

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT MUBENDE**  
**CIVIL SUIT NO.37 OF 2021**

**1. KABUYE ABDU MUBIRU**  
**2. KAGOMA HOLDINGS COMPANY LIMITED** **PLAINTIFFS**

**VERSUS**

**MAGUNDA SENTEZA DAVID** **DEFENDANT**

**BEFORE HON JUSTICE MOSES KAZIBWE KAWUMI**  
**JUDGMENT**

**Introduction.**

The Plaintiffs filed this suit for a declaration that the 1<sup>st</sup> Plaintiff is the equitable owner of land described as Buwekula Block 51 Plots 4 and 7 at Buyondwa village, a declaration that the 1<sup>st</sup> Plaintiff agreed with the defendant to use the 2<sup>nd</sup> Plaintiff as a borrower for the balance of the purchase price and to be entered on the titles as the proprietor under the contract entered between him and the defendant and for the 2<sup>nd</sup> Plaintiff to use the titles as collateral for a loan from Centenary Bank.

The Plaintiffs further seek a declaration that they complied with the terms of the oral and written contracts with the defendant and are ready to pay the balance as agreed, an order of specific performance, General damages, interest and costs. **In the alternative** the Plaintiffs seek an order for the defendant to refund UGX. 240,000,000/= with interest at 24% per month, General damages and Costs.

The defendant denies the Plaintiffs' claims and contends that he never received the alleged UGX. 200,000,000/= but was fraudulently convinced to execute an agreement to the effect by the 1<sup>st</sup> Plaintiff. It is also contended that the agreement was not read to him yet he is illiterate in the English language in which it was written.

The defendant filed a Counterclaim pleading that the agreement executed between him and the 1<sup>st</sup> Plaintiff is illegal and unenforceable for contravening the Illiterates Protection Act(Cap.78) and prays for the dismissal of the suit with costs.

### **Background.**

On 4<sup>th</sup> August 2021 the 1<sup>st</sup> Plaintiff entered into a land sale agreement for Plots 4 and 7 on Buwekula Block 51 owned by the defendant. The 1<sup>st</sup> Plaintiff claims to have paid UGX. 200,000,000/= of the agreed consideration of UGX.900.000.000/=. The balance of UGX.700, 000, 000/- was to be acquired from Bank of Africa using the titles for the subject of the sale agreement as collateral.

The 1<sup>st</sup> Plaintiff however negotiated with Centenary Bank which advised that he uses the 2<sup>nd</sup> Plaintiff to borrow the UGX. 700,000,000/= but the titles which were in the custody of the defendant had to be registered in the 2<sup>nd</sup> Plaintiff's name and mortgages registered thereon before the money could be disbursed to the defendant's account. The 1<sup>st</sup> Plaintiff claims to have got acceptance of the changes from the defendant.

The defendant however refused to execute a fresh agreement indicating the 2<sup>nd</sup> Plaintiff as the purchaser of the land. The defendant further refused to surrender the certificates of title to the Bank for the loan transaction to be completed even when communication of its approval





and undertaking to remit UGX. 700,000,000/= directly to his Account was allegedly made by the Bank Officials.

The defendant instead sold the land to 3<sup>rd</sup> parties but did not refund the deposited UGX. 200,000,000/= to the 1<sup>st</sup> Plaintiff who lodged a caveat on the titles prior to filing the suit. The Plaintiffs claim that the defendant is literate in the English language and fully understood the contents of the sale agreement aided by his witness to the same.

On the other hand, the defendant contends that he was fraudulently convinced by the 1<sup>st</sup> Plaintiff to execute the 4<sup>th</sup> August 2021 agreement for UGX.900. 000 .000/= before receiving the UGX. 200,000,000/=. The agreed consideration for his land was UGX. 700,000,000 /= but not UGX 900, 000, 000/= reflected in the agreement.

He contends that the intention was for the Lending Bank to disburse the asset acquisition loan of UGX. 700,000,000/= in the belief that the 1<sup>st</sup> Plaintiff had used UGX. 200,000,000/= of his own funds to partly finance the purchase in line with the lending policy for such loans.

