THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT-01-LD-CA-001-2018

(ARISING FROM FPT-00-LD-CS-065 OF 2013)

1. TIBASAGA JANE

2. NIGHT KALYEBARA } **:::::::::::::::::::::::::: APPELLANTS**

VERSUS

NYAIKA ROBERT :::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE HON. MR. JUSTICE VINCENT EMMY MUGABO

JUDGMENT

This is an appeal against the judgment and decree of the Chief Magistrate of the Chief Magistrate's Court of Fort Portal at Fort Portal, His Worship Omalla Felix, delivered on the 20th day of December 2017.

Background

The respondent filed Civil Suit No. 065 of 2013 against the appellants in the Chief Magistrate's Court of Fort Portal, seeking a declaration of ownership of the suit land, a permanent injunction restraining the appellants from further claims on the suit land, general damages, and costs of the suit.

The respondent's claim against the appellants is that he bought the suit land from the 1st appellant for a consideration of UGX. 2,000,000/= with an initial deposit of UGX. 400,000/=. However, subsequent attempts by the respondent to make the final payment were rejected by the 1st appellant and the respondent failed to take vacant possession of the suit land. It later emerged that the 1st appellant had sold the land to the 2nd appellant.

At the hearing, the appellants denied the respondent's claim, and the 1st appellant stated that he sold the suit land to the 2nd appellant due to the respondent's failure to pay the full purchase price of the suit land. In his judgment, the trial chief magistrate decreed that the suit land belongs to the respondent and issued a permanent injunction restraining the appellants from making further claims on the suit land. The trial chief magistrate also ordered the appellants to give vacant possession of the suit land, and each party to bear its own costs of the suit.

Being dissatisfied with the decision of the trial Chief Magistrate, the appellants appealed to this court on the following grounds:

I. The learned trial chief magistrate erred in law and fact when he failed to properly evaluate the evidence on record hence arriving at an erroneous and unfair decision.
II. The trial chief magistrate erred in law and fact when he failed to direct himself on the law concerning contracting and breach of contract hence arriving at an erroneous decision.
III. The trial magistrate erred in law and fact when he failed to resolve issues that were framed at scheduling but instead framed his own issues which, still, he did not resolve hence arriving at the erroneous decision.
IV. The trial magistrate erred in law and fact when he failed to consider the evidence of PW2, DW1 and DW2 that the 1st appellant refunded the appellants money worth UGX. 400,000/= with an interest of UGX. 100,000/= hence arriving at an erroneous decision.
V. The trial magistrate erred in law and fact when he ordered for vacant possession of the suit land when the order was not pleaded in the plaint.

Representation and Hearing

The hearing proceeded by way of written submissions. Mr. Samuel Muhumuza represented the appellants while Mr. Victor Busingye represented the respondent. Both counsel filed written submissions which I have considered in this judgement.

Duty of the First Appellate Court

This being a first appeal, this court is under a duty to reappraise the evidence, subject it to exhaustive scrutiny and draw its own inferences of fact, to reach its independent conclusion as to whether the decision of the trial court can be sustained. This duty is well explained in the case of ***Father Nanensio Begumisa and three others v. Eric Tiberaga SCCA 17of 2000*** where the court held thus:

> ***"It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."***

It is not the function of a first appellate court to merely scrutinise the evidence to see if there is some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the trial court's findings should be supported. In doing so, the court should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses ***(see Peters v. Sunday Post [1958] E.A 424).***

Against this background, I now re-evaluate the evidence presented at trial against the appellants' grounds of appeal.

Submissions by Counsel for the Appellants

In his written submissions, counsel for the appellants submitted on grounds 1 and 4, and then grounds 2 and 3, concurrently, and then ground 5 separately.

On grounds 1 and 4, counsel submitted that there was cogent evidence on record that the respondent did not complete the purchase of the suit land and was never given vacant possession of the same. Counsel argued that it was wrong for the trial chief magistrate to consider the intention of the parties rather than the events that transpired between the parties.

Counsel directed this court to the testimony of PW2 who accepted the refund of UGX. 500,000/= on behalf of the respondent. Counsel argued that the testimony of PW2 during cross-examination corroborated with that of DW1 which attested to the fact that the parties had agreed to a refund.

