

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**  
**HCT – 01 – CV – CS – 008 OF 2010**

**1. RWABUTWIGIRI DICK** }  
**2. KAMUKURINGWA ENOS** } .....**PLAINTIFFS**

**VERSUS**

**MUSINGUZI MUYAMBI SAM**.....**DEFENDANT**

**BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.**

**Judgment**

This is a civil Suit instituted against the Defendant for; a declaration that the Defendant is in breach of contract; an order for specific performance of the contract; general damages and costs of the suit.

**In the alternative**, an order that the Defendant refunds UGX 66,000,000/= being the value of the cattle given to the Defendant in consideration of the land not given to the Plaintiffs, interest from December 2003 when the cattle were given to the Defendant at a rate of 30% per annum and special damages.

**Brief facts**

That on 1<sup>st</sup> December 2003, the Plaintiff purchased land from the Defendant measuring one square mile (equivalent to 640 acres or 259 hectares) comprised in Kibale Block 52 Plot 1 and Leasehold Register Volume 1072 Folio 11 land at Bwitankaja, Kibaale, Tooro at a consideration of 220 Ankole heads of cattle. 180 heads of cattle were handed over immediately leaving a balance of 40 heads of cattle. A sale agreement was executed and the Defendant undertook to process the Certificate of Title of the subject land in the names of the Plaintiffs.

Subsequently in 2004, the parties entered into an addendum in which the Plaintiffs handed over the remaining 40 heads of cattle to the Defendant and the Defendant undertook to process the Certificate of Title for the subject land and was to hand over the same to the Plaintiffs by 4<sup>th</sup> September 2004. The Defendant failed and refused to process the said Certificate of Title despite numerous reminders from the Plaintiffs.

After the filing of this suit the Defendant approached the Plaintiffs and asked them to fund the process of mutation and transfer of title. The Plaintiffs in order to mitigate the loss facilitated the Defendant to process the mutation and transfer of title. The Plaintiffs in the course of the said process of mutation and transfer of title discovered that the Defendant had

made other sub-divisions on the original title, sold other pieces of land to third parties and the only available land was approximately 182 Hectares. The Certificate of Title for 182 Hectares was processed and transferred to the Plaintiffs on 27<sup>th</sup> April 2012 and the same was handed over to the Plaintiffs. Consequent to the foregoing, the Plaintiffs have not been given 77 Hectares of the land they purchased from the Defendant and that the Defendant was in breach of the agreement.

The Defendant on the other hand in his Written Statement of Defence averred that on 1<sup>st</sup> December 2003, the Plaintiffs together with their father late Karara Lazaro did purchase the Defendant's land comprised in LRV 1072 Folio 11. While the Defendant was in the process of subdividing the land for purposes of transferring to the Plaintiffs, he received a written letter from the late Lazaro Karara to the effect that the Plaintiffs had been illegally added to the sale agreement. The letter indicated that the Plaintiffs' late father was the only purchaser of the land and had moved with his sons as witnesses to the sale agreement and not parties to the transaction. That the Plaintiffs' late father further instructed the Defendant not to effect any transfer in the names of all the three until that "confusion" was settled, a thing that caused a delay by the Defendant to effect the transfer.

In 2006, the Plaintiffs' late father in a bid to protect his interest lodged a caveat forbidding any transfer or Registration of any 3<sup>rd</sup> parties on the title. That even after the death of the Plaintiffs' father in 2007 the Defendant was in constant negotiations with the Plaintiffs.

That the Defendant shall contend that he is not in breach of the terms of the contract, but rather that the Plaintiffs' father's letter to the Defendant explains the reasons for the delay in effecting the transfer. Further, that the Defendant at all material times has been alive to his obligations and duties under the contract but that the failure to execute transfers in the names of the Plaintiffs has not been caused by a fault of his own but rather by the Plaintiffs. The Defendant prayed that the suit be dismissed with costs.

### **Issues**

1. Whether the Defendant is in breach of the contract?
2. What are the remedies available?

Counsel Bwiruka Richard appeared for the Plaintiff and M/s Tusasirwe & Co. Advocates represented the Defendant. By consent both Counsel made written submissions.

### **Summary of evidence**

**PW1 Kamukuringwa Enos** stated that the 1<sup>st</sup> Plaintiff, their late father and himself bought land from the Defendant at 220 cows. That upon completion of paying the cows and doing the survey, it was discovered that the land was less than one square mile as purchased by the Plaintiffs and their late father. That the other buyers were also seeking to get their own titles and the matter was reported to Police. That he demanded for the title to no avail thus this suit and there upon the Defendant the engaged another surveyor.

