

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL SUIT No. 0013 OF 2012

**1. LEO OGUGUA OKOCHA }
2. CYNTHIA NDARU OKOCHA} PLAINTIFFS**

VERSUS

MANIA MARGARET AZA DEFENDANT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The plaintiffs, who are husband and wife, jointly and severally, sued the defendant for general and special damages for breach of contract, interest and costs. The plaintiffs' case is that on 27th March 2012, they jointly executed an agreement with the defendant by which the defendant sold to them land comprised in plot 25 Awudele Crescent, Arua Hill Division in Arua Municipality at the price of shs. 120,000,000/= . At the signing of the agreement, the plaintiffs paid shs. 60,000,000/= leaving a balance of shs. 60,000,000/= which by that agreement they undertook to pay within three months from the date of execution of the agreement. In the event of their failure to pay the balance within the stipulated time, the defendant was to refund the amount advanced in part payment or alternatively if the plaintiffs were still interested in seeing the transaction through, they were to pay a surcharge of 30% on the amount outstanding.

It is further the plaintiffs' case that during or around the month of June 2012, they intimated to the defendant that they had the balance of the agreed purchase price ready for payment but the defendant became evasive. Efforts to cause her receipt of the balance were futile and subsequently in August 2012 the defendant finally informed the plaintiffs she was no longer in position to sell them the plot they had contracted for but instead offered an alternative plot which the plaintiffs were not interested in purchasing. They therefore demanded for a refund of the part payment they had made, which the defendant has since then refused or failed to refund, hence this suit for recovery of the sum paid and other attendant damages and costs.

In her written statement of defence, the defendant attributes failure to conclude the transaction to the plaintiffs. She contends that the balance of the agreed purchase price fell due on 27th June 2012 but the plaintiffs had failed to pay it on due day. They deposited the initial payment directly onto her bank account and ought to have paid the balance in a similar manner. For that reason there was no need to search for her in order for them to pay the balance. It is the plaintiffs who frustrated the contract by demanding that she produces the title deed to the land in her names together with duly executed transfer forms before they could pay the balance yet at the time of signing the agreement of purchase of the plot they were well aware that the land was not yet registered in her names, but was still in the names of the previous owner. It is then that her School Management Committee decided that she offers them plot No. 16 Jerekede Road instead which the plaintiffs rejected. Alternatively, the plaintiffs should pay the agreed 30% surcharge for the default and take the agreed plot 25 Awudele Crescent.

In her testimony, the second plaintiff stated that she is ordinarily resident in the United Kingdom and when contracting with the defendant for the purchase of plot 25 Awudele Crescent, she transacted through her agents in Uganda; Irene Opio a friend of hers, her sister Lilian Ayikoru Adriko, and a one Kafu Nasur a broker introduced to her by her sister. The agreement was prepared in Uganda by the defendant's lawyers and transmitted to the plaintiffs in the United Kingdom from where they signed it and transmitted copies back to the defendant. The part payment was as well effected through the plaintiff's agents and when the balance was due, they remitted it to the same agents who unfortunately were unable to find the defendant in order to effect payment because the defendant had become evasive. In August 2012, the defendant rejected the balance of the purchase price because she said she was unwilling to pay the 20% commission demanded for by brokers. When eventually they engaged a lawyer to follow up the defendant, the defendant produced a different set of title documents to a different piece of land comprised in plot No. 16 Jerekede Road, suggesting that they buy that one instead on grounds that the Board of Governors of a school she owns had stopped her from selling plot 25 Awudele Crescent because it belongs to the school. The plaintiffs rejected that alternative plot and demanded for a refund of the part payment they had made which the defendant has failed to pay.