It is the defendant's case that he did not agree to execute an agreement with the 2<sup>nd</sup> Plaintiff and no money was paid before executing the 4<sup>th</sup> August 2021. The defendant claims that he orally rescinded the 4<sup>th</sup> August 2021 agreement and sold his land to 3<sup>rd</sup> parties but caveats were lodged which has caused him great inconvenience hence the claim for General damages.

### **Representation.**

M/S Bagyenda &Co. Advocates appeared for the Plaintiffs while M/S Kania, Alli &Co. Advocates &Solicitors appeared for the defendant.



Counsel filed a joint scheduling memorandum in which the following issues were framed for resolution by the court-

1. Whether there was a valid and legally binding land sale contract between the 1<sup>st</sup> Plaintiff and the defendant for the sale and purchase of land described as Buwekula Block Plots 4 and 7 at Buyondwa on 4<sup>th</sup> August 2021 and if so whether the said contract was breached by the Defendant?
2. Whether the agreement of sale of land described as Buwekula Block 51 Plot 4 and 7 between the 1<sup>st</sup> Plaintiff and the Defendant was executed in compliance with the Illiterates Protection Act, Cap.78?
3. Whether the suit by the 2<sup>nd</sup> Plaintiff discloses a cause of action against the Defendant?
4. Whether the 1<sup>st</sup> Plaintiff fraudulently induced the Defendant to enter into a Contract of sale of land described as Buwekula Block 51 Plots 4 and 7 at Buyondwa on 4<sup>th</sup> August 2021?

I do not find need to delve into the 4<sup>th</sup> issue since the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> issues have the potential to dispose of the case. I will first handle the 3<sup>rd</sup> issue.

### **The burden and standard of proof.**

In civil cases the burden of proof lies on that person who would fail if no evidence at all were given on either side. The burden of proving a particular fact therefore lies on that person who wishes the court to believe in its existence unless the law provides that the proof of that fact shall lie on any particular person.

The standard of proof required to be met by either party seeking to discharge the legal burden is on a balance of probabilities. The evidence must carry a reasonable degree of probability but not so high as is





required in a criminal case. Where fraud is pleaded however the burden of proof required is slightly higher than on a balance of probabilities.

The facts must prove the matters beyond a mere conjecture or surmise and where the case is left in equilibrium, the court cannot incline the balance either way, the Plaintiff will have failed to discharge the burden of proof.

**Sections 101,102 and 103 of the Evidence Act. Sebuliba V Cooperative Bank Limited (1982) HCB 129; Dr.Vincent Karuhanga v National Insurance Corporation.{2008}HCB 151;Nsubuga V Kavuma{1973}HCB 307.**

Resolution of the 3<sup>rd</sup> issue.

**Whether the suit by the 2<sup>nd</sup> Plaintiff discloses a cause of action against the defendant?**

A cause of action means every fact which if traversed, it would be necessary for the Plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which, taken with the law applicable to them gives the plaintiff a right to claim relief against the defendants.

**Narrottam Hemantini Bhatia V Boutique Shazim Ltd. SCCA No.16/ 2009.**

A cause of action is established when the Plaintiff shows that he/she enjoyed a right which was violated and that the defendant is liable for the violation of that right.

**Auto Garage &Others V Motokov (1971) EA 514.**

The 1<sup>st</sup> Plaintiff contends that it was agreed with the defendant that a loan be taken out by the 2<sup>nd</sup> Plaintiff which was to be registered as the owner of the defendant's land based on which the titles would be used

as collateral for financing the balance of the agreed consideration being UGX. 700,000,000/=.

The Defendant denies that any such arrangement was made as signified by his refusal to endorse an agreement indicating the 2<sup>nd</sup> Plaintiff as the one that allegedly paid him UGX. 200,000,000/= and was purchasing his land.

It is trite to state that the question of whether a Plaint discloses a cause of action is determined upon perusal of the Plaint and attachments thereto with an assumption that the facts pleaded or implied therein are true.

