

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT SOROTI
CIVIL SUIT NO. 9 OF 2014

MARTIN ORECH.....PLAINTIFF

V

1. AKONYET SILVER CHARLES	}	
2. REGISTRAR OF TITLES	:.....}	DEFENDANTS
3. HOUSING FINANCE COMPANY LTD		

BEFORE HON. LADY JUSTICE H. WOLAYO

JUDGMENT

The plaintiff sued the three defendants for cancellation of title, declaration that the plaintiff is the rightful owner of the suit property, specific performance, mesne profits, and any other relief deemed fit by the court. An analysis of the plaint reveals that the suit is founded in contract, to be specific, the plaintiff sued for an intentional breach of contract by the 1st defendant and for fraud.

Particulars of fraud included inter alia, benefiting from the sale agreement without any consideration on his part; refusal to pay rent for staying in the suit premises for eight years after being paid goodwill, and retracting from the sale agreement after payment of the purchase price.

In his defence, the 1st defendant denied the claims and alleged fraud on part of the plaintiff. Namely, that he connived to cause the defendant to execute powers of attorney and an agreement of sale on the same date; entering into agreement of sale with the attorney instead of the 1st defendant; among other particulars. He also averred that the plaintiff colluded with Lubega to effect a sale of his property.

The 2nd defendant, the Registrar of Titles was sued in that capacity. He did not file a defence.

Ms Opwonya & Co. advocates appeared for the plaintiff while the defendants were represented by Ms. Asingwire & Co. advocates.

Five issues were framed for trial.

1. Whether Mr. Lubega acted within the authority of the Power of Attorney (POA) and if not whether the attorney's actions were within the knowledge of the 1st defendant.
2. What was the effect of the revocation of POA?
3. Whether the sale of the suit property was valid.
4. Whether the third defendant had a duty to transfer the suit property into the names of the plaintiff.
5. Whether there were any acts of fraud as pleaded
6. Remedies.

Both counsel filed written submissions that i have carefully considered.

In civil cases, the burden of proof lies on a balance of probabilities. Where fraud is alleged, the burden is slightly higher and under section 101 of the Evidence Act, he who alleges the existence of a fact must prove it.

Summary of the case

It was not disputed that on 9.4.1998, the 1st defendant was given an offer by the Ministry of Lands and Housing, to purchase Plot 9 Ochuloi road, Soroti. Pexh. 1 refers. It is a notorious fact that at the time, a government policy to sell pool houses to the public officers in occupation was under implementation.

It is also not in dispute that the terms of the offer were that the 1st defendant was to pay a deposit of 8% of the purchase price of 13,000,000/ and the balance within twelve months from the date of the offer, i.e, by 8.4.1999.

Upon completion of the purchase price, the 1st defendant was entitled to a certificate of title.

The 1st defendant did not effect transfer of the title nor hand over possession to the plaintiff in accordance with the disputed sale agreement.

1. Whether Mr. Lubega acted within the authority of the Power of Attorney(POA) and if not whether the attorney's actions were within the knowledge of the 1st defendant.

That the 1st defendant gave powers of attorney to Mr. Johnson Lubega is not in dispute. These powers of attorney dated 6th April 1999 and admitted as Dexh. 2 were in respect of the suit property and the donee was authorised to:

1. To take over all the documents of allocation of the above premises and handle all matters relating to the processing of initial payment of the purchase price of the same.
2. To raise money required to pay the Uganda government the 8% reserve price to secure the said premises to be registered in the names of the donor.
3. To negotiate and to enter into an agreement of sale of the said premises on behalf of the donor in accordance with his instructions.
4. After getting the said property registered in the names of the donor, and, through the donor, to effect a transfer of title to any third party.

A plain reading of these powers of attorney reveals that the donee was authorised to raise money, pay the required 8% deposit, enter a sale agreement on behalf of the donor, and after securing the registration of the donor as registered proprietor, effect transfer of the title to the third party.

Counsel for the 1st defendant 's arguments that a sale could not be effected when the donor had not secured registration of the property in his names lacks substance in view of the clear instructions in the power of attorney that the donee would first secure registration in the names of the 1st defendant and then effect transfer. In other words, the donee was authorised to enter into a sale agreement, a perfectly lawful transaction even before the donor was the registered owner because the POA authorised sale before the registration and transfer.

It is a fact that on the 6th April 1999 when the power of attorney was given to Johnson Lubega, the said donee signed a sale agreement with the plaintiff in which the donee agreed on behalf of the 1st defendant to sell plot 9 Ochuloi road to the plaintiff at an agreed price of

20,000,000/ . In the same agreement, the donee received 8,000,000/ as advance and the balance would be paid after the certificate of title is secured. That the sale agreement and the POA were witnessed on 9.4.1999 does not detract from the fact that they were drafted the same day and by the same firm of advocates Emesu & Co.

