

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASINDI
CIVIL SUIT NO.35 OF 2021

SIRAJ BYARUHANGA ::: PLAINTIFF

VERSUS

**KATUSHABE DIANAH ::: DEFENDANT/COUNTER
(Suing through her lawful Attorney CLAIMANT
Mugenyi Nabboth)**

AND

- 1. SIRAJ BYARUHANGA**
- 2. ASIIMWE RASHID**
- 3. COMMISSIONER LAND REGISTRATION ::::COUNTER DEFENDANTS**

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

- [1] The plaintiff brought this action against the defendant for enforcement of his right to own property guaranteed under Article 26 of the Constitution of the Republic of Uganda, 1995 (as amended) and seeking for the following;
- a) A declaration that the plaintiff is the registered proprietor of land comprised in **FRV HQT 191 Folio 14, Bugahya (Road) 17, plot 760 land at Busisi measuring approximately 0.1600 Hectares.**
 - b) A declaration that the actions and activities of the defendant of forcefully entering onto the suit land, attempting to take possession or placing there objects without the prior permission of the plaintiff and or any claim of right, trying to alienate, deal in and carry out activities adverse to the plaintiff's interest and possession amount to trespass on the suit land.
 - c) A permanent injunction restraining the defendant, her agents, servants or anybody deriving interest from her or acting under

her authority from trespassing, disposing, alienating or in any other way interrupting or interfering with the plaintiff's ownership, use, enjoyment of and quiet possession of the suit land.

d) An order for general damages and costs of the suit.

- [2] The plaintiff's case is that he is the registered proprietor of land comprised in **FRV HQT 191 Folio 14, Bugahya Block (Road) 17, plot 760 at Bulisi measuring approximately 0.1600 Hectares** which on 11/10/2020 he purchased from the then registered proprietor a one **Asiimwe Rashid** at a valuable consideration of **Ugx 150,000,000/=**. That upon payment obtained of the purchase price, the plaintiff obtained vacant possession and took actual /physical possession of the suit land thereof.
- [3] That on the 11/11/2020, the plaintiff's enjoyment of quiet possession of the suit land was interrupted by the defendant's lawful Attorney a one **Mugenyi Naboth** who without the consent/permission of the plaintiff entered on the suit land claiming ownership and as such trying to place materials and objects thereon without any color of right, illegally lodged a caveat on the suit land claiming that he had purchased the suit land for his sister **Katushabe Dianah**, the defendant.
- [4] The plaintiff avers and contends that the defendant's continuous entry onto the suit land without the plaintiff's permission is unlawful and amounts to trespass and therefore in contravention of his exclusive right to the suit land.
- [5] Lastly, the plaintiff avers and contends that as a result of the defendant's actions he has been greatly inconvenienced, suffered embarrassment and harassment at the hands of the defendant and her agents who deprive him of the quiet enjoyment of the suit land, psychological torture and mental anguish for which he prays for general damages.
- [6] The defendant on the other hand, denied the plaintiff's allegations and contended that she is the rightful owner of the suit property which she lawfully purchased from **Asiimwe Rashid** at an agreed upon consideration of **Ugx 100,000,000/=** payable in 2 instalments of **Ugx 50,000,000/=** which she paid cash and the other **Ugx 50,000,000/=**

paid through the bank by the defendant's takeover of the vendor **Asiimwe Rashid's** loan in **Hokofam Ltd** where the vendor had mortgaged the property/suit land.

- [7] That on the 27/2/2020, the vendor **Asiimwe Rashid** executed a sale agreement for the suit property with the defendant's brother and lawful Attorney **Mugenyi Naboth** stipulating that the defendant had paid **Ugx 80,000,000/=** comprising of **Ugx 50,000,000/=**, the vendor's loan due to **Hokofan Ltd** which the defendant had taken over and **Ugx 30,000,000/=** as cash received by the vendor.
- [8] That the defendant later advanced **Ugx 10,000,000/=** by cheque to the vendor **Asiimwe Rashid** and around April 2020, the defendant through her brother and Attorney **Mugenyi Naboth** paid the vendor **Asiimwe Rashid** the remainder of **Ugx 10,000,000/=** in two equal instalments of which the vendor acknowledged receipt of the same.
- [9] The defendant as well habitually paid the monthly instalment of **UGX 3,700,000/=** to **Hofokam Ltd** in fulfilment of her obligation of repayment of the vendor's loan she had taken over. She took over possession of the suit property which was in a dilapidated state, renovated it into a tenable state and subsequently in June 2020, placed therein a tenant.
- [10] That however, sometime in 2020, the vendor **Asiimwe Rashid** engaged the defendant with a proposal that the defendant sells the property to a certain Hajji but when the defendant declined the proposal, the vendor **Asiimwe Rashid** transferred the title to his brother, the plaintiff in this matter and they ordered **Hofokam** to reject and stop receiving the monthly instalments from the defendant to which **Hofokam Ltd** complied and duly communicated to the defendant.
- [11] The defendant on receiving information about the fraudulent transfer of title from the vendor **Asiimwe Rashid** to the plaintiff's names, lodged a caveat on the said land upon which the plaintiff instituted the current suit seeking from court to regain the suit property from the defendant.
- [12] The defendant filed a counter claim against the plaintiff as the 1st counter defendant and the vendor **Rashid Asiimwe** and the