**Attorney General V Oluoch (1972) EA 392; Ismail Serugo V KCC& Another CACA No.2/1998.**

The 1<sup>st</sup> Plaintiff did not furnish evidence of a Resolution by the 2<sup>nd</sup> Plaintiff's Board of Directors reflecting a decision for the purchase of the Defendant's land and/or to acquire a loan from Centenary Bank. The "**agreement**" that the Defendant was required to sign substituting the 1<sup>st</sup> Plaintiff with the 2<sup>nd</sup> Plaintiff did not also make any reference to the one of 4<sup>th</sup> August 2021 which the Defendant acknowledges.

Counsel for the Plaintiffs justified its backdating to 4<sup>th</sup> August 2021 reasoning that it was to maintain the date for the payment of the balance of the consideration. I find no merit in the argument for the reason that if the change in purchasers had been agreed reference to the agreement of 4<sup>th</sup> August 2021 would not have had any negative effect since the Lending Bank had given the advice.

It was not surprising that the Defendant became apprehensive and refused to sign the fresh document.

Mr. Mugume Godfrey(PW1) who was the Bank Officer processing the loan to the 2<sup>nd</sup> Plaintiff told court that he did not tell the Defendant that





the transaction had been switched from the 1<sup>st</sup> Plaintiff to the 2<sup>nd</sup> Plaintiff as the borrower.

PW2 further told court that he was not certain that the Defendant received the letter from the Bank communicating the approval of the loan and the fact that UGX. 700,000,000/= would be remitted to his account.

I fail to find any nexus between the 2<sup>nd</sup> Plaintiff and the Defendant for a cause of action against him to be established. I dismiss the 2<sup>nd</sup> Plaintiff's suit against the Defendant with costs.

Resolution of the 1<sup>st</sup> issue.

**Whether there was a valid and legally binding land sale contract between the 1<sup>st</sup> Plaintiff and the defendant for the sale and purchase of land described as Buwekula Block Plots 4 and 7 at Buyondwa on 4<sup>th</sup> August 2021 and if so whether the said contract was breached by the Defendant?**

The Contracts Act, 2012 defines a ***"contract"*** to mean ***"an agreement enforceable by law as defined in Section 10."***

Section 10(1) of the Contracts Act provides:-

***"A contract 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."***

It is not disputed that the respective parties to the 4<sup>th</sup> August 2021 agreement had capacity to contract since both of them were adults. The agreement was signed with the free consent of both parties and the sale/purchase of land was a lawful object. The parties also intended to be legally bound by the agreement.

The only contention is whether the UGX. 200,000,000/= indicated as received by the Defendant as a deposit on the agreed consideration was actually paid to him. None of the witnesses in court testified to witnessing the actual receipt of UGX. 200,000,000/= by the defendant.

Paragraph 5(iii) of the Plaintiff relating to the payment states:-

**"As evidenced from the attached contract, the 1<sup>st</sup> Plaintiff deposited an initial deposit of UGX. 200,000,000/= with the defendant which he acknowledged by affixing his signature thereto."**

Clause 2 of the Agreement provides ;-

**"The 1<sup>st</sup> instalment of UGX. 200,000,000/= cash paid on execution of this agreement and receipt of which is further confirmed and acknowledged by the vendor affixing his signature hereto in the presence of his witness and the rest of the witnesses to the transaction."**

The Defendant denied receiving the alleged part payment both in his pleadings and in court. It was upon filing the WSD/Counterclaim that the Plaintiff in his reply stated that on 4<sup>th</sup> August 2021 at Nansana the Defendant told him that the suit land had an encumbrance by Stabex International and he needed UGX. 200,000,000/= for the caveats on the certificates of title to be vacated.

In his witness statement the 1<sup>st</sup> Plaintiff stated that he met and paid the Defendant at Shell Nansana in the presence of a one Kayaga Esther Linda. The said witness to the payment was not produced by either party as a witness but it is not denied that she witnessed the execution of the Agreement. PW4 who drafted the agreement told court that he did not witness the money being paid to the Defendant.

The Defendant stated in court that both him and Kayaga agreed to the execution of the agreement before receiving the money on the





understanding that the consideration was to be indicated as UGX. 900,000,000/= so that the lending Bank releases UGX 700,000,000/= which would cover the consideration he had agreed on with the 1<sup>st</sup> Plaintiff.

