

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
CIVIL SUIT NO. 393 OF 2008**

PEREZI KALAMUZI.....PLAINTIFF

VERSUS

SENTONGO GABRIEL..... DEFENDANT

**JUDGEMENT
BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA**

The plaintiff sued for a declaration and order of specific performance of a contract of sale of land he made with the defendant and in the alternative, a claim of a refund of a sum of Shs.55,000,000 representing payments made towards the contract, compensation of property that was allegedly destroyed by the defendant, interest and costs of the suit.

The brief facts of the case are that defendant agreed and did sale land measuring 80 acres comprised in Block 107 Plot 26 at Maddu Mpigi District (hereinafter called the suit land) to the plaintiff for a sum of Shs.24,000,000 and the agreement was on 23/8/07 reduced into writing. At the time of the sale, the land was not yet registered in the defendant's names but he did procure registration eventually. The plaintiff claims to have paid the 1st installment of Shs.17,500,000 and it was agreed that the balance of Shs. 6,500,000 would be paid upon the defendant producing a certificate of title and execution of the transfer forms. That the plaintiff took up possession of the suit land and put up some developments and crops but was prevented by the defendant from making a survey to enable him take over possession of the portion he had purchased. That the defendant in addition failed on request to hand over the title and signed transfer forms in order to conclude the transaction.

The defendant denied the claims and stated that he agreed to sale the suit land to the plaintiff under the mistaken belief that the portion available for sale measured 80 acres which was the acreage subject of sale in the sale agreement. He further stated that after signing the agreement, he became aware that the land available for sale was only 75 acres because the acreage on the ground did not match the acreage appearing on the certificate of title and that an adjacent plot encroached into the suit land. He in addition contended that the plaintiff was at the time of making the agreement aware that the defendant himself and other people occupied part of the

suit land, which portion was not available for sale. He prayed for dismissal of the suit but was prepared to make a refund of that part of the purchase price that had been paid to him.

Issues:-

1. Whether the sale agreement between the plaintiff and the defendant is valid/ binding.
2. Whether the defendant or plaintiff breached the terms of the agreement.
3. What remedies are available to the parties.

As part of his submissions, counsel for the defendant submitted that the agreement which is the basis of the trial, is illegal and does not in any way confer rights upon the plaintiff as it expressly offends the mandatory and statutory requirements contained in **Section 3 of the Illiterates Protection Act Cap 78**. In their view, it was never in contention that the defendant is and was an illiterate person who does not know how to read or write and is therefore fully protected by that law. Counsel cited various cases including **Mukiibi Joseph Vs Elite Technologies International Ltd HCCS No.227 of 2010** and **Tikens Francis & Anor Vs the Electoral Commission & 2 Others Election Petition No.1 of 2012** and **Kasala Growers Co-operative Society Vs Kakooza & Anor SCCA 19/20/10** the latter in which the Supreme Court held that the contents of a contract shall not be binding on an illiterate, when it is not shown on the document (by a certificate) that the contents were read to them and they understood them. He argued that this is a legal issue that overrides all other questions in pleadings including admissions and should be determined by the court at the outset. Not much was said in reply to this objection save for the plaintiff's submissions in their rejoinder that the evidence available is that the agreement was clearly read and explained to both parties by the Advocates who prepared it.

Ordinarily, under 0.6 Rule 28 points of law ought to be raised in the pleadings and can be disposed of before or at the commencement of a suit. See for example, **AG Vs Major General Tinyenfunza Sc. Constitutional Appeal No.1 of 1987**. In fact, this objection was never raised in the defence, but from their submission, counsel wishes this court to treat it as an illegality and therefore determinable at any stage of the proceedings.