Counsel for the appellants further argued that the respondent had agreed to a refund after failing to pay the final instalment. Counsel submitted that the learned trial chief magistrate did not consider this evidence on record and failed to test the truthfulness of the respondent's witnesses.

On grounds 2 and 3, counsel submitted that the trial magistrate ignored the issues framed at the scheduling conference and even though he framed his own issues, he improperly resolved the same, hence reaching an erroneous conclusion.

Counsel for the appellants also argued that even though upon payment of a deposit, the property passes to the purchaser who acquires an equitable interest in the property and that the vendor holds the property in trust for the purchaser, the transfer of property to the purchaser passes upon

payment of the full purchase price. Counsel referred this court to the case of ***Ismail Jaffer Akkuba & Another Vs. Nandakak Harjum Kara & another SCCA No. 053 of 1995.***

Counsel argued that since the respondent had not paid the whole consideration of UGX. 2,000,000/= to the 1st appellant, the sale of the suit land was incomplete, and the 1st appellant was entitled to rescind the contract for breach of the fundamental term. Counsel referred this court to the case of ***Sihra Singh Santokh Vs Fauu Uganda Ltd HCCS No. 517 of 2004***.

On ground 5, counsel for the appellants argued that the court cannot grant a remedy that has not been sought by a party in its pleadings unless it is the view of the court that such a remedy will meet the ends of justice. Counsel referred this court to the case of ***Kalemera Vs. The Kabaka of Buganda & Another HC Msc. Application No. 1086 of 2017.***

Submissions by Counsel for the Respondent

Counsel for the respondent submitted that ground 1 of the appeal should be struck out for its generality as it offends Order 43 Rule 1(2) of the Civil Procedure Rules.

On ground No. 4, counsel for the respondent argued that the respondent was not aware of any refund or any meeting agreeing to that refund. Counsel argued that the issue of the refund was fabricated by the 1st respondent to defeat the interests of the respondent.

On ground 3, counsel for the respondent submitted that the trial chief magistrate never deviated from the issues as raised at the scheduling conference and whatever issues framed and resolved by the trial chief magistrate would have led to the same conclusion that the respondent is the owner of the suit land.

On the issue of consideration, counsel for the respondent argued that it is trite law that consideration need not be adequate. Counsel argued that the purchase was upon a consideration of UGX. 2,000,000/= and the respondent had made part payment and when he offered to pay the final instalment, the 1st appellant became elusive.

Counsel also argued that the 1st applicant could not have rescinded the agreement without a demand notice or written communication on rescission and therefore the sale of the suit land to the 2nd appellant was a breach of contract.

Counsel for the respondent further argued that the suit land had passed to the purchaser upon payment of the 1st instalment of UGX. 400,000/= and the 1st appellant was only holding the suit land in trust of the respondent.

On whether there was a breach of contract by the respondent, counsel argued that the sale agreement did not stipulate timelines on when the final instalment would be paid and therefore the respondent did not breach the contract of the sale of the suit land and since the sale agreement was silent on the payment terms, the 1st appellant had no right to rescind the contract.

On the order by the court that the appellants give vacant possession of the suit land, counsel argued that section 98 of the Civil Procedure Act empowers the court to give any orders that would meet the ends of justice. Counsel argued that having found that the suit land belonged to the respondent, the court was right to order for vacant possession of the suit land.

Consideration by Court

Before delving into the merits of this appeal, I will first address the point of law raised by counsel for the respondent that ground 1 of the appeal should be struck out for being too general. The law on the conciseness of the grounds of appeal is provided for under Order 43 Rule 1(2) of the Civil Procedure Rules. Order 43 Rule 1(2) of the Civil Procedure Rules provides that:

> ***"The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and the grounds shall be numbered consecutively."***

In the case of ***Kizito Mumpi Ssalongo Vs. Seruga Frank Civil Appeal No. 68 of 2010*** Justice Tuhaise struck off ground 7 of the appeal which read in part ***"yet there was unanimous agreement by the said vendor's family who all endorsed and witnessed the transaction"*** as being outrightly argumentative and narrative.

