

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**  
**CIVIL SUIT No. 0022 OF 2016**

5 **CANDIRU ASINA BINNIA ..... PLAINTIFF**

**VERSUS**

10 **CENTENARY RURAL DEVELOPMENT BANK LIMITED ..... DEFENDANT**

**Before: Hon Justice Stephen Mubiru.**

15 **JUDGMENT**

The plaintiff sued the defendant for general and special damages for breach of contract, interest and costs. The plaintiff's claim is that during or around January, 2016, she saw an advertisement in the "Red Pepper Newspaper" of 4th January, 2016, inviting persons interested in the purchase  
20 of land comprised in LRV 3671 Folio 13, Plot No. 10 Abure Road in Koboko Town, Koboko District. It was indicated in that advertisement that the registered owner of the land had mortgaged it to the defendant but had defaulted in his mortgage instalments, prompting the defendant to foreclose, hence the sale. In response to that advertisement, the plaintiff purchased the property by private treaty on 21st April, 2010 at the price of shs. 55,000,000/=

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Pursuant to that purchase, the plaintiff caused a transfer of the title into her name at the cost of shs. 10,000,000/=, took possession of the premises and undertook extensive renovations thereof, where after she let them out to a one Dr. Noah Musa with effect from 1<sup>st</sup> January, 2010. To her surprise, the mortgagor sued the defendant and the auctioneer challenging the foreclosure and  
30 sale of the property to the plaintiff by the defendant. The plaintiff applied for and was granted leave to join that suit as a co-defendant and counterclaimant. The suit was finally decided on 19<sup>th</sup> March, 2015 in favour of the mortgagor. the plaintiff's counterclaim was dismissed with costs and the court directed the plaintiff to return the duplicate certificate of title to the mortgagor. The mortgagor's costs were taxed and allowed at shs. 16,669,000/= and the costs of execution at shs.

8,000,000/= all of which the plaintiff was obliged to pay. The plaintiff not having received any rent from her tenant since June 2010 upon eruption of the dispute over ownership of the property, she having handed over the title deed and vacant possession of the property to the mortgagor, and paid the costs of those proceedings, is aggrieved and by this suit seeks to recover  
5 diverse items of special damages adding up to shs. 324,050,650/=-, general damages of shs. 115,000,000/= costs and interest.

In its defence, the defendant refutes the plaintiff's claim and contends that she is not entitled to any of the reliefs claimed because she fraudulently procured the property the defendant  
10 advertised for sale, resulting in the cancellation of the sale by court. In the alternative, it stated that it has already paid off the costs incurred by the plaintiff of the proceedings by the mortgagor by which the sale was reversed and is willing to refund to the plaintiff the purchase price of shs. 55,000,000/= it had received from the plaintiff in the aborted sale. It prayed that the plaintiff's case be dismissed with costs.

15 At the hearing of the suit, the plaintiff who by the nature of her employment is ordinarily resident in South Sudan, was represented by her nephew and holder of her powers of attorney Mr. Ayile Abdu Hakim, who testified that the defendant Centenary Bank sold land to the plaintiff but the court later decided that the land reverts to the previous owner. There was a sales agreement made  
20 during the year 2010 between the defendant and the plaintiff, in respect of plot 10 Abure Road in Koboko Municipality. He signed that agreement on behalf of the plaintiff as buyer and as a witness to that agreement. the plaintiff bought it at shs. 55,000,000/=-. The plaintiff paid the purchase price in two instalments but paid the agreed price in full.

25 The witness was then called to sign the sales agreement at the defendant's Arua Branch. The bank then wrote to the occupants of the property informing them of the sale. Thereafter the Credit Administrator at that time, Mr. Oketch Gabriel Akol together with an auctioneer, Apollo, went to Koboko and introduced the witness to the occupants. It was a single storied commercial building and he was given the title to the land after it had been transferred into the plaintiff's  
30 name. They took over possession from the 1<sup>st</sup> June 2010 and rented it out to Koboko Medical Centre, a private Clinic owned by Dr. Musa Noah. He was paying us shs. 860,000/= per month.

Soon thereafter they discovered that there were serious problems with the property. They started receiving letters from the former owner addressed to their tenant, Dr. Musa Noah, some of which were asking him to vacate the premises and some asking him to pay rent, others to increase rent. He would forward the letter to the witness as soon as he would receive them and he wondered  
5 what was going on. The plaintiff and the witness complained to the bank in writing. The mortgagor, Mr. Govule Richard, was still occupying five of the rooms of the building and had refused to vacate. The bank reacted by going there and evicting Mr. Govule from the five rooms amidst chaos at the premises.