A similar situation was handled by Justice Geoffrey Kiryabwire in the case of **Agro Value Processors Impex (U) Ltd Vs. Uganda Railways Corporation HCCS 251 of 2005** where an objection in the form of a point of law that was raised by counsel for the defendant after the commencement of the trial (during the plaintiff's case) and again during the submissions. The Learned Justice observed that;

“In this particular case the point of law sought to be relied on was not pleaded by the defendants who instead filed a comprehensive defence to the case and allowed the matter to go to trial. In such a situation, Order 6 rule 29 of the CPR gives the Court several options of actions including ‘... to make such orders in the suit as may be just...’ I find that the trial having progressed as it did, this objection was an afterthought which should have been brought at the earliest opportunity which it was not. The just thing to do in these circumstances therefore is to overrule the objection...”

I have noted that it was during his examination in chief that the defendant first revealed that he does not understand English. This was in response to a query made by his lawyer Lugalambi to that effect. It is therefore strange that that fact was not one of the grounds of the defence or a matter raised at the commencement of the suit. That evidence was supported by PW2 who testified that PW1 does not know how to read and write and she has never seen him do so. Even so, on further questioning the defendant acknowledged having signed the agreement and testified that the lawyer who wrote the agreement explained to both him and the plaintiff and defendant the contents of the agreement and between the two parties they knew what they were doing.

Contrary to the defendant's evidence, I noticed that he was clear on many aspects of the agreement which were in English. For example, he was able to point out the acreage as being 75 acres. Also, when queried by either counsel, he explained what he understood by what was included in clauses 1 and 6.1 of the agreement. Thus he did not strike me as an illiterate or at least as someone who did not understand what he was signing. On that evidence alone, I am not convinced that the defendant was an illiterate, and if he was so, the contents of the agreement were read to him and he understood them before he signed. Accordingly the objection raised by the defendant was an afterthought and is rejected by this court. I shall therefore proceed to resolve the issues as raised.

Issue one

Whether the sale agreement between the plaintiff and the defendant is valid/ binding?

In the case of **Osuman Vs. Hajji Haruna Mulangwa SCCA No. 38 of 1995** that was cited by counsel for the plaintiff in his submissions, the term a valid contract was defined to mean in every case, a contract sufficient in form and substance so that there is no ground whatever for setting it aside between the vendor and the purchaser, i.e. a contract binding on both parties.

In the instant case, a contract in the form of a sale agreement was executed by the parties. This was exhibited in evidence by the plaintiff as **P Exhibit 1** and was not rebutted to by the defendant. In the sale agreement dated 23/8/07, the defendant agreed to sale to the plaintiff 80 acres out of land comprised in Gomba Block 107 Plot 26 at Maddu stated to measure 75 hectares. Both parties signed the agreement and I have already held that they did sufficiently understand its contents. On the face of it, the document appears to be a well drafted, properly attested and a legally binding agreement between the plaintiff and defendant for the sale of the suit land.

On his facts, the plaintiff contends that the contract was valid and binding on both parties. That the terms were specific and he followed them by making part payment of the purchase price and was prepared to pay the balance at the point when the defendant, as vendor, handed over to him the instrument of transfer and certificate of title. That it was the defendant who reneged on his promise by refusing to perform the contract on the basis that his family was against it.

On the other hand, it was submitted for the defendant that the agreement was made in total error or under the mistaken belief of the availability of the land available for sale to the plaintiff. It was argued that at the time of entering into the contract, both parties were under the mistaken belief that the suit land measured 75 hectares but it later turned out that it measured only 75 acres. That the actual size of the suit land was confirmed after the contract was signed when the plaintiff brought surveyors to the land and when the defendant obtained confirmation of that fact from the land registry. That this was a common mistake in law as to the existence of the subject matter of the contract which rendered it *void abinitio* and unenforceable. In this, counsel relied on the authority of **Bell Vs. Lever Brothers (1932)AC 161**. The defendant thereby sought to be discharged from further performance of the contract.

I agree with counsel for the defendant that I make a finding of mistake, this will render the contract *void ab initio*. It must be noted however that not all mistakes recognized under the common law will necessarily render a contract *void abinitio*. If it is a common mistake (i.e. where both parties make the same mistake), the court must distinguish the facts. In cases of *res extincta* (if the subject matter is found not to exist at all) then the contract is void. However, where the mistake is as to quality, it will only render the contract voidable. See for example **Bell Vs Lever Bros (1932) (supra)** and **Leaf Vs Int Galleries (1950)2 KB 86**.