The defendant testified in her defence that she was approached on 27th March 2012 by a one Irene Opio who said she had a friend called Cynthia who wanted to buy land. Later on Cynthia's sister, Endriaku Lillian, came with a one Kafu Nasur and met the defendant at her office at the school from where she showed them the land titles and documents for plot No. 25 Awudele Crescent. She told them the title was not registered in her name yet but that the land belonged to her. It was still registered in the names of the previous owner, Moses Draza of Ozuu Brothers. She showed them the transfer forms, the discharge form from DFCU Bank as well as the agreement by which she purchased the plot. They took all documents, photocopied them and sent them to Cynthia. They also took photographs of the plot and the building on it which they sent to Cynthia. They gave the defendant's telephone number to Cynthia and she called the defendant. The defendant told her the title was not in her names but she had paid for the land in full. The defendant also told her that if she bought the land they would transfer it directly into the plaintiffs' names. The defendant told her the lease was about to expire but that it was renewable and the defendant would help her to transfer the title directly into her names. The second plaintiff said she would send the money that afternoon. She sent the money through Irene Opio. Irene deposited shs. 60,000,000/= on the Centenary Bank School Account whose details the defendant gave her. Irene Opio, Kafu Nasur and Lillian Endriaku brought her the deposit slip. An agreement of purchase was then prepared and she signed on 27th March 2012 at Heritage Courts Hotel, in Arua.

Later, five people visited the defendant at her office; Irene Opio, Kafu Nasur, Abeka and Aloro. Irene demanded for shs. 5,000,000/= as a loan. The other ones demanded for shs. 20,000,000/= as a commission. The defendant told them it would not be possible because she had already deposited the money with Housing Finance. The defendant had withdrawn the money from Centenary Bank, added another shs. 30,000,000/= and redeemed the loan in Housing Finance Bank which was heavy on the school. The defendant complained to Cynthia about the demands being made by Aloro and the rest since she considered them to be the agents of Cynthia. The defendant asked her to appoint a lawyer so that she can deal with a lawyer instead. That was when counsel Daisy was introduced to her as Cynthia's lawyer. The advocate visited her office and the defendant showed her those documents; the land title, the agreement they had signed, the

one from Draza Moses, etc. The defendant told the advocate there was a delay in the payment of the balance. This was in July 2012 and the three months had elapsed.

Counsel Daisy said the balance would be paid but that she wanted straight papers. She wanted the land title in the defendant's names and the transfer forms. She said if they are not availed she would not proceed with the transaction. The defendant tried to assure her that Cynthia had seen the papers before and was O.K with the transaction but she insisted on what she had said. She did not agree with the defendant and she left the defendant's office. After a few days she sent the defendant a notice of intention to sue. Within the same week the defendant received summons from the police that she had obtained money by false pretence and the land in question was not hers and had been mortgaged to DFCU Bank. The defendant went to the police, made a statement and gave them the documents. The defendant was released on police bond and wrote a complaint to the office of the DPP. The file was called to Kampala. Draza Moses and the L.C.1 were called to the Police in Arua and made statements. The file was taken back to Kampala. The defendant was later summoned to police and told she had no case to answer since the land was hers and she had evidence to prove it. The defendant then received a court summons to file a defence in the suit. She engaged a lawyer for advice. The demand notice required her to refund the money within three days or face court action. She did not have the money.

It is not true that she was not available. She received two emails she sent her, a handwritten letter and also talked to her on phone and I told the second plaintiff she was ready to conclude the transaction. The defendant was informed by Kafu, Aloro, Irene Opio and Rebecca between July and August 2012 that they had received the balance but would not give her the money unless she paid them a sum of shs. 20,000,000/=. In her email, Cynthia had only mentioned having sent the defendant signed documents for her signature and not clean documents as Daisy had demanded. The defendant then suggested giving them an alternative piece of land because Counsel Daisy had rejected the ones she had. The alternative the defendant offered was located only about 500 metres away. It is plot 16 Jerekede Road. It is in Anyafio East Cell, Mvarra Ward, Arua Hill Division, Arua Municipal Council.

