was for the Respondent to accept and receive the balance of the purchase price amounting to **Ugx 1,000,000/=** which I have nevertheless already found untenable. The **Ugx 4,000,000/=** was never part of the contract in question. It only arose upon parties agreeing for refund of the purchase price paid to and received by the Appellant. The Appellant refunded **Ugx 2,500,000/=** and was left with a balance of **Ugx 4,000,000/=**.

[27] In the premises, I find that the Respondent was entitled to the payment of the refund of the **Ugx 4,000,000/=** upon the Appellant's rescission of the contract and regaining possession and ownership of the land, the subject

of the contract which she later sold to the 1st Defendant. She could not be allowed to regain the land and at the same time retain money had and received on the contract of sale of the land, despite the Respondent having not pleaded the refund.

[28] Therefore, as regards the order by the trial Magistrate that the Appellant refunds the balance of the part of the price received amounting to **Ugx 4,000,000/=** was proper. The trial Magistrate acted within his powers under **S.98 CPA** and **S.9 M.C.A** to make such an order for ends of justice to be met and ensure that all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters are avoided, for example, a fresh action by the Respondent for recovery of the refund of the purchase price balance. So, though the Respondent did not plead recovery of the refund of the purchase price, on the authority of **Simba (K) Ltd & 4 Ors Vs UBC, SCCA No.3/2014**, the order of the trial Magistrate is permissible in law. In **Simba (K) Ltd**, it was held that a court can decide an unpleaded matter if the parties have led evidence and addressed court on the matter in order to arrive at a correct decision in the case and to finally determine the controversy between the parties.

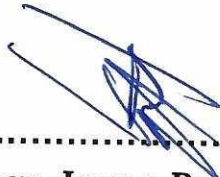
[29] In the instant case, in both her pleadings and evidence, the Appellant admitted the payment of the refund of the purchase price and indeed, paid part of it amounting to **Ugx 2,500,000/=** which the Respondent acknowledged receipt, leaving a balance of **Ugx 4,000,000/=** (D.Exh.2).

[30] In conclusion, for the reasons discussed and given, the appeal partially succeeds with the following orders:

1. A declaration that the 1st defendant is the lawful owner of the suit plot of land having lawfully bought the same from the 2nd defendant is upheld.
2. An order of Specific performance against the 2nd defendant to refund a sum of **Ugx 4,000,000/=** owing to the plaintiff and being part of the original **Ugx 6,500,000/=** she received from the plaintiff and agreed to pay back to him is set aside and substituted with an order that the Appellant refunds the balance of the purchase price to the Respondent amounting to **Ugx 4,000,000/=**.

3. The order that the Appellant pay the Respondent general damages of **Ugx 3,000,000/=** is set aside for there was no justification for it since the Appellant was an innocent party in the transaction in question and had not failed or refused to refund the **Ugx 4,000,000/=**.
4. The order for costs is set aside and substituted with an order for costs in favour of the Appellant both in the lower court and on appeal for the Respondent unjustifiably filed this suit to recover land he had knowingly given up and therefore lost interest therein and had received partial refund of the purchase price.

Dated this 25th day of January, 2024.



Byaruhanga Jesse Rugyema
JUDGE.