It was a term of the agreement that the suit land measured 75 hectares (approximately 150 acres) in its entirety and that the subject of the agreement was only 80 acres. It follows from that term that it was the duty of the defendant, to survey off and hand over to the plaintiff a certificate of title and transfer instrument in respect of 80 acres carved out of the suit land. My interpretation is that the size of the land sold to the plaintiff was a fundamental term of the contract. The defence of mistake was raised by the defendant so according to Section 110 of the Evidence Act, the burden is fully upon him to prove that fact.

Evidence was led to show that the defendant had been a customary tenant on the suit land before the signing of the contract. That before signing the contract, he was resident there with his wife and children as a tenant of one Racheal Nankya the original registered proprietor of the land. That he is still in occupation and utilizing 20 acres out of the suit land. He further testified that he came to the decision to sell the suit land after he was approached by agents of the Uganda Commercial Bank (now Stanbic Bank) with a notice that they were going to sell the suit land after Ms Nankya failed to service a mortgage. In a way, they were giving him a chance to redeem the land. He stated by then, that he did not know Ms. Nankya or the actual size of the suit land but he was definite about the size of his entitlement of 20 acres as he was aware of its boundaries. That his only knowledge of the size of the land (i.e. to be 75 hectares) was from a photo copy of the certificate of title which was handed over to him by the bank officials. He was however unable to furnish any proof to court with regard to the alleged mortgage by Ms. Nankya or that he had ever made any payments to a bank to retrieve the title.

The defendant went on to state that at the time of the sale, he did inform the plaintiff about the status of the land and that they did inspect the boundaries of the portion that he was ready to sell to him. He also claims to have shown him other occupants on the land and it was agreed that

they were to be left untouched but that if the plaintiff needed more land, he was to deal directly with them. It was his testimony also that the plaintiff was aware that he was also resident on a portion of the suit land but they did not inspect that part since it was at the material time, 'locked'. He stated also that he made it clear to the plaintiff that he was to remain in his portion and it was therefore made a term of the agreement that the land sold did not include that piece of land that him and his family occupied and utilized. In conclusion, he testified that he is not in breach of the contract but only unable to perform his part because after its execution, he discovered that the suit land was in fact only 75 acres, and thus, he could no longer hand over 80 acres to the plaintiff and retain his 20 acres as was stipulated by the contract.

He further stated that the situation was further complicated by the fact that a subsequent survey had indicated that a neighboring land comprised in Block 107 Plot 155 had its boundaries cutting into the suit land. DW2 contributed by stating that she is resident on 20 acres of the suit land with the defendant and her children and that she had no prior knowledge of the sale and did not authorize it.

For the plaintiff it was submitted that the defendant is in breach and had the duty to perform the contract by handing over 80 acres which if necessary, would include the portion occupied by the defendant. In cross examination, the plaintiff admitted having knowledge that at the time the contract was signed, the suit land was in the names of Ms. Nankya, who had mortgaged it to the bank and that the defendant was purchasing it from a bank. He even admitted ever seeing the agreement through which the plaintiff purchased the suit land from the bank. He also admitted that he was aware that at the time of making the contract, the defendant was resident on part of the suit land. He further admitted that before the purchase, the defendant showed him the boundaries of the portion he was to purchase. He stated that he was aware of the portion occupied by the defendant but that the latter told him that he would leave that portion to allow him vacant possession as part of the sale.

PW2 testified that he introduced the plaintiff to the defendant after the latter intimated to him that he wanted to sell 80 acres of land. He supported the fact that the plaintiff was shown the boundaries of the land to be sold and that currently, both parties are resident on different portions of the suit land. He further supported the testimony of the plaintiff, that the latter was able after a

survey to locate only 75 acres on the suit land and that these extended into the portion occupied by the defendant.