That it was upon pursuance of the title that the Plaintiffs discovered that the Defendant had made other sub-divisions on the original title and sold pieces of the land to other parties and the only available land was 182 Hectares. A Certificate to that effect was made and given to the Plaintiffs and they have not got the 77 Hectares and thus the Defendant was in breach of the contract. The 2<sup>nd</sup> Plaintiff therefore sought 66 heads of cattle for the 77 Hectares each cow being valued at UGX 1,000,000/= and prayed for special damages, general damages and costs.

**PW2 Rwabutwigiri Dick** told Court that him, the 2<sup>nd</sup> Plaintiff and their late father bought land from the Defendant on 1<sup>st</sup> December 2003 at 220 cows. They paid 180 cows and an agreement was executed to that effect. A balance of 40 cows left which were later paid to the Defendant and he promised to process the Certificate of Title. The Certificate of Title was eventually processed but was for less than one Square mile.

**PW3 Kangangure Frank** stated he was present during the transaction and signed on the sale agreement when the 180 heads of cattle were handed to the Defendant out of the 220 cows. That the two parties agreed that the 40 remaining cows would be paid after the title had been given to the Plaintiffs.

The **Defendant** in his Witness Statement stated that he, the Plaintiffs and their late father agreed to 220 heads of cattle for the Defendant's land and an agreement was executed to that effect. That he went to the Plaintiff's farm and selected 180 heads of cattle that would be passed on to him after surveying the suit land and the 40 heads of cattle would be paid after the title had been transferred into the Plaintiffs and their late father's names.

On 15/1/2004 the survey was commenced and completed on 19/3/2004, both parties and the community where the suit land is agreed that the swamp and other communally used land be excluded from the land that had been sold by the Defendant leaving only 182 Hectares available to the Defendants.

In April 2004 the Plaintiffs then brought the 40 heads of cattle and an addendum to the agreement was made after the Plaintiffs had agreed to the size of the land and to the available land. That after making the addendum the Plaintiffs withheld the 40 heads of cattle which prompted the Defendant to write to them to cancel the deal.

The Defendant went on to state that after signing the addendum the Plaintiff's late father approached him and requested that his name be substituted with that of Buganzi William, his son-in-law since he was getting frail. This was rejected by the Plaintiffs thus causing confusion and the 2<sup>nd</sup> Plaintiff lodged a caveat and this prevented the transfer of the land. That in the course of all this Lazaro Karara passed on and on the Plaintiffs made a complaint at Police and the Plaintiffs there from took it upon themselves to do the transfer.

That in 2010 he was served summons in the instant case and he did not neglect/fail to transfer the land into the Plaintiffs and late Lazaro's names in breach of contract. Rather he was prevented from performing his obligations because of the confusion amongst the buyers and the caveat lodged by 2<sup>nd</sup> Plaintiff.

## **Resolution of issues:**

### **1. Whether the Defendant is in breach of the contract?**

In the case of **Muyingo versus Lugemwa and 2 others, Civil Suit No. 24 of 2013 [2015] UGHCLD 20 (18 June 2015)**, the definition of a contract was stated to be as follows;

*“Traitel in his book – The Law of contract, 8th edition quoted in page 1 of Chitty on Contracts – General Principles (Sweet and Maxwell) at page 263, described a contract to be an agreement giving rise to obligations which are recognized by law. On the other hand, Pollock – Principles of Contract, 13th Edition at page 1 defines a contract as “a promise or a set off promises which the law will enforce.” What is important is that there must be evidence of two (or more parties) with capacity to contract entering into a binding agreement. It is also a cardinal principle, that in order to form a legally binding contract, both parties must have agreed to offer something of value, or more specifically, consideration is a cardinal necessity of the formation of a contract. See for example, Tweddle versus Atkinson (1861) 121 ER 762 and Combe versus Combe (1951) 2KB 215.”*

In the case of **Ronald Kasibante versus Shell Uganda Ltd HCCS No. 542 of 2006** breach of contract was defined as;

*“The breaking of the obligation which a contract imposes which confers a right of action for damages on the injured party.”*

During scheduling it was agreed that consideration of 220 heads of cattle were to be paid for an agreed size of land being one square mile.

The Defendant admitted entering into contract with the Plaintiffs but denied breach of contract.

Counsel for the Plaintiff submitted that the Defendant claimed to have written to the Plaintiffs and also received response from the Plaintiffs through M/s Ruhindi, Spencer & Co. Advocates where the Plaintiffs agreed to take less land. That the said letter was not received by the Plaintiffs and the letter allegedly written by the Plaintiffs was only on behalf of Lazaro Karara and cannot bind the Plaintiffs. That the transactions were made in writing and any agreement between the parties had to be reduced in writing. The addendum which was made later is silent about the variation.