It was also the Defendant's evidence that he agreed to the inspection of the land by Bank Officials in the belief that the 1<sup>st</sup> Plaintiff was going to get the loan from which he would get his UGX. 700,000,000/= as agreed prior to the execution of the 4<sup>th</sup> August 2021 agreement.

The introduction of the payment of UGX. 200,000,000/= at Shell Nansana in the Reply to the WSD/Counterclaim and subsequently adding the presence of Kayaga in the Witness statement points to an afterthought about this important piece of evidence by the 1<sup>st</sup> Plaintiff especially given that there is no trail or documentation of receipt prior to the agreement witnessed in the Plaintiff's Lawyer's Chambers.

The 1<sup>st</sup> Plaintiff and the Defendant were not strangers to each other, It was the 1<sup>st</sup> Plaintiff's evidence that the Defendant had in the past been supplying him with tea leaves and Delivery Notes would be executed. That he would sometimes advance the Defendant undocumented sums in the region of UGX. 20,000,000/= to 50,000,000/-but not anything like the UGX. 200,000,000/ =.

What comes to mind is what could have prevented the parties from documenting such an exchange of a huge sum? Why did they not wait to exchange the money before the Lawyer since the agreement was drafted on the same day? One also wonders when the 1<sup>st</sup> Plaintiff came to learn of the Defendant's need for UGX. 200,000,000/= Was it on 4<sup>th</sup> August 2021 or he had just come to pay him at Shell Nansana?

It is also strange that the 1<sup>st</sup> Plaintiff could not provide evidence to show that indeed the Defendant owed Stabex International money and the





caveat was removed on or after the 4<sup>th</sup> August 2021 to lend credence to the evidence of the part payment in contention.

On 5<sup>th</sup> October 2021 way after the agreed period within which the 1<sup>st</sup> Plaintiff was supposed to pay the alleged balance of the consideration, the Defendant sold his land to 3<sup>rd</sup> parties. The Agreement of sale was introduced into evidence as PEX6 and the stated consideration therein for the same subject matter as in the 4<sup>th</sup> August 2021 agreement is UGX. 700,000,000/=.

The 5<sup>th</sup> October 2021 agreement corroborates the contention by the Defendant that he was selling his land at UGX. 700,000,000/= and the added UGX. 200,000,000/= was a ploy to dupe the Bank into believing that the 1<sup>st</sup> Plaintiff had made a part payment so as qualify for an Asset acquisition loan per the loan policy of the Bank.

Why would the Defendant have otherwise agreed to lose UGX.200,000,000/= on the transaction with 3<sup>rd</sup> parties over the same asset yet he was assured that it would be the 1<sup>st</sup> Plaintiff's Bank to directly pay him the alleged balance of the consideration if he had indeed received the UGX. 200,000,000/- per the 4<sup>th</sup> August 2021 agreement?

The Plaintiffs further seek a refund of UGX. 40,000,000/= brokerage fees for the land transaction allegedly paid by the 1<sup>st</sup> Plaintiff to Haruna Mayanja(PW2) and Kikadde Ivan(PW3). The 4<sup>th</sup> August 2021 agreement is silent on brokerage fees. Whereas PW2 and PW3 stated that each of the parties to the land transaction was to pay them UGX. 20,000,000/= no such agreement was reduced into writing to bind the parties .

PW2 and PW3 did not also witness the exchange of the UGX. 200, 000, 000/- but only claim to have been told by the parties. The document to prove receipt of the alleged UGX.40,000,000/- was also not witnessed by the Defendant yet he had allegedly instructed the 1<sup>st</sup> Plaintiff to pay his



share of the fees and would deduct the amount from the balance of the agreed consideration.

I failed to find any credible evidential value in the testimonies of PW2 and PW3 in relation to the alleged part payment to the Defendant. No evidence was led to prove that the Defendant acquiesced to the alleged payment of the brokerage fees so as to remotely link it to the alleged receipt of the UGX. 200,000,000/= part payment from the 1<sup>st</sup> Plaintiff.