In the agreement, it was explicitly agreed that once the 1st defendant had secured the certificate of title, he would be paid the balance of 12,000,000/ that would be used to settle the full purchase price after which the 1st defendant would effect transfer and give possession to the plaintiff.

On the first issue, i find that the donee acted within his powers when he raised money through the sale agreement with the plaintiff who paid the donee 8,000,000/ as initial payment on 6th April 1999. Consequently, the 1st defendant as donor had constructive knowledge of the payment.

2. What was the effect of the revocation of POA?

By his own admission in Dexh.1, on 1.12.1999, the 1st defendant authored a letter to the Secretary Uganda Land Commission informing the Commission that he had paid the 8% deposit to Housing Finance Bank and that he requested for another set of lease documents as Mr. Johnson Lubega had picked them on 12.7.1999 but he had not delivered the lease documents to the 1st defendant as promised.

It is not in dispute that by 12.7.1999 when Mr. Lubega collected lease documents for the suit property, , the 1st defendant had not withdrawn the powers of attorney from him.

The alleged revocation is in fact another power of attorney to Odele Dennis and nowhere does it make reference to the power of attorney to Lubega. This second power of attorney is not dated. I can only deduce that it was executed on 23rd February 2000 because that is the day the donee of that POA Odele Dennis acknowledged receipt of the POA.

In a letter to the manager of Housing Finance bank dated 23rd January 2000, the 1st defendant wrote as follows:

‘ i hereby would like to inform you that the POA given to Mr. Johnson Lubega of P.O. Box 482 Soroti in respect of Plot 9 Oculoi road has been withdrawn and revoked by

me. I would like to advise you not to deal with him in any matters concerning me as regards the above mentioned plot.

Please find attached to this letter a copy of a legal document to this effect.'

Therefore, the POA to Mr. Lubega was only withdrawn by implication on 23rd February 2000 and only in as far as Housing Finance Bank was concerned but not the rest of the world because the POA to Odele is conspicuously silent on the POA to Mr. Lubega.

As submitted by counsel for the plaintiff, the latter could not have known that Mr. Lubega no longer had powers of attorney without an express clause in the POA to Odele that Lubega had ceased to have such powers.

Nevertheless, by 23.2.2000, Lubega had entered into a valid contract with the plaintiff for sale of plot 9 Oculoi road and for eventual transfer to the plaintiff. This contract entered into by a duly authorised attorney was valid and enforceable under the law. In his evidence, the plaintiff showed that Lubega made an offer to sale, presented a power of attorney and a sale agreement that were both executed on 6.4.1999 and witnessed on 9.4.1999. The plaintiff performed his part of the contract when he paid 8,000,000/ on the date the sale agreement was executed and 12,000,000/ before 5th October 1999.

Pexhs 5 and 6 show that by 1st September 1999, the plaintiff had paid the full purchase price of 20,000,000/ because that is when he was to enter possession of the property. Mr. Lubega who was still the only person with POA by this time, acknowledged as much in his letter to the plaintiff dated 5.10.1999 (Pexh. 6) in which he assured the plaintiff that he would enter possession by 1st November 1999 and in the meantime, the 1st defendant was to pay rent of 150,000/ to the plaintiff until then.

By 5th October 1999, the plaintiff had paid the full purchase price.

Therefore, by 21st January 2000 when the 1st defendant communicated an alleged revocation of powers of attorney to the manager Housing Finance Bank, the plaintiff had paid full purchase price. This means the purported revocation was of no effect at all.

3. Whether the sale of the suit property was valid.

This issue has been canvassed under issue no.1. Suffice it say that the sale agreement between Lubega and the plaintiff constituted a valid contract under which the plaintiff performed his obligations.

4. Whether the third defendant had a duty to transfer the suit property into the names of the plaintiff.

This issue was overtaken by events when counsel for the 3rd defendant Housing Finance bank raised a preliminary objection that the plaintiff had no cause of action against it and i ruled in favour of the third defendant in which i determined that the third defendant had a duty to transfer the title of the suit property to the 1st defendant.

5. Whether there were any acts of fraud as pleaded

The plaintiff pleaded the following particulars of fraud.

- a) The 1st defendant sought a third party when the offer to purchase the pool house had expired and then retracting after receipt of full purchase price from third party.
- b) Benefiting under a sale agreement yet seeking to nullify it.
- c) The first defendant refusing to pay rent for the premises for eight years when he knows he was paid good will.

On the first part of allegation of fraud under para (a), i agree with counsel for the 1st defendant that the allegation that the 1st defendant offered property for sale when the offer to purchase a pool house had expired is self defeating.

However, the second leg of the particulars has merit, i.e, retracting from a sale agreement after securing the full purchase price for the property.