D.W.2, Eyokia Jill Dawa, testified that she enrolled as an advocate in May 2012. Before that, she was contacted by an agent called Kafur Nasur to prepare a sale agreement for plot 25 Awudele Street in Arua Municipality. At that time she was working with M/s Alaka and Company Advocates and was acting on behalf of the law firm and both the seller and the buyer. The buyers had agreed with the seller, the defendant, to pay a consideration of shs. 120,000,000/= in completion of the transaction. However at the time of preparation of the agreement, the buyers paid the first instalment of shs. 60,000,000/= to the vendor's account and one of the terms of the agreement was that the balance of the shs. 60,000,000/= was supposed to be paid within three months from the date of the transaction, and in the event that within the three months period that balance was not paid, the balance would then attract an interest of 30%. It was also agreed that if the buyers did not complete the payment the land in question would then revert to the vendor and she would refund the initial deposit. She prepared the agreement and the vendor signed together with the witnesses of the buyer and the agreement was handed over to the agent of the buyers Kafu Nasur to be transmitted to the buyers since they were not based in Uganda. Upon handing the agreement over to the agent until now, she does not know what transpired because she never received any feedback. She herself did not sign the agreement because the transaction was not complete yet and she would only sign after the buyers had perused the agreement, signed it and sent it back. The witnesses signed from the chambers of Alaka and Company Advocates and not at Heritage Courts. It was signed by Kafu Nasur, Adio Irene among others. Both plaintiffs were not present and did not sign on that day. She does not know when the agreement was sent to them after she completed the agreement and handed it over to Kafur Nasur because she never received the documents back. Paragraph 2 (c) of the agreement specifically addresses the reversion of the land to the seller.

D.W.3, Opio Wilfred testified that twice before, Dudu of Alaka and Company Advocates, Aloro, and Kafu met at his compound at Anyafio Senior Quarters on the third occasion. He called two of them to find out what their meeting was about. They told him the seller was not willing to pay their full commission of the sale. Some were threatening action and threatening to take the seller to court for failure to pay them. He decided to call the seller, the defendant, who is a friend and tried to find out whether she knew what was going on and the threatened action. She explained to him everything.

D.W.4, Yassin Ajiga, the then L.C.1 Chairman of the area, testified that one day he was called by Kafu Nasur together with Dudu that they were negotiating to buy the defendant's land in the area. They had assembled at the defendant's place at Ayafio Model School in her office. They said they are buying the plot but were paying half of the money and the balance would be paid later and they presented an agreement written by Alaka Advocates. The price was shs. 120,000,000/= and they paid shs. 60,000,000/= but he did not see the money. After about three months the defendant called him and said Kafu Nasur was proposing to pay the balance of shs. 60,000,000/= but had demanded a commission of shs. 20,000,000/= she said she had rejected that and from there he does not know what happened.

In her final submissions, counsel for the plaintiffs, Ms. Daisy Patience Bandaru argued the plaintiffs had by 27th March 2012 remitted the balance due to Kafu Nasur but the defendant became evasive and as such the transaction could not be concluded. On 2nd August 2012 when she eventually availed herself, she refused to carry the contract through but instead offered an alternative plot thus constituting a breach of contract on her part. She breached the contract on ground of her unwillingness to pay the commission that the brokers were demanding for. In the alternative, even if the plaintiffs had failed to pay the balance within the stipulated time, the remedy under the contract was for the defendant to refund the part payment that had been made. The defendant failed to fulfil this either. In the result, the plaintiffs are entitled to a refund of the part payment they made, general and special damages, and costs.

In response, counsel for the defendant, Mr. Samuel Ondoma submitted that the defendant did not breach the agreement but it was instead breached by the plaintiffs. Under the terms of the contract, the defendant had no obligation to give the plaintiffs clear documents of title in her name in respect of the land sold to them. The plaintiffs should have deposited the balance onto the defendant's account. By the time the defendant offered an alternative piece of land, the time agreed within which payment of the balance was due had already elapsed. The demand for refund of the part payment that had been made within three days was unrealistic and the proposal for the alternative piece of land was an attempt at an amicable settlement.