Commissioner Land Registration as the 2nd and 3rd counter defendants respectively for recovery of the suit land, general damages for breach of contract of sale of land dated 27/2/2020 between the counter claimant/defendant and the 2nd counter defendant, a declaration that the transfer and registration of the suit land from the 2nd counter defendant's names into the 1st counter defendant's names by the 3rd counter defendant is null and void, an order against the 3rd counter defendant for cancellation of the certificate of title for the suit land registered in the names of the 1st counter defendant and an order that the counter claimant be registered as the true and lawful proprietor of the suit land/property.

- [13] In his written statement of Defence, the vendor **Asiimwe Rashid**/2nd counter defendant admitted that on 27/2/2020 he executed a sale agreement of the suit property with the counter claimant who was represented by a one **Bob Rukundo and Mugenyi Naboth** , her lawful Attorney at an agreed consideration of **Ugx 100,000,000/=**.
- [14] He also admitted that the duplicate Certificate of title to the suit land/property was held by and in custody of **Hofokam Ltd**, a financial institution over the loan which the counter claimant took over and as a result, the sale agreement captured the loan figure of **Ugx 50,000,000/=** and **Ugx 30,000,000/=** paid and received by the vendor as part of the suit land price leaving a balance of **Ugx 20,000,000/=** payable within a period of 4 months.
- [15] The vendor **Rashid Asiimwe**/the 2nd Counter defendant further admitted that by the month of April, 2020, the counter claimant had paid up on the balance of **Ugx 20,000,000/=** as had been agreed upon under the suit land agreement as the 2nd instalment payment.
- [16] That however, by the end of the month of **August 2020**, the counter claimant had defaulted on her loan repayment obligation with **Hofokam Ltd** and in the month of **July 2020**, **Hofokam Ltd** had issued a demand notice for a sum of **Ugx 11,310,000/=**, threatening to recall the loan and realise the security (suit land), and as a result, as a way of avoiding to have a bad credit reference status, **Rashid Asiimwe**/2nd Counter defendant sold the suit property to **Siraji Byaruhanga**, the plaintiff/counter defendant for a sum of **Ugx 150,000,000/=**.

[17] Upon the payment of the loan with **Hofokam**, the 2nd counter defendant obtained the duplicate certificate of title to the suit land from **Hofakam Ltd** and handed over the same to the plaintiff/1st counter defendant who subsequently got registered on the title of the suit land in 2021.

[18] The 2nd defendant averred that he refunded all the monies paid by the counter claimant amounting to **Ugx 50,0000,000/=** through the counter claimant's agents **Bob Rukundo** and **Mugenyi Nabboth** in respect of the purchase of the suit land and that the 2nd defendant is therefore not in any way indebted to the counter claimant and therefore, the counter claimant has no interest in the suit land, he has no caveatable interest on the same, and that the caveat as lodged should be vacated and or removed.

Counsel Legal representation

[19] The plaintiff/1st counter defendant was represented by **Counsel Kinali** upon **Mr. Kasangaki** opting out as a result of his being found to have had a conflict of interest in the matter while **Counsel Magere Hilary** represented the defendant/counter claimant. **Ms. Nabirye Gertrude** represented the 2nd counter defendant.

[20] The parties were directed and given timelines to file final submissions for consideration by this court. Whereas counsel for the defendant/counter claimant filed the submissions, neither the plaintiff/1st counter defendant nor the 2nd counter defendant filed their respective submissions. This court has therefore proceeded to determine this suit by writing the judgment without the input of **Counsel Kinali** and **Nabirye** in form of final submissions.