In the instant case, ground 1 is stated in the following terms: ***"The learned trial magistrate erred in law and fact when he failed to properly evaluate all the evidence on record hence arriving at an erroneous and unfair decision."***

By asserting that the learned trial magistrate failed to properly evaluate all the evidence on record, the appellants highlighted a specific legal standard and its alleged violation. It is my considered view that ground 1 states a substantive legal argument with clarity and conciseness. Therefore, contrary to the argument of counsel for the respondent, ground 1 does not offend Order 43 Rule 1(2) of the Civil Procedure Rules.

In the premises, the objection raised by counsel for the respondent with respect to ground 1 is overruled.

Be that as it may, as per the authority in ***Kizito Mumpi Ssalongo Vs. Seruga Frank (supra)***, I find grounds 3 and 4 outrightly argumentative and narrative, hence offending Order 43 Rule 1(2) of the Civil Procedure Rules. Therefore grounds 3 and 4 are accordingly struck out.

For proper determination of this appeal, I shall, therefore, resolve grounds 1 and 2, concurrently, by re-evaluating the evidence on record against the law of contract and land transactions.

It is trite law that in a transaction for the sale of property, the property passes to the purchaser, upon payment of the deposit, 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 remains with the vendor until the final payment when the legal title passes to the purchaser **(*See: Ismail Jaffer Akkubhai & Others Vs Nandakak Harjivan Karia & Another SCCA No. 53 of 1995.***

From the foregoing, it can be said that at the sale of land, both the vendor and the purchaser have concurrent obligations: the vendor must deliver a good title and the purchaser must pay the whole and final price. In the case of ***Kagumya Godfrey Vs. Ntale Deo HCCS No. 298 of 2004*** citing with approval the case of ***Holland Vs. Wiltshire (1954) 90 CLR 409 420***, the court held that:

> ***"In the context of contracts for sale of land the vendor's obligation is to deliver a good title and the purchaser's obligation is to pay the price. Those are concurrent and mutually dependent obligations in the absence of any provision in the conduct to the contrary. If any party***

informs the other that it cannot or will not complete the conduct by the settlement date he or she commits an anticipatory breach amounting to a repudiation which gives the innocent party a right to terminate the contract. Presented with the repudiatory conduct of the guilty party, the innocent party has an election to either refuse to accept the repudiation or continue to require performance or accept the repudiation and bring the contract to an end."

In the instant case, evidence on record shows that the respondent bought the suit land from the 1st appellant on 12th October 2009 at a consideration of UGX. 2,000,000/= but paid a first instalment of UGX. 400,000/=. However, upon paying the first instalment, the 1st appellant remained in possession of the suit land. Evidence from PW2, DW1, DW2, and DW3 shows that when the respondent failed to pay the remaining instalment for nearly two years, a meeting was convened by PW2, Kyomuhendo Nassan, who is also the chairperson of Nyakabara village where the suit land is situate, and the parties agreed that the 1st appellant is at liberty to sell the suit land on condition that she would refund the initial deposit to the respondent with an interest of UGX. 100,000/=.

The evidence on the record also shows that after agreeing to a refund, the 1st defendant found a buyer, the 2nd appellant, who bought the suit land. According to DW1, the 1st appellant, when he called the respondent to get his refund, the respondent told him to take the money to his wife, but the respondent's wife refused to acknowledge receipt. The following day, the 1st appellant, in the company of PW2, took the refund to Kyomuhendo Nassan, the LCI chairperson of the area who acknowledged receipt of the same on behalf of the respondent.

Contrary to the argument of counsel for the respondent, given that the land sale agreement (Pexh 1) had no timelines for payment of the final instalment, then the final payment fell due when it was demanded. There is evidence from the DW1, the 1st appellant herein, which was corroborated by PW2, that a meeting was held, and that the respondent admitted that he was unable to make the final and last instalment. The inability of the respondent to pay the final instalment amounted to repudiation of the land sale agreement.

The testimony of PW1 that the 1st respondent refused to accept the final instalment can only be taken with a pinch of salt as it was contradicted by PW2, the LCI chairperson of the village where the suit land is situate, during his cross-examination. It suffices to note that it is PW2 who authored the sales agreement between the respondent and 1st appellant.