In their joint scheduling memorandum, the parties agreed on the following issues;

1. Whether the defendant breached the contract of sale of plot No. 25 Awudele Crescent in Arua Municipality.
2. What are the remedies available to either party?

First issue: Whether the defendant breached the contract of sale of plot No. 25 Awudele Crescent in Arua Municipality.

It is common ground between the parties to the suit that on 27th March 2012 they entered into an agreement of sale / purchase of land comprised in plot 25 Awudele Crescent, Arua Hill Division in Arua Municipality at the price of shs. 120,000,000/=. At the signing of the agreement, the plaintiffs paid shs. 60,000,000/= leaving a balance of shs. 60,000,000/= which was to be paid within three months of the signing failure of which the plaintiffs were either to pay a surcharge of 30% on the balance owing or alternatively the defendant would refund the part payment made by the plaintiffs.

According to clause 2 (b) of the agreement, the balance was to be paid within “a period of three months” while clause 2 (c) provides that “after three months from the date of signing this agreement if the balance is not being paid by the purchasers to the vendor, the vendor will refund back the amount paid and claim back her land.” Although clause 2 (b) does not specify the date from which the period of time begins to run, one of the cardinal rules for the interpretation of contracts is that the court must read the contract as a whole, give effect to all provisions therein, and interpret the terms in a common sense manner in the light of the obligation as a whole and the intention of the parties as manifested thereby. Applying that rule, the parties must be deemed to have intended that the three months stipulated in clause 2 (b) began to run from the date of signing the agreement as expressly specified in clause 2 (c). Since the parties did not all sign on the same day, the defendant having signed the agreement on 27th March 2012 (see exhibit P. Ex. 2) and the plaintiffs sometime in April 2012 (see P. Ex. 3 dated 18th April 2012) determination of the date when the balance was due requires first a determination of which, of the two dates, is the operative date for reckoning of the three months’ period.

Normally, the effective date of the contract is either the date the contract states as the effective date, or if no specific effective date is set forth, then the date the last party accepts the terms by

signing is the date of execution. If a contract does not specify its effective date, it goes into effect on the date it was signed by the person to whom the contract was offered for signature (see *Williston on Contracts* § 6:1 (4th ed. 2009-2010)). Since the terms of a contract only become binding when the party offered the contract signs it, the contract is not effective until the last of the parties has signed it. In *Eccles v. Bryant and Pollock* [1948] Ch. 93, it was held that where parties enter into an agreement for the sale of real property “subject to contract,” the contract, in the absence of express agreement to the contrary, is not complete until the parties have exchanged their copies in accordance with ordinary conveyancing practice, and until such exchange is effected either party can withdraw.

Similarly in *Domb and another v. Isoz* [1980] 2 WLR 565, the plaintiffs as purchasers of land sued the defendant for specific performance of a contract of sale and alternatively, damages for breach of contract. The contract in question formed one of a chain of transactions in which the contracts had been signed by the parties and the question was whether the contracts could be binding before they had been exchanged. The Court of Appeal held;

It was argued that exchange is a mere matter of machinery, having in itself no particular importance and no particular significance. So far as significance is concerned, it appears to me that not only is it not right to say of exchange that it has no significance, but it is the crucial and vital fact which brings the contract into existence. As for importance, it is of the greatest importance, and that is why in past ages this procedure came to be recognised by everybody to be the proper procedure and was adopted. When you are dealing with contracts for the sale of land, it is of the greatest importance to the vendor that he should have a document signed by the purchaser, and to the purchaser that he should have a document signed by the vendor. It is of the greatest importance that there should be no dispute whether a contract had or had not been made and that there should be no dispute as to the terms of it. This particular procedure of exchange ensures that none of those difficulties will arise. Each party has got what is a document of title, because directly a contract in writing relating to land is entered into, it is a document of title.