Issues for determination

- [21]
1. Who is the rightful owner of the suit property.
 2. Whether the 2nd counter defendant breached the sale agreement with the counter claimant.
 3. Whether the 1st and 2nd counter defendants acted fraudulently in dealing with the suit land.
 4. What remedies are available to the parties.

Issue No.1: Who is the rightful owner of the suit property.

[22] Counsel for the defendant/counter claimant submitted that the counter claimant adduced evidence of the copy of the land sale agreement (**D.Exh.3**), acknowledgment of receipt of the purchase price (**D.Exh.4**) and transfer forms (**D.Exh.5**) signed by the vendor, the 2nd counter defendant in favour of the defendant/counter claimant.

[23] Upon perusal of the pleadings of all the parties and their evidence as adduced in court in court, I find the following as undisputed facts:

(i) Both the plaintiff/1st counter defendant and the Defendant/counter claimant derive their interest from the vendor **Rashid Asimwe**, the 2nd Counter defendant, the initial registered owner of the suit land that comprised of a house, the suit property. The vendor **Rashid Asimwe**, the 2nd counter defendant first sold the suit land to the defendant/counter claimant as per the sale agreement dated 27/2/2020 (**D.Exh.3**) at an agreed consideration of **Ugx 100,000,000/=**. The defendant/counter claimant paid the full consideration as evidenced below:

a) The suit property had been mortgaged by the vendor **Rashid Asimwe**, the 2nd counter defendant to **Hofokam Ltd**, a financial institution that held and had custody of the suit land certificate of title over a loan that had been advanced to the vendor, the 2nd counter defendant. The parties to the sale of the suit property agreed that the defendant/counter claimant takes over the loan, then worth **Ugx 50,000,000/=** by way of servicing it via the vendor's **Hofokam Ltd Account No.103102002518**. As a result, the sale agreement (**D.Exh.3**) captured the loan figure of the **Ugx 50,000,000/=** and **Ugx 30,000,000/=** paid cash and received by the vendor (**D.Exh.4**) as part payment of the suit land price leaving a balance of **Ugx 20,000,000/=** payable within a period of 4 months.

b) By the month of April 2020, the defendant/counter claimant had paid up on the balance of **Ugx 20,000,000/=** as had been agreed upon. By his pleadings, the vendor, the 2nd counter defendant under **paragraph 5(a) of the 2nd defendant's W.S.D** stated as follows;

“That by the month of April 2020, the counter claimant had paid up on the **Ugx 20,000,000/=** as had been agreed upon as

the 2nd instalment payment under the suit land sale agreement.”
The 2nd counter defendant admitted in the same terms in his witness statement on record dated 17/12/2021.

c)As per paragraph 13 of the 2nd counter defendant’s witness statement upon the defendant/counter claimant’s payment of the full purchase price, the 2nd counter defendant (vendor) was to surrender the duplicate certificate of title (in custody of Hofokam Ltd) and sign transfer forms to effect a change in proprietorship into her name. Indeed the transfer forms were duly signed in favour of the defendant/counter claimant **(D.Exh. 5)**.

d) A one **Mugenyi Naboth** (DW1) was the formerly recognized Attorney of the Defendant/counter claimant who transacted suit property on behalf of the defendant/counter claimant as evidenced by the power of Attorney **(D.Exh.1)** and his endorsement on the sale Agreement **(D.Exh.3)** of the suit property for and on behalf of the defendant/counter claimant.

e)The Plaintiff/1st counter defendant purchased the suit land/property second in time from the Defendant/counter claimant as per the purchase agreement on record dated 11/10/2020 between him and the vendor **Rashid Asimwe**/the 2nd counter defendant **(P.Exh.2)**. Thereafter, he got himself the registered proprietor of the same **(P.Exh.1)**.

[24] The vendor **Rashid Asimwe**/the 2nd counter defendant justified his sale of the suit property to the Plaintiff/1st counter defendant on the grounds that the Defendant/counter claimant failed to regularly service the loan she took over in **Hofokam Ltd** and retrieve the certificate of title. **Hofokam Ltd** had demanded for the loan arrears and threatened to recall the loan, sell the suit property, a fact he considered detrimental to his name by having a “bad credit reference status.”

[25] The Plaintiff/1st counter defendant on the other hand claimed to had done due diligence before purchasing the suit property and that at the time he purchased it and got registered as proprietor thereof, he was unaware of the previous dealings and undertakings between **Asimwe Rashid** and the Defendant/counter claimant.