All evidence considered, I find credibility in the contention by the Defendant to the effect that he did not receive the alleged part payment. Payment of consideration which is one of the requirements of a valid contract was not made. The 4<sup>th</sup> August 2021 agreement was therefore not a valid and legally binding document that can be enforced against the Defendant.

I am alive to the legal principles relating to a signatory to a contract being bound to the contents therein and for the duty of the court being to enforce what the parties agreed to in a contract and not what the court considers to have been the right thing.

**L'Estrange V Gracoub Ltd (1934)2KB 394; Parker V South Eastern Railway Co.CPD 416;Fina Bank Ltd V Spares &Industries Ltd(2000) 1EA 52.**

The cited authorities relate to valid and therefore enforceable contracts unlike in the present suit where the contract was invalid for want of consideration. I also note that the contrived plan between the 1<sup>st</sup> Plaintiff and the Defendant to dupe the Lending Bank into issuing the loan was an act in breach of public policy which would still invalidate the contract.

Resolution of the 2<sup>nd</sup> issue.



**Whether the agreement of sale of land described as Buwekula Block 51 Plot 4 and 7 between the 1<sup>st</sup> Plaintiff and the Defendant was executed in compliance with the Illiterates Protection Act, Cap.78?**

**Section 3 of the Illiterates Protection Act** requires a person who writes a document on behalf or in the name of any illiterate to write on the document his or her own true and full name as the writer of the document and his or her true address to imply that he /she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over to him or her.

**Section 1 (b) of the Act** specifically defines the term "*illiterate*" in relation to documents to mean "*a person who is unable to read and understand the script or language in which the document is written or printed.*"

The defendant insisted that he was illiterate in the English language and that the Agreement he signed was not read to him and the contents fully explained. Mr. Balukhu Bagheni (PW4) the Lawyer who drafted the Agreement stated in his Witness statement that the Defendant and his witness read through the Agreement after which he again loudly read it out and explained the contents to them before they executed it and he got no complaint from either.

The fact that PW4 admits to have loudly read out and explained the contents of an agreement that had just been allegedly read by the Defendant only points to the latter's illiteracy of the Language in which the document was written. PW4 could not have done that if he had been assured by the Defendant that he had fully comprehended the contents of the document.





Even if the Defendant knew of the ploy by him and the 1<sup>st</sup> Plaintiff to inflate the Consideration in the agreement for purposes of acquiring a loan that was to cover the actual consideration, the statutory duty for PW4 to comply with the requirements of the Illiterates Protection Act was not diminished in my view. The agreement lacks any evidence to show that it was read over and explained to the parties.

The agreement was merely signed by a person purporting to witness it on behalf of the 1<sup>st</sup> Plaintiff. PW4 did not indicate his full name and stamp as an Advocate/Lawyer in the Chambers it was drawn. The physical location of the Chambers is not also indicated but only the Postal address is shown.

Section 3 of the Illiterates Protection Act is couched in mandatory terms to protect the Illiterate. PW4 had to be clearly identified as the author of the Agreement on behalf of both the 1<sup>st</sup> Plaintiff and the Defendant. The requirement for PW4's compliance with the Act was even more important given that he did not witness the Defendant receiving the alleged part payment in the Agreement he drafted.

It is settled law that where a statutory provision commands something to be done in mandatory language and makes it an offence to disregard the statutory command, breach of the command renders any act done in disregard of it void.

**Stanbic Bank Uganda Limited V Senyonjo Moses & Another. CACA No.147/2012; Bostel Brothers Ltd V Hurlock [1948]2 ALL ER 312.**

In view of the non-compliance to the mandatory requirements of the Illiterates Protection Act as discussed above, the 4<sup>th</sup> August 2021 agreement cannot be enforced against the Defendant.

I dismiss the suit by the 1<sup>st</sup> Plaintiff against the Defendant and make the following Orders.



(a) The Commissioner Land Registration is ordered to remove any caveats lodged by the Plaintiffs on the certificates of title for land comprised in Buwekula Block 51 Plots 4 and 7 at Buyondwa, Mubende.

(b) The Plaintiffs shall pay costs of the suit to the Defendant.



Moses Kazibwe Kawumi

Judge

11<sup>th</sup> January 2024