I am in agreement with counsel for the plaintiff that by purporting to withdraw the POA from Lubega in February 2000 after full purchase price had been paid by the plaintiff to Lubega and therefore by implication to the 1st defendant, the 1st defendant was acting fraudulently with deceit and with intention to frustrate the transfer of the property by Lubega into the names of the plaintiff.

With respect to fraud by benefiting under a sale agreement yet seeking to nullify it. By his own admission in his testimony, the 1st defendant acknowledged that Lubega paid the 8%

deposit and when he inquired after the lease documents, he was told they had disappeared. He also acknowledged executing a POA for Lubega and acknowledged the sale agreement between Lubega and the plaintiff. The 1st defendant also admitted that balance of the purchase price for the pool house was paid into his account but he did not know who paid the money. He also admitted that he went to Housing Finance bank to request for the title but officials were evasive.

Clearly, the payments into the 1st defendant's account in Housing Finance led to his registration as registered owner of the pool house. This means he benefitted from the sale agreement between Lubega and the plaintiff but refuses to honor his part of the bargain.

An honest person would want to refund the money received to mitigate the effects of his repudiation but this never happened.

As rightly submitted by counsel for the plaintiff, fraud has been defined by several authorities to imply some act of dishonesty. In **Zaabwe v Orient Bank Ltd SCCA No. 4 of 2006**, the Supreme Court expounded on the meaning of fraud to include

'anything calculated to deceive, whether it be a single act or combination of circumstances, whether suppression of the truth or the suggestion of what is false, whether it be direct falsehood or innuendo, by speech or by silence, by word of mouth or by look and gesture...'

By seeking to retain property paid for with someone else's money, who honestly believed that the seller intended to sell, the 1st defendant was being dishonest, deceitful and fraudulent.

According to the 1st defendant, the plaintiff was fraudulent when he dealt with Lubega and also colluded with him because Lubega never paid the 1st defendant any money. This argument is self defeating because the 1st defendant in his testimony clearly stated that money was paid into his account and that he sought to secure the title from Housing Finance bank except that he did not know who paid the money. Yet, he admitted that Lubega was acting on his behalf.

I find no merit in the defence raised by the 1st defendant and i find that he acted fraudulently in benefiting from the sale and then retracting from it.

His counsel submitted that a title of a registered owner's registration can only be defeated on grounds of fraud.

The finding of fraud means that although he was rightly registered as the registered owner, this was an essential step before transfer to a third party. As the lessee of the lease on the property, his refusal to effect transfer under the sale agreement with the plaintiff became an act of fraud as soon as he purported to withdraw instructions from Lubega, his attorney who negotiated the sale and on failure to mitigate the breach by refunding the purchase price.

6. Remedies

The plaintiff prayed for special damages. His contention was he would have earned 500,000/ per month from rent for 101 months. Counsel for the plaintiff did not refer to this remedy and neither was it proved so i am entitled to conclude that it was abandoned.

Instead, counsel submitted that the plaintiff was entitled to general damages of 75m/. Although the plaint is silent on this prayer, one of the prayers is any other just and equitable relief.

By intentionally declining to hand over possession and transfer the suit property to the plaintiff, the 1st defendant was not only acting fraudulently but was also in breach of contract.

The plaintiff is entitled to general damages for the breach and fraudulent conduct that has deprived the plaintiff the enjoyment of the suit property for which he paid the full purchase price. Possession should have taken place in October 1999. For approx. 17 years, the plaintiff has been unable to benefit from the 20,000,000/ he paid the 1st defendant.

Nevertheless, in considering an award, i have a duty to consider the circumstances of the 1st defendant who is a retired civil servant. There is no point in ordering an award that cannot be enforced.

I consider a sum of 2, 000,000/ adequate as symbolic general damages for the wrong suffered.

With regard to the prayer for specific performance, this is an equitable remedy that will be given after careful consideration and when no other remedy is adequate. Although the 1st defendant has been in possession for seventeen years since he repudiated the contract, the fact that the repudiation was deliberate and shrouded in deceit is sufficient reason for me to order specific performance. The 1st defendant cannot be permitted to benefit from his deceit.

I therefore make the following orders.

1. The plaintiff is entitled to general damages of 2,000,000/.
2. The plaintiff is entitled to an order of specific performance in the following terms:
 - a) The registrar of titles directed to cancel the 1st defendant as registered owner and substitute the plaintiff as registered owner.
 - b) The 1st defendant directed to hand over vacant possession to the plaintiff within two months from the date of delivery of this judgment failure of which a warrant for vacant possession will issue.
 - c) The certificate of title for plot 9 Oculoi road, Soroti will be handed over to the plaintiff.
3. Costs of the suit to the plaintiff to be paid by the 1st defendant only.

DATED AT SOROTI THIS 11TH DAY OF APRIL 2016.

HON. LADY JUSTICE H. WOLAYO