Plaintiff/1st counter defendant's due diligence

- [26] It is now trite that the value of land as valuable property calls for thorough investigations before purchase. Call it due diligence. The buyer who fails to carry out due diligence and buys from fraudsters gets no legal title; **Naome Auma & Anor Vs Nantume Ruth & Anor, H.C.C.S No.363 of 2010 [2020] UGHCD1.**
- [27] Due diligence involves visit to the land, inquiries from the local authorities and neighbours about the ownership authenticity, history of the land, boundaries, family consents where they are necessary and for any other encumbrances, last but not least, conduct a search in the Ministry of lands registries. In the instant case, the burden lay on the plaintiff/counter defendant to prove that he did the desired due diligence before purchase of the suit property; **Ss 101 and 102 of the Evidence Act. See also Hannigton Njuki Vs G.W Musisi [1999] KALR 794.** Other than mere claiming that he did due diligence and searched the land registry, the plaintiff does not explain exactly what kind of due diligence he conducted on the ground to ascertain and satisfy himself that the suit property had no encumbrances.
- [28] Though the Plaintiff/1st counter defendant claims that upon payment of the purchase price for the property he obtained vacant possession and took actual/physical possession of the suit land and enclosed it to secure it from strangers and intruders, I am unable to agree with him because his brother **Asiimwe Rashid** who sold him the property, during cross examination in court, conceded that **Katushabe** the defendant/counter claimant was in possession of the suit property upon purchase and she had placed therein a one **Hon. Natumanya Florence** as a tenant. **Baguma John** who had renovated the house on instructions of the defendant/counter claimant had locked the house and handed over the keys to **Hon. Natumanya.** The Plaintiff and 2nd Counter defendant group broke into and placed therein other people, they evicted the Defendant/counter claimant's tenant.
- [29] The vendor/2nd counter defendant having conceded that the defendant/counter claimant had placed a tenant in the house, it follows that the 2nd purchaser in time of the suit property cannot claim to had purchased the suit property without knowledge of the tenant therein as

an encumbrance; **Uganda Posts & Tel. Vs Abraham Katumba [1997] IV KALR 103** it was held that,

“as the law now stands a person who purchases an estate which he knows to be in occupation and use of another person other than the vendors without carrying out the due inquiries from the person in occupation and use commits fraud.”

In the premises, I find the Plaintiff/1st Counter defendant **Siraji Byaruhanga** never purchased the suit land as a bonafide purchaser for value without notice of knowledge of the 3rd party interest/earlier claimants.

[30] In the instant case, I find that the Plaintiff/1st Counter defendant conducted what I may call a perfunctory search of the title to land before the alleged purchase but did not carry out the physical inspection of the land. The vendor **Rashid Asiimwe**/the 2nd Counter defendant on the other hand is a self-claimed/confessed fraudster who admits that he had wholly sold the suit property to the Defendant/Counter claimant but later took it upon himself to purport to retrieve the title or rescue the property from the **Hofokam Ltd** by servicing the loan the purchaser had taken over. Rashid Asiimwe did this to purposely defraud the purchaser. Both Plaintiff/1st Counter defendant and the 2nd Counter defendant colluded to defraud the Defendant/Counter claimant.

[31] In **Bunny Industries Ltd Vs F.S.W Enterprises Pty Ltd &Anor [1982] QSCFC 64**, (In the Supreme Court of Queensland) Connly J. held that:

a) Where there is a clear and undisputed contract, the court will not permit the vendor to transfer the legal estate to a third person and the reason for this as being because in equity the property was transferred to the purchaser.

b) It must therefore be considered to be established that the vendor is a constructive trustee for the purchaser of the estate from the moment the contract is entered into.

See also **Lysaght Vs Edwards (1876) 2 Ch.D 499 at 506** and **William Kasozi Vs DFCU H.C.C.S No. 1326 of 2000**.

[32] In this suit, the Defendant/Counter claimant is found to had lawfully purchased the suit land/property at an agreed consideration of **Ugx 100,000,000/=** and the Plaintiff/Counter defendant is found to have purchased the suit property in bad faith, in collusion with the 2nd

Counter defendant to defraud the Defendant/counter claimant. The foregoing resolves both the 1st and 3rd issues in the affirmative, that is, in favour of the Defendant/counter claimant.

