

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

CIVIL SUIT NO. 237 OF 2012

**1. NAMANYA GEORGE
2. FRANK KABUNDU..... PLAINTIFFS
V**

MUKALAGI STEPHEN.....DEFENDANT

BEFORE HON. LADY JUSTICE HENRIETTA WOLAYO

JUDGMENT

A. Introduction

1. By a specially endorsed plaint lodged in the Civil Division registry on August 8, 2012, the Plaintiffs sued the Defendants for recovery of 75m/ under a commission agreement signed by both parties on June 20, 2011 witnessed by Kabega Musa, advocate. By the said agreement, the parties agreed that the Plaintiffs would get 50% of the purchase price of land comprised in Block 12 Plot 1 located at Kittuta, Lwabyata, Nakasongola in consideration of their services as brokers who would *follow up and process payment in compensation from Uganda Land Commission for said land*.
2. The Defendant filed a written statement of defence in which he pleaded illegality of the agreement, that 25m already received by Plaintiffs was sufficient and that the Plaintiffs had not done anything to justify the commission. Furthermore, that the Plaintiffs had promised the purchase price would be 500m but instead, they negotiated a price of 200m.
3. In reply, the Plaintiffs denied the plaintiff's averments

B. Background facts

4. On October 30, 2012 a default judgment was entered against the Defendant after he had failed to file an application for leave to appear and defend the suit. Subsequently, the default judgment

was set aside and the Defendant was given leave to file a written statement of defence which he filed on December 28, 2012.

5. Hearing proceeded by witness statements and documentary evidence and on December 5, 2016, hearing commenced and thereafter both Plaintiffs testified. The Defendant called one witness only and the case was reserved for judgment on February 26, 2019. While counsel for the Plaintiffs filed written submissions on March 7, 2019, counsel for the Defendant has never filed his submissions.

C. Agreed issues for trial

- a) Whether the commission agreement is illegal and unenforceable
- b) Whether the Plaintiffs are entitled to the claim of 75m/
- c) Remedies

I am alive to the legal requirement that the Plaintiffs bear the burden of proof and the standard of proof of the evidence is on a balance of probabilities which standard applies to either party who asserts a fact.

D. Issue No. 1: whether the commission agreement is illegal and unenforceable

6. The Cambridge Advanced Learners Dictionary defines '*commission*' it as formally choosing someone to do a special task. This means the Plaintiffs were tasked by the defendant, to '*make follow up and process compensation*'.
7. Mukalagi DW1, in his witness statement adduced evidence that tended to suggest there was duress, intimidation and fraud prior to entering the agreement. In his witness statement, Mukalagi testified that he was introduced to the two Plaintiffs by his neighbour in the village who worked with the Uganda Land Commission (ULC) and the two then took him to ULC where he was introduced to its officials who later gave him some documents to sign. According to Mukalagi, the two Plaintiffs took him to the Land Fund Project lawyers Kabega, Bogezi & Co. Advocates who

made him sign a document that turned out to be the commission agreement.

8. Section 92 (a) of the Evidence Act invalidates a written contract if the person challenging its validity can prove intimidation, fraud, duress among other vitiating factors. From my analysis of the Defendant's evidence, he seems to suggest he was made to sign the commission agreement prior to translation thereby suggesting lack of consent, fraud and duress. However, under Section 16(2) of the **Contract Act 7 of 2010**, where consent is induced by misrepresentation or silence which is deemed fraudulent, this will not vitiate the contract if the affected party had an opportunity to discover the truth through due diligence and he did not.

Proof of fraud

10. The Defendant in his evidence testified that a friend of his who works in the ULC introduced him to the Plaintiffs and that after signing the agreement, the Plaintiffs and himself opened a joint bank account in Bank of Africa where the first payment for the land as deposited whereupon, money was withdrawn and the Plaintiffs took their 50% which translates into 25m. It seems to me that the Defendant willingly paid the 25m and it was before this point that he could have repudiated the commission agreement by declining to withdraw any money from the bank.
- 11 The fact that the Defendant admits he willingly went to ULC after being introduced by a friend and after he realized he would not be able to evict the tenants on his land, and went ahead to open a joint account with Plaintiffs but bearing in mind the higher standard of proof in allegations of fraud, duress and intimidation I find there was no fraud or duress or intimidation orchestrated by the Plaintiffs on the Defendant at the time of entering the agreement, and the agreement represents what the two parties agreed.

Illegality

- 12 Although Counsel for the plaintiff in his submissions addressed me on illegality of contract principally because the Defendant raised

this defence in the written statement of defence, Counsel's focus was on the parole evidence rule and that the Defendant knew the 50% term in the contract as he understands English given that he authored letters to ULC that are attached to the written statement of defence.

13 Sections 26 and 27 of the Contract Act make reference to illegality and the effect of the two sections is that where an illegal promise is made for doing an act, the contract will be void to the extent of the illegality.