10 The tenant continued paying rent to the plaintiff up to when court finally ordered the plaintiff to vacate the premises in 2016. This was an order of the High Court in suit between the mortgagor, Mr. Govule Richard and the defendant. The plaintiff was initially not party but somewhere she became a claimant after being misadvised by the lawyers representing the defendant at the time, M/s. Odama and Manzi Co. Advocates. The court decided that the building be given back to Mr.  
15 Govule. The certificate of title was also to be given back to him and the plaintiff was also to pay costs of around shs. 16,000,000/=. They continued to occupy the premises until 17<sup>th</sup> May 2016 when the witness was arrested in Koboko on orders of the High Court for failing to pay the shs. 16,600,000/= as costs. From Koboko he was brought to the High Court in Arua and then to Arua Prison where he spent nine days as a civil debtor.

20 While in prison, he communicated with the plaintiff who struggled hard and raised that money, paid it and the witness was released. She paid all the money but in two instalments to Mr. Govule Richard through the latter's lawyers, M/s Alaka and Company Advocates. She also paid shs. 8,000,000/= as bailiffs costs. After that the witness was released. We handed over the certificate  
25 of tile and we vacated the premises. He handed over both to the mortgagor, Mr. Govule Richard on 6<sup>th</sup> June 2016. Having lost the house, they went to the bank asking for compensation but with no positive response from the defendant, hence the suit. He prayed that the defendant be ordered to compensate them by way of refund of purchase price, shs. 55,000,000/=. the renovations that were undertaken on the property at a cost of shs. 13,481,650/= property taxes paid to the Local  
30 Government Koboko Municipality a total of shs. 900,000/= at shs. 150,000/= per years for six years, the transport costs incurred for the suit from Juba to Arua and from Koboko to Court.

They suffered psychological torture and the plaintiff also lost rent. He also prayed for an award of interest that money because the bank has benefited from it. The claim in total is shs. 200,000,000/= as the amount claimed by Mr. Govule. They have lost business and would need compensation for that.

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Under cross-examination, he admitted that there in the judgment of this court in the case where the mortgagor Mr. Govule sued the defendant, the Court found that the plaintiff was fraudulent in the transaction. She was found to be dishonest in the transaction. The court found that part of the dishonesty was in her having deposited money as part of the purchase price with the  
10 defendant before the sale. As a result, the court had found that there was a fraudulent transfer of the title into the name of the plaintiff. The plaintiff was unable to appeal that decision because she came to know about the judgment after one year had elapsed.

The tenancy agreement between the plaintiff and Musa Noah began on 1<sup>st</sup> June 2010 and ended  
15 in 2015 after the judgment. For all that period the tenant was paying rent to the plaintiff. By the time the plaintiff began the renovations, she had been in possession and use of the premises for two years. Although he admitted that occupancy is bound to cause wear and tear, he contended that renovation should ideally be done on one's house not on another person's house, as it turned out in this case. Although their having to meet costs was as a result of an order of court, it was as  
20 a result of being misadvised by the bank to join the suit as counterclaimant. They had no lawyer and when they went to the bank, they were advised to join the suit and counterclaim, amidst their protestations to Mr. Manzi, the defendant's lawyer that they did not like to incur costs of the proceedings in case Mr. Govule won. Their interest was to save time and so they followed the instructions of Centenary Bank and it that advice which led them into that situation of being  
25 found to have engaged in fraud. They did not in any way act contrary to the advert. They submitted their bid, the bank told them they were successful and asked them to make payments. They did not engage a lawyer and did not seek for independent advice. They at all time dealt with the defendant's loan officer whom they met in Koboko. Although the court found that they did not complied with the advert, but this was on the advice of the bank. The court found that  
30 their having dealt with the bank rather than the auctioneer was dishonest.

P.W.2 Mr. Dudu John Ogentho, practicing as a Court bailiff, t/a Quick Debt Solutions Auctioneers and Court Bailiffs, testified that he received instructions from a one Mr. Govule Richard to execute against a decree against the plaintiff and P.W.1, following a suit in which Mr. Govule Richard had sued the plaintiff and Centenary Bank which was decided in his favour. It is  
5 him who prepared the warrant of arrest in that suit. The warrant of execution was issued by court on 13<sup>th</sup> May, 2016. He executed the decree by way of arrest of P.W.1 who by then was holder of powers of attorney of the plaintiff. He was to recover shs. 16,646,000/= The money was eventually paid by the plaintiff. He and P.W.1 entered into a consent on that day and he was paid shs. 8,000,000/= with P.W.1 acting on behalf of the plaintiff. The consent was entered into after  
10 P.W.1's arrest, who paid shs. 16,000,000/= on execution of the consent. P.W.1 paid the balance later. Although a bailiff's costs are supposed to be taxed by court, his bill of costs was not taxed. His costs were included in that sum. That was the close of the plaintiff's case.