Counsel for the Defendant on the other hand in his submissions noted that the 1<sup>st</sup> Plaintiff was illiterate, therefore, he cannot read or understand English and under the Illiterates Protection Act, this document should have been translated and read to the illiterate and bear a certificate of translation. That in the circumstances the provisions of the Illiterates Protection Act are a mandatory legal requirement and failure to adhere to them renders the document void. Therefore, it cannot be relied upon in any litigation by any party seeking to enforce a right.

In the case of **Long way suit case manufacturing Co. Ltd versus UAP Insurance, HCT – 00 – CC – CS – 417 of 2010**, it was held that the contract offended the provisions of the

Illiterates Protection Act and was unenforceable because it was between a Chinese national and an insurance company. The Chinese was found not to understand English and there was no Certificate of translation. The Court concluded that there was no *consensus ad idem* and that for that reason and for noncompliance with the provisions of the Act, there was no subsisting contract to be enforced.

Counsel for the Plaintiff in rejoinder submitted that the two parties signed an agreement and an addendum was also made by the same parties. The two documents were admitted in Court as Exhibits PE1 and PE2 and they were agreed documents.

That the issues raised by the Defendant that these two documents are void because of the provisions of the Illiterates Protection Act and the evidence on record confirming that the 1<sup>st</sup> Plaintiff never signed on PE1 and PE2 are not tenable.

The Plaintiffs who are illiterates agreed to the terms of PE1 and PE2 and paid 220 heads of cattle to the Defendant.

Further, that the Illiterates Protection Act in its preamble is an Act for the Protection of Illiterate persons. The provisions of the Act would only apply if the Plaintiffs are denying the terms of PE1 and PE2. The Act is a shield/protection to illiterates and cannot be said to deny illiterates their rights under a document which they admit as to its contents and terms. That the Defendant admits executing the agreements PE1 and PE2 and their terms bind him.

The Defendant through his Counsel stated that in the instant case the remedy the Plaintiffs have is restitution since there was no valid contract. That they can get back their cows or alternatively, take the available land since they agreed to it in the varied agreement.

Secondly, that the 1<sup>st</sup> Plaintiff has no locus standi in the instant suit since he did not sign the contract and **Order 15 Rule (1)(5)** and **Order 15 Rule (5)** of the Civil Procedure Rules be invoked to allow amend the issues since there was no valid contract and that the provisions of the Illiterates Protection Act were violated.

In regard to breach of contract, that since there was no valid agreement there was therefore no breach of agreement. That from the conduct of the two parties it was inferred that the Plaintiffs opted to waive their rights under the original contract or vary the terms bringing them under the scope of **Section 29 (d)** of the Evidence Act. That, there is proof that the agreement was yet to be finalised and was a work in progress.

Counsel for the Plaintiffs however noted that there was no variation of the agreement and there is no exception to the parole evidence rule set out in **Section 91** and **92** of the Evidence Act. That the addendum PE2 was executed subsequently and if indeed it was true that the Plaintiffs agreed to vary the terms of the contract the same would have been reflected on the addendum.

In the instant case the Plaintiffs paid 220 heads of cattle which the Defendant does not dispute for 259 Hectares of land however, only 182 Hectares were given to the Plaintiffs and a title to that effect.

In the case of **Nakana Trading Co. versus Coffee Marketing Board (1994) KALR 534**, where it was held that;

*“A breach of contract occurs when one or both parties fail to fulfil the obligations imposed by the terms.”*

The Plaintiffs and the late Karara Lazaro paid the Defendant the agreed consideration of 220 heads of cattle however, the Defendant only delivered to them 182 Hectares less by 77 Hectares of the 259 Hectares (one square mile) as had been agreed by the parties. In the circumstances I find that the Defendant did indeed breach the contract.

From the reading of the Court record the 1<sup>st</sup> Plaintiff did not mention that he did sign the contract himself but rather through a representative which was confirmed by PW3. The witnesses were silent as to whether the person that signed for the Plaintiff was illiterate or not so Court shall not speculate.

However, as submitted by Counsel for the Plaintiffs it is true that the Illiterates Protection Act is there to protect the illiterates and not deny them their rights. In this case even if the 1<sup>st</sup> Plaintiff is illiterate he is protected by the said Act not to mention the fact that none of the parties is disputing the contents of the sale agreement. The parties agreed to certain terms and one party failed to deliver as agreed. I do not see how the validity of the agreement comes in, in the instant case.

It was pointed out by Counsel for the Defendant that the 1<sup>st</sup> Plaintiff had no locus standi because he did not sign the agreement. This argument to me cannot stand because it is very clear from the evidence of both parties that the transaction was between the Plaintiffs, their late father and the Defendant. The 1<sup>st</sup> Plaintiff though personally did not sign the agreement his interest was secured by a representative that signed on his behalf.