[33] The Defendant/counter claimant is the rightful owner of the suit property. The 1st and 2nd counter defendants acted fraudulently in dealing with the suit land and the 1st Counter defendant therefore cannot be protected by the provisions of **Ss.176 & 181 RTA** for his title had lost its indefeasibility; **David Sejjaka Nalima Vs Rebecca Musoke, S.C.C.A No.12/85[1992] V KALR at 22.**

Issue No.2 Whether the 2nd defendant breached the sale agreement with the counter claimant.

[34] In this case, I find that the land Sale Agreement (**D.Exh.3**) was between the Counter claimant as purchaser and the 2nd Counter defendant as vendor. Under the terms of that agreement, the vendor (2nd Counter defendant) agreed to sell and transfer ownership of the suit property with the house thereon to the purchaser (Counter claimant) for a consideration of **Ugx 100,000,000/=**. Upon completion of the payment of the consideration, the vendor (2nd Counter defendant) lost and therefore had no interest at all in the suit property to transact or pass to any other party. The terms of the agreement had nothing to do with the burden the purchaser (Counter claimant) had regarding the securing of the loan in **Hofokam**. It was in her best interests to service the loan she had taken over and retrieve the security i.e, certificate of title and the suit property itself. It was never the responsibility of the vendor **Asimwe Rashid**/2nd Counter defendant to retrieve the title. The vendor had surrendered all his rights and obligations as regards the **Hofokam** loan from the time he accepted that the Defendant/Counter claimant take over the Hofokam loan.

[35] The 2nd counter defendant washed off his hands upon receipt of the full consideration of the suit property and therefore could not be seen to interfere in the counter claimant's management of the **Hofokam** loan by purporting to redeem the property for his own benefit. Having redeemed it, he would still in law be required to hold the security as a trustee and for the eventual benefit of the purchaser by virtue of the doctrine "fiduciary relationship" and "the right to trace"-**Snell (27th**

edition) quoted in **Bunny Industries Ltd Vs F.S.W Enterprises pty Ltd and Anor (supra)** at **p.289** states;

“The right to trace is founded upon the existence of a beneficial owner with an equitable proprietary interest in property in the hands of a trustee or other fiduciary agent.”

[36] The sale agreement (**D.Exh.3**) entered between by the 2nd Counter defendant and the Counter claimant was valid as between the parties. It had no reference whatsoever as to the loan obligations in the **Hofokam Ltd**. It therefore follows that the 2nd Counter defendant sale of the suit property to the Plaintiff/1st counter defendant already sold to the Defendant/counter claimant amounted to a breach of contract on the part of the 2nd Counter defendant. The 2nd Counter defendant vendor had parted with the suit property and therefore had no interest at all in the suit property to sell to the Plaintiff/1st counter defendant. If sold, the Defendant/counter claimant would in law trace it from the plaintiff/1st counter defendant. The 2nd issue is in the premises found in the affirmative.

Issue No. 4: What remedies are available to the parties.

[37] The Defendant/counter claimant is found to be the rightful owner of the suit property and therefore, as against the Counter defendants is entitled to the following declarations;

- a) Recovery of the suit land comprised in **FRV HQT 191 Folio 14, Bugahya Block (Road) 17, plot 760 at Busisi** registered in the names of the Plaintiff/1st counter defendant, its transfer and registration from the 2nd Counter defendant's names into the 1st Counter defendant's names by the 3rd Counter defendant being null and void.
- b) An order against the 3rd Counter defendant for cancellation of the certificate of title of land comprised in **FRV HQT 191 Folio 14, Bugahya Block (Road) 17, plot 760 at Busisi** registered in the names of **Siraji Byaruhanga**, the 1st Counter defendant and the Counter claimant **Katushabe Dianah** be registered as the true and lawful proprietor.
- c) General damages of **Ugx 45,000,000/=** arising from breach of contract of sale of land by the 2nd Counter defendant with the Counter claimant considering also the economic inconvenience the Counter claimant has been put through for she had purchased

the property using hard earned money while in the United Kingdom, embarrassment with the authorities while pursuing the Plaintiff/1st counter defendant and 2nd Counter defendant, mental distress and loss of use of property by way of rental.

d) The general damages to attract interest at court rate p.a from the date of the judgment until full payment.

e) **Costs as against the Plaintiff/1st counter defendant and 2nd Counter defendant** in favour of the Defendant/counter claimant.

In conclusion, the plaintiff/1st counter defendant's suit is dismissed and judgment is given in favour of the Defendant/Counter claimant with the above referred to terms.

Signed, dated and delivered at Masindi this 16th day of **September, 2022.**

Byaruhanga Jesse Ruyema
JUDGE.