The defendant relied on the testimony of D.W.1, Mr. Ronald Sekidde, its Legal Manager  
15 Banking and litigation, who in his witness statement stated that the defendant's branch at Arua lent shs. 45,000,000/= to a one Mr. Govule Richard from November, 2008 over a period of eighteen months. The borrower mortgaged his property comprised in LRV 3571 Folio 13 Plot 10 Abure Road as security for the loan. When he defaulted, the bank foreclosed and sold the security to the plaintiff in April 2010 at the price of shs. 55,000,000/= The borrower successfully  
20 challenged the sale by suit in which both parties to this suit were the defendants and the plaintiff in addition was a counterclaimant. The court found that the plaintiff and the defendant had fraudulently connived to dispose of the property. The court directed cancellation of the transfer of the plaintiff's registration as proprietor, on account of fraud attributable to the plaintiff, and directed both parties to pay the costs of the suit. The defendant offered to refund the plaintiff'  
25 purchase price which offer the plaintiff has not taken to-date.

Under cross-examination he stated that the plaintiff bought a property from the defendant but the procedures of sale were not done properly. There were faults or flaws in the process of selling the property. The borrower challenged the process of sale and there were findings that the  
30 process was not properly followed and the sale was cancelled. The defendant's officers at the Arua Branch were supposed to request for legal advice. In this case no legal advice was

requested for. All branches are manned by branch Managers and the Branch Manager is supposed to liaise with the recovery unit at the head office before and during a sale of security and the sale is supposed to be approved by the head office. This particular sale was not approved by the head office. The registration was cancelled because of fraud implicating the plaintiff. That  
5 was the close of the defence case.

The parties filed a joint memorandum of scheduling by which the following were agreed as the issues to be decided by court;

1. Whether the plaintiff is entitled to compensation for the sale of land and property  
10 comprised in LRV 3571 Folio 13 Plot 10 Abure Road, Arua by the defendant which was cancelled by the court? If so, how much?
2. What are the remedies available to the parties?

In his final written submissions, counsel for the plaintiff Mr. Samuel Ondoma argued that it is  
15 not disputed that there was a valid contract of sale of the property in issue between the plaintiff and the defendant. The plaintiff relied on misleading information furnished by the defendant to enter into that transaction. Under the agreement of sale, the defendant undertook to indemnify the plaintiff in the event of failure of title. Since the sale was annulled by an order of court, the plaintiff is entitled to the indemnity that was agreed upon. During the entire transaction, the  
20 plaintiff did not obtain independent legal advice and entirely relied on legal advice given by the officers of and lawyers representing the defendant. As a result of reliance on the defendant's misstatements, the plaintiff had incurred losses of funds she spent on purchasing the property, renovating it, the costs of litigation and rental income she would have earned from the property, all of which she is entitled to recover from the defendant. The defendant not having pleaded and  
25 proved fraud on the part of the plaintiff in that transaction, she is entitled to recover. Having pleaded and proved the special damages, the plaintiff is entitled to an award of special damages as claimed. She is also entitled to an award of general damages in light of the inconvenience she has suffered as a result of that annulled sale. She is as well entitled to interest and costs.

30 In his final written submissions, counsel for the defendant Mr. Joseph Luswata argued that it is not a disputed fact that the plaintiff bought the property in issue and that the court subsequently

annulled the sale. The sale having been annulled on account of fraud attributed to both parties to this suit, the plaintiff is not entitled to recovery of the sums claimed. That notwithstanding, the defendant has committed itself and is willing to refund the shs. 55,000,000/= the plaintiff paid as purchase price of the property. The plaintiff not having pleaded reliance on false misstatements of fact by the defendant, could not introduce that argument at the trial since the defendant was denied opportunity to respond to it in its pleadings.