I also note that the addendum did not make mention of any variation of the terms showing that the Plaintiffs had agreed to the 182 Hectares, therefore this is a very big lie intended to defraud the Plaintiffs of their purchased land.

In regard to restitution, though a remedy in contract, it does not stand in the instant case because there are other options that are available to the Plaintiffs and there was a valid contract between the parties.

I therefore, find that the Defendant was in breach of the contract.

## **2. What are the remedies available?**

The Plaintiff in the instant case prayed for a declaration that the Defendant is in breach of the contract, an order of specific performance, in the alternative, an order that the Defendant refunds UGX 66,000,000/= being the value of the cattle given to the Defendant in consideration of the land not given to the Plaintiffs, general damages, interest and costs of the suit.

The Plaintiffs are claiming the 77 Hectares that were not given to them which are equivalent to 66 cows and each cow is valued at UGX 1,000,000/=.

The Plaintiffs pray that if the Defendant has no land to give them then he should pay them UGX 66,000,000/= at an interest rate of 30% per annum putting into consideration the fact that the cows were paid in December 2003 and would have multiplied by now.

The plaintiffs also proved to Court that the Defendant was in breach of contract and as a result the Plaintiffs have suffered loss and inconvenience and prayed for general damages.

Counsel for the Defendant on the other hand submitted that it is impossible to have specific performance as a remedy in this case because there is no available land to give the Plaintiffs and that is why the Defendant opted to rescind the contract.

On special damages, Counsel for the Defendant stated that these were never specifically proven and no evidence was led to show how many cows went for an acre and that the Plaintiffs opted to transfer the land to themselves after the 2<sup>nd</sup> Plaintiff lodged a caveat. That in the circumstances the Plaintiffs are not entitled to this remedy either.

On the claim of interest, that this is legally and factually flawed as the money on which it is premised unclear, unled and uncertain.

It is trite law that general damages are the direct probable consequences of the act complained of. Such consequences may be loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering. Damages must be prayed and proved, as held in ***Kampala District Land Board & George Mitala versus Venansio Babweyana SCCA 2/2007***.

And in the case of ***Haji Asuman Mutekanga versus Equator Growers (U) Ltd, SCCA No. 7 of 1995***, Oder JSC (R.I.P.) held that with regard to proof, general damages in a breach of contract are what a court (or jury) may award when the court cannot point out any measure by which they are to be assessed, except in the opinion and judgment of a reasonable man.

The general principle under **Section 27 (2)** of the Civil Procedure Act is that costs follow the event and a successful party should not be deprived of costs except for good reasons.

Costs are therefore granted at the discretion of court as and when it deems fit to do so during and after trial. Therefore, it is not automatic that for every case court will award costs.

In the case of ***Butagira versus Deborah Namukasa (1992-1993) H.C.B 98 at 101*** as cited for the Plaintiff, it was held that:

*“The general rule is that costs shall follow the event and a successful party should not be deprived of them except for good cause. This means that the successful party is entitled to costs unless he is guilty of misconduct or there is some other good cause for not awarding costs to him. The court may not only consider the conduct of the party in the actual litigation but matters which led up to the litigation.”*

In the instant case I find that the Plaintiffs proved their case on a balance of probabilities and they are entitled to entitled to a refund of 66 heads of cattle or an equivalent of UGX

66,000,000/= being payment for the 77 Hectares that were not delivered to them since the Defendant has no more land to give them.

At an interest of 30% per annum (commercial rate) is awarded from December 2003 till full payment.

The Plaintiffs in their pleadings did pray for special damages and documentary proof is attached there too. However, they only prayed for special damages worth UGX 4,124,500/= and that is what I award.

The plaintiffs being cattle keepers and persons who derive livelihood from the same proved to this Court their losses and inconveniences as caused by the Defendant sufficiently and are therefore entitled to general damages of UGX 20,000,000/= with interest at Court rate.

The Plaintiffs being the successful party are awarded costs.

In summary the plaintiff's claim is allowed in the following terms of the orders;

- a. A declaration that the Defendant is in breach of contract.
- b. That the Defendant refunds the 66 Ankole Cows or the equivalent of UGX 66,000,000/=.
- c. Interest of 30% per annum on (b) above from December 2003 till full payment.
- d. That the Defendant pays the Plaintiffs special damages of UGX 4, 124, 500/=.
- e. That the Defendant pays the Plaintiffs general damages of UGX 20,000,000/=.
- f. Interest on (e) above at Court rate from the date of judgment till payment in full.
- g. That the defendant pays the Plaintiff the costs of this suit.

Right of appeal explained.

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**OYUKO. ANTHONY OJOK**

**JUDGE**

**15/12/2016**