14 I take judicial notice that brokers are part of the real estate business and they operate under the general law of contract as is the case with most jurisdictions. In a Canadian case **Ontario (Real Estate and Business Brokers Act, Director) v NRS Mississauga Inco (2003) 6 ITELR 100**, the court discussed provisions of Real Estate and Business Act and held that depositors' funds held by NRS the broker was presumed by law to be held in trust for the depositors but that the fund did not have priority over other creditors after the NRS became insolvent. Worthy of note in this precedent, although of persuasive value only, is that brokers in real estate business offer legitimate services and are entitled to be paid for these services.

Public policy issues

15 While I find that brokers in real property business do legitimate business, the instant case is unique in the sense that it involved public funds which should be accessed directly by the person who needs assistance as for instance the Defendant without any intermediaries. That said, in the absence of a clear procedure for accessing the land fund, it is easy to understand why the Defendant sought help of the Plaintiffs as brokers.

16 I want to state clearly that for the system to leave room for brokers to come in between potential beneficiaries and the land fund falls short of required public service standards in delivery of services. Therefore, the contract in so far as it required the Plaintiffs to *make*

'follow up and process payment in compensation from Uganda Land Commission' is illegal on grounds of public policy as public services are free unless specifically charged under the law.

Unconscionable term

17 A fundamental aspect of this dispute is the 50% commission agreed by the parties. I am mindful that the law of contract was codified in the Contract Act 2010 but the Act did not rule out application of principles of the common law as mandated by Section 14 of the Judicature Act. It is for this reason that I want to discuss the concept of unconscionable terms as grounds for the court to depart from the freedom of contract doctrine. English law on unconscionable terms is governed by **the Unfair Contracts Act 1977 and Unfair Terms in Consumer Regulations (UTCCR) 1999.**

Regulation 5 (1) defines an unfair term as

'A contractual term that has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'

While this definition is not binding on me, it aptly captures the definition of unfair and unconscionable terms in a contract. In Arua **HCMA No. 1 of 2014 arising from Nebbi Chief Magistrate's court Civil Suit No. 51 of 2009 Charles Athembi v Commercial Microfinance Ltd and another**, Justice Stephen Mubiru discussed the concept of unconscionable contractual terms and made reference to **Alec Lobb (Garages) Ltd v Total Oil Ltd [1983] 1 ALL ER 944** where the court in that case observed that to establish a contract is unconscionable, a party had to have used its superior bargaining power to the detriment of the weaker party.

18 The Defendant has demonstrated that he was in a weaker position because he needed to access the land fund so that he can benefit from his land which was occupied by tenants and he approached someone who worked there and who in turn led him to Plaintiffs who were connected to the project officials. Obviously, he was not

in a position to negotiate the 50% because he signed a pre-prepared agreement and he wanted the payment. The Plaintiffs were in a more powerful position since they claimed to be part of the ULC and indeed Kabubu signed the supplier EFT payment details form as a civil servant. This is a case of well-connected parties taking advantage of this desperate Defendant to extract half the value of his land as commission a bargain that is irreconcilable with what is right and reasonable as opined by Justice Mubiru in the Athembi case (**supra**).

19 Although counsel for the Plaintiff did not address me on this concept and neither did counsel for the Defendant who did not file written submissions, I find that no reasonable owner of land would accept to split payment due from a purchase of land in equal proportions with a land broker and therefore the agreement as it relates to 50% commission cannot be enforced for being unreasonable and unconscionable.

20 Issue No. 1 is answered in favour of the Defendant in the following terms:

- a) the commission agreement is illegal on public policy grounds to the extent it monetized access to the land fund, a government project whereas public services are free except where charges are specifically imposed by law;
- b) The 50% commission is unconscionable as no reasonable land owner would accept such a term.

E. Summary of findings

- a) For the reasons that there was no fraud or duress or intimidation orchestrated by the Plaintiffs on the Defendant at the time of entering the agreement, the said agreement represents what the two parties agreed.

- b) A system that leaves room for brokers to come in between potential beneficiaries and the Land Fund falls short of required public service standards in delivery of services.
- c) The commission agreement is illegal on public policy grounds to the extent it monetized access to the land fund, a government project whereas public services are free except where charges are specifically imposed by law.
- d) No reasonable owner of land would accept to split payment due from a purchase of land in equal proportions with a land broker and therefore the agreement as it relates to 50% commission cannot be enforced for being unreasonable and unconscionable.

F. Remedies

20. Having found that the contract is illegal in as far as it required the Plaintiffs to make follow up and process payment from Uganda Land Commission, a public body whose services are free unless charges are imposed by law, it follows that the Plaintiffs suit ought to be dismissed.

G. Orders

- a) The Plaintiffs suit is dismissed.
- b) The Plaintiffs shall pay the respondent costs of the suit.
- c) 25m deposited into court by the Defendant by order dated September 12, 2012 shall be returned to the Defendant.

DATED AT KAMPALA THIS 28TH DAY OF FEBRUARY 2020

HON. LADY JUSTICE HENRIETTA WOLAYO

Legal representation

Kabega, Bogezi & Bukenya Advocates for the Plaintiffs
Kaganzi & Co. advocates for the Defendants