It is common ground between the parties that the sale forming the basis of this dispute was annulled by decision of the High Court on account of fraud in the transaction. In light of the fact that it was annulled by reason of fraud attributable to both parties, this suit may be disposed of on basis of one of the cardinal principles of litigation; *ex turpi causa non oritur actio* (no claim arises from a base cause). I have perused the judgment by which the sale was annulled (exhibit P. Ex. 5) and at pages 28 - 38 where the trial judge analysed the aspect of fraud in the transaction, he found as follows, at page 33 - 36 of the judgement;-

The conflicting evidence of the defence on how the property was sold points to dishonesty in the transaction. D.W.3 (Mr. Ayile Abdu Hakim) as the agent of the counterclaimant participated in this dishonesty.....All details shown in exhibit P.E.2 that is where DW3 would have gone to inquire and conduct the sale. He did not, for the reasons he never told court. He instead went to the bank itself to conduct the purchase / sale....Here the bank evidently showed it was interested in selling to another person. It changed who had to sell to itself, it concealed the place of sale which was 20/4/2010 secret and nobody knew it including the plaintiff. Unfortunately, the counterclaimant herself and the agent participated in this process. For instance, it is Asinah Chandiru who on 20/4/2010 paid money on an account which up to now is not known. It is the agent who on 20/4/2010 went to the bank to execute a secret agreement, not even known to the banker's agent D.W.1 before he was called to sign as his evidence goes. Such conduct depicted dishonesty.....I believe the evidence on record proved fraud against the registered owner as indicated above.....In the present case, evidence showed Asinah Chandiru the registered owner of the land deposited money on an account nobody knows on 20/4/2014, a day before the agreement of sale.....Her agent secretly executed exhibit D15 with the bank instead of D.W.1 as exhibit P.E.2 clearly showed him as agent. I find that LRV 3671 Folio 13 was fraudulently transferred into the names of Asinah Chandiru. I subsequently (sic) order that the same name be cancelled from the land register and the register be reverted to the original position of the plaintiff as the registered proprietor (emphasis added).

It was counsel for the plaintiff's contention in his final submissions that there was no fraud attributed to the plaintiff in the execution of the agreement of sale (D.E.15 at that trial) but rather at the stage of transfer of the title into her name, which transaction was entirely handled by the bank with no involvement of the plaintiff. This argument is not supported by the extract reproduced above. It is clear that both parties to the suit was found complicit in the fraud involving the sale / purchase of the property in issue, leading up to and including its transfer into the plaintiff's name. The further contention that the plaintiff was misled by the defendant is thus of no avail. This ground does not appear to have been directly pleaded or argued. In any event, cancellation of her registration was prompted by the finding that she was an active participant in the fraud, hence the resultant dismissal of her counterclaim.

At common law, a person is not entitled to reap any financial benefit from his or her own wrong. This is because the law recognises that, in the public interest, such acts should be deterred and moreover that it would shock the public conscience if a person could use the courts to enforce a money claim either under a contract or otherwise by reason of his having committed such acts. No person can claim indemnity or reparation for his or her own wilful and culpable unlawful act. Such a person is under legal disability precluding him or her from stating a claim. The maxim *ex turpi causa non oritur actio* was explained by Diplock L.J, in *Hardy v. Motor Insurers' Bureau*, [1964] 2 QB 745, [1964] 2 All ER 742 in the following terms;

The rule of law on which the major premise is based, *ex turpi causa non oritur actio*, is concerned not specifically with the lawfulness of contracts but generally with the enforcement of rights by the courts, whether or not such rights arise under contract. All that the rule means is that the courts will not enforce a right which would otherwise be enforceable if the right arises out of an act committed by the person asserting the right (or by someone who is regarded in law as his successor) which is regarded by the court as sufficiently anti-social to justify the court's refusing to enforce that right. (emphasis added)

Generally, decisions in which the *ex turpi causa* defence has been applied have required the existence of joint illegal conduct by the parties. It precludes damage awards that allow a person to profit from illegal or wrongful conduct or that permit evasion or rebate of a penalty prescribed by the criminal law. If a plaintiff's conduct was in contravention of the law and if this conduct was a factor in producing his or her injury or loss, the plaintiff may well be found guilty of being



the author of his or her own misfortune. Individuals must take responsibility for their actions. *Ex turpi causa*, properly understood, applies to deny recovery where lending the court's assistance to persons involved in serious criminal or dishonest activity would reflect adversely on the administration of justice. The doctrine of *ex turpi causa non oritur actio* is a defence that  
5 invalidates an otherwise valid and enforceable action in order to preserve the integrity of the legal system.