In that case it was decided that the essential characteristic of exchange of contracts is that each party should have such a document signed by the other party in his or her possession or control so that, at his or her own need, he or she can have the document available for his or her own use. Exchange of a written contract for sale is effected as soon as each part of the contract, signed by the vendor or the purchaser as the case may be, is in the actual or constructive possession of the

other party or of his or her advocate. Therefore in the instant transaction, considering the importance of the signature of the plaintiffs as purchasers, the terms of the contract became binding only when exchange took place and thus was on or about 18th April 2012. That being the case, the plaintiffs were under a contractual obligation to pay the balance on or before but in any event not later than 18th July 2012.

According to the defendant, during the month of July 2012, she was approached by counsel for the plaintiffs concerning the documents of title and by that time the three months had elapsed. However D.W.4 testified that after about three months from 27th March 2012, the defendant called him and said Kafu Nasur was proposing to pay the balance of shs. 60,000,000/= but had demanded a commission of shs. 20,000,000/= which she had rejected. During her testimony, the second plaintiff adduced a letter dated 27th June 2012 in which she expressed her frustration at the defendant's failure to meet her agents in Arua in order to receive the balance of the purchase price to back up her claim that she remitted the balance to her agents well within the agreed three months' time. The defendant denied having received that letter which the plaintiff claims to have transmitted by email.

I have reviewed the evidence concerning the claimed futile attempts by the plaintiffs to pay the balance and the defendant's denial that those attempts were made within the stipulated time. I find the evidence of the plaintiffs to be more persuasive than that of the defendant. I find the defendant unreliable as a witness. She claimed to have signed the agreement at Heritage Courts Hotel while DW2 who prepared the document said the defendant signed it from the chambers of M/s Alaka and Company Advocates. Furthermore, she was inconsistent in explaining why she offered the plaintiff an alternative plot. At one point she said it was because the Board of governors of her school as owners of the plot cancelled the sale and in the same breath that it was because counsel for the plaintiffs had rejected the documents of title to the plot as unsatisfactory and further still she told DW4 that it was because she was unwilling to pay the shs. 20,000,000/= commission demanded by Nasur Kafu. I am therefore inclined to believe the more consistent version of the plaintiffs than that of the defendant. I find that it is the defendant who breached the contract and not the plaintiffs.

Second issue: What are the remedies available to either party?

From the outset, since the defendant did not file any counterclaim. She is not entitled to any relief. On the other hand, the plaintiffs seek special damages for breach of contract, interest and costs. When the parties appeared before my learned brother Judge Yassin Nyanzi on 31st October 2012, he entered a judgment on admission against the defendant in the sum of shs. 60,000,000/= with interest at the rate of 6% per annum from that date until payment in full.

As regards the claim for special damages, in paragraph 5 (b) of the plaint, the plaintiffs claimed a sum of shs. 700,000/= as special damages being legal fees incurred in the attempt to enforce the contract through conveyancing before litigation was initiated. A receipt to that effect (exhibit P. Ex. 7 was adduced in evidence. This claim was not only particularly pleaded but has also been specifically proved. It is accordingly awarded.

As regards general damages, it was held in *Johnson v. Agnew [1979] 2 W.L.R. 487*, at p. 499 that in cases where a breach of a contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it is more logical and just rather than tie the plaintiff to the date of the original breach, to assess damages as at the date when (otherwise than by his or her default) the contract is lost. I however take cognisance of the fact that the parties had in their contract agreed on a 30% surcharge on the balance as adequate compensation for a belated payment. Considering that over five years have elapsed since then, factoring in the fall in the value of money over that period but mindful of the plaintiffs' obligation to mitigate their loss, I award the sum of shs. 18,000,000/= as general damages for breach of contract.

All in all, in addition to the sum of shs. 60,000,000/= decreed on 31st October 2012, judgment is hereby entered for the plaintiffs against the defendant for shs. 700,000/= as special damages, shs. 18,000,000/= as general damages and the costs of the suit.

Dated at Arua this 20th day of July 2017.

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Stephen Mubiru
Judge
20th July 2017