The respondent having repudiated the contract, the 1st appellant was at liberty to rescind or terminate the same. Counsel for the respondent argued that the 1st appellant did not communicate his termination or rescission of the contract. With due respect to counsel for the respondent, I find this argument untenable simply because rescission is effected by any clear indication of the intention to be no longer bound by the contract and the intention must be communicated to the other party, privately, or publicly evidenced ***(see: Sihra Singh Santakh Vs. Faulu Uganda Ltd Civil Suit No. 517 of 2004).***

In the instant case, during cross-examination, PW2 admitted attending a meeting where parties agreed that the 1st appellant would sell the land to another purchaser and refund the initial deposit with an interest of UGX. 100,000/= to the respondent. This evidence was corroborated by DW1, DW2 and DW3. Perhaps, it was after the said meeting that PW1, the LCI

chairperson, wrote a letter dated 19th May 2011 (Dexh 1) informing all and sundry that the suit land belonged to the 1st appellant.

I am also inclined to believe that this letter (Dexh 1) was intended to enable the 1st appellant to sell the suit land so that she could make a refund to the respondent. Therefore, in the circumstances, the rescission of the contract was effectively communicated to the respondent, at least publicly.

Counsel for the respondent also argued that the respondent did not instruct PW1, the LCI chairperson, to receive the refund on his behalf. The evidence on record, however, shows that there was an attempt by the 1st appellant to pay the respondent the refund, directly, but the respondent became elusive.

Be that as it may, I find the argument of how the refund was made immaterial in this case because the sale of the land contract had been rescinded and there was nothing wrong with the 1st appellant entrusting the chairperson of the village with the refund for the respondent's access. It was a prudent act with or without the authority of the respondent in the face of his elusiveness.

In concluding that the suit land belongs to the respondent, the trial chief magistrate reasoned that:

> ***"The 1st defendant admits the having agreed with the plaintiff to buy the land in dispute and all the defence witnesses corroborated the fact meaning that there is an attempt to sell the land to the plaintiff. As to whether this sale was concluded or not, the court should look at the intention of the parties as was unfolded in the testimony of the parties.....***

As to whether the balance is still due or not, the same can be ascertained and whatever is owed the balance can make good the same but on the issue of the suit land passes to the buyer who is the plaintiff in this case."

With due respect, I find the ratio of the trial chief magistrate erroneous for three reasons. Firstly, it focuses on the intention of the parties in isolation of their obligation to fulfil their part of the bargain. i.e., the 1st appellant giving vacant possession of the suit land, and the respondent paying the full purchase price. Secondly, the ratio does not take into consideration that the respondent had repudiated the contract by failing to pay the final instalment of UGX. 1,600,000/= out of the 2,000,000/= agreed purchase price. Thirdly, the ratio of the trial magistrate failed to recognize that the 1st appellant had elected to rescind the contract following repudiation by (i) having a meeting with the defendant in the presence of the LCI chairperson (PW2), DW2 and DW3, (ii) the chairperson writing a letter stating that the suit land belongs to 1st appellant, and (iii) going with the respondent at Kakara's home so that Kakara's son can buy the suit land.

In the case of ***Sihra Singh Santakh Vs. Faulu Uganda Ltd Civil Suit No. 517 of 2004***, the court held that where a wronged party elects to rescind a contract *de futuro* following a breach by the other party, all primary obligations of the parties under the contract which have not yet been performed are terminated.

Therefore, the 1st appellant, having rescinded the contract, had no contractual obligations to deliver vacant possession of the suit land and ownership returned to her provided she made a refund of the initial deposit by the respondent.

It is, therefore, my finding that the evidence on record does not, on the balance of probability, support the conclusion that the suit land belongs to the respondent.

The trial magistrate simply misapplied the facts of the case to the law of contract and land transactions, hence arriving at an erroneous conclusion.

Resultantly, this appeal succeeds on the first two grounds for the reasons given above and I find no reason to determine the merits of ground 5 of the appeal.

Accordingly, the trial court's judgment, decree and orders in FPT-00-LD-CS-065 of 2013 are hereby quashed and set aside.

The appellants are awarded the costs of this appeal.

It is so ordered.

Dated at Fort Portal this 24th day of January 2024.

Vincent Emmy Mugabo

Judge