The court has to weigh the gravity of the anti-social act and the extent to which it will be encouraged by enforcing the right sought to be asserted against the social harm which will be  
10 caused if the right is not enforced. The fair balance to be struck between the general interest of society and the interests of the individual, will inevitably vary. For example in *Safeway Stores Ltd and Others v. Twigger and Others*, [2011] 2 All ER 841, [2011] 1 Lloyd's Rep 462, the court was asked whether, when a company had been fined for anti-competitive practices, the company could then recover the penalties from the directors and senior employees involved. It was held  
15 that the undertaking was not entitled to recover the amount of such penalties from its directors or employees who are themselves responsible for the infringement. Longmore L.J, considered the application of the maxim "*ex turpi causa non oritur actio*," saying: "recovery of the penalty likely to be imposed .....is recovery for the consequence of a sentence for the criminal (or quasi-criminal) act of entering into an illegal agreement, whereas recovery of the costs of ....  
20 investigation is recovery for the consequences of making the illegal agreement.....The rationale of the maxim is the need for the criminal courts and the civil courts to speak with a consistent voice. It would be inconsistent for a claimant to be criminally and personally liable (or liable to pay penalties to a regulator such.....but for the same claimant to say to a civil court that he is not personally answerable for that conduct." It followed that the *ex turpi causa* principle did apply to  
25 preclude the claimants from seeking to recover from the defendants either the amount of the eventual penalty or the costs of coping with the regulator's investigation.

From the foregoing, the decision as to whether a claim is tainted with turpitude depends not on whether the person against whom the claim is made will suffer disadvantage, but rather on  
30 whether there is a discernible public interest which will be damaged by the court's sanctioning of the prosecution of the claim. No court will lend its aid to a person who founds his or her cause of

action upon an immoral or an illegal act. If, from the plaintiff's pleadings, evidence or otherwise, the cause of action appears to arise *ex turpi causa*, or is the transgression of a positive law of this country, then the court will find that such a person has no right to be assisted. In such situations, the court does not seek to protect the defendant but decides so only because courts will not lend  
5 their aid to such a plaintiff, for neither party may be rendered assistance where both are equally in fault (*potior est conditio defendentis*).

The question therefore is whether in this case, the plaintiff's claim is founded upon the ground of any immoral act, transgression of a positive law, or upon the ground of her being guilty of  
10 anything which is prohibited by a positive law of this country. In *Mason v. Clarke*, [1955] A.C. 778, it was treated as settled law that a plaintiff having intention to use the subject-matter of an agreement for an unlawful purpose cannot sue upon it. In the instant case, the plaintiff was in the earlier suit found to have used the agreement of purchase (exhibit D.E.15 in that suit), for the unlawful purpose of fraudulently depriving the mortgagor of that property. She would be  
15 precluded from relying on the same agreement, to claim relief against the other party.

In every case based on a transaction relating to property evinced by a written document or instrument, where it appears either by admission on the pleadings, or in the evidence given upon the issues joined upon the pleadings in the case, that the action is connected with an illegal  
20 transaction to which the plaintiff was a party, the question arises whether the plaintiff can or cannot succeed in his or her action without relying upon the illegal transaction. If he or she cannot, the action fails; if he or she can, it prevails. In the instant suit, there is no way the plaintiff can sustain her claim without having to disclose the transaction that this court found in an earlier proceeding to be tainted by fraud, which resulted in the annulment of her title. Her  
25 cause of action originated from that transaction and does not exist independent of it.

The maxim *ex turpi causa non oritur actio* or "fraud unravels all," if plain English is to be preferred, stipulates that the courts will not allow their process to be used by a dishonest person to recover a remedy on basis for a fraudulent transaction gone wrong. A suit cannot be based on  
30 the fallout of an immoral or fraudulent transaction. Harsh as it may seem, the court will not come to the aid of a person found guilty of fraud by a court of law in another suit, to enable that person

recoup his or her perceived loss arising from a fraudulent transaction perpetuated by him or her. Enforcing "rights" arising in situations of that nature that are sought to be asserted in this suit would promote the social harm of fraudulent transactions in the acquisition and sale of land, the very purpose of prevention of which the maxim exists. In the result, the suit is dismissed by reason of being incompetent.

Although under section 27 (2) of *The Civil Procedure Act* costs follow the event unless court orders otherwise, a successful litigant who has been guilty of some sort of misconduct relating to the litigation or the circumstances leading up to the litigation, may be denied costs (see *Anglo-Cyprian Trade Agencies Ltd v. Paphos Wine Industries Ltd*, [1951] 1 All ER 873). The defendant having been found previously in a judgment of this court to have been a perpetrator of the fraud, the defendant is guilty of misconduct relating to the circumstances leading up to the litigation, which conduct is reprehensible or worthy of reproof or rebuke by way of denial of the costs of this litigation. In the final result, the suit is dismissed. Each party is to bear their own costs.

Dated at Arua this 21<sup>st</sup> day of December, 2017

.....  
Stephen Mubiru  
Judge,  
21<sup>st</sup> December, 2017.