Clause one of the contract states that the defendant was the owner/proprietor of all land **and** developments on the suit land which measures 75 hectares. Ordinarily this would have been a term being presented as a fact in the knowledge of the defender as vendor. However, the evidence shows that he did not know the actual size of the land at the time he sold it. The plaintiff agreed to purchase the suit land with those facts because he testified, that he was aware that at the time of purchase, the land had not yet been redeemed from the bank and was still in the names of Ms. Nankya and even saw the agreement of sale between the bank and the defendant. Again, although it was the duty of the defendant to know or at least confirm the size of the land before offering part or the whole of it for sale to the plaintiff, the plaintiff agreed to go ahead with the sale even without first ascertaining the actual acreage of the suit land. He chose to believe the representation made by the defendant that the suit land measured 75 hectares and it was that acreage that was inserted in the contract that both parties signed. As it turned out later, a physical survey and a search at the land registry revealed that the suit land actually measured 75 acres only.

Stemming from the above, it is my finding that this was a common mistake of both parties in that, at the time of making the contract, they assumed that the suit land measured 75 hectares and this is the acreage that was inserted into the contract. The parties then hoped that the plaintiff's portion would be curved out of the suit land.

Counsel for the defendant cited the authority of **Bell Vs Lever & Bros (1932) (supra)** which gave the principle that the quality of the subject matter of a contract will undermine the parties' assent and make the contract void where that mistake "*makes the thing without the quality essentially different from the thing as it was believed to be.*" It was further held in that case that in order for the contract to be void by common mistake, the mistake must involve the actual subject-matter of the agreement and must be of such a "*fundamental character as to constitute an underlying assumption without which the parties would not have entered into the agreement*".

That authority can be distinguished from the current facts in that, although the suit land was found to be less in size, its identity had not changed and it still exists and potentially under the occupation and control of both parties. In fact, according to the latter case **Solle Vs Butcher**

(1950)1 KB 671 even a fundamental mistake will not necessarily render a contract void because a contract is void only upon failure of a condition precedent. Lord Denning was in **Solle Vs Butcher** (supra) of the view that a contract will be void only if the mistake prevents the formation of the contract or if it is fundamental and the party seeking to set it aside is not at fault, that is even in cases where such party considers such mistake to be fundamental. Emphasis mine. It was never a condition precedent that the suit land had to be 75 hectares or give a condition term if it was found not to be of that size. In fact, the plaintiff has for more than six years been utilizing part of it without interference from the defendant. Further, the defendant cannot seek to set aside the contract for he was not completely blameless or not at fault. This is because, he chose to believe the information provided by the bank agents (a photocopy at that), that the land was 75 hectares and took no steps to confirm the actual size from the land registry before going ahead to deal in it.

I therefore find that there was a valid contract of sale of land between the plaintiff and defendant and it could not be rendered void by a common mistake of the parties to it.

Issue two

Whether the defendant or plaintiff breached the terms of the agreement

Following the authority of **Solle Vs Butcher (supra)**, I have found that the contract is not a nullity and could be enforced against the defendant. However, I have also found that although the suit land exists in its legal form, after signing of the contract it was found not to exist to the extent of the size that could accommodate both parties within their expectations as envisaged by the sale agreement. The point here is that neither party is in breach of the agreement. Certainly the plaintiff is not in breach. He is ready and willing to pay the balance of Shs.6,500,000/- in order to receive the residue of the suit land and a transfer into his names. The defendant cannot also be said to be in breach. I am persuaded by his arguments that he was mistaken to believe that the suit land measured more than 80 acres and therefore, there would be more than enough to share with the plaintiff. As it is now, he cannot avail any more land to the plaintiff as him and his family is resident on at least 20 acres of the suit land. I accordingly find that the parties being in mistake of the subject matter of the contract, neither was in breach thereof.

Issue three

What remedies are available to the parties?

In his pleadings, the plaintiff wants the court to declare him owner of the suit land and specific performance of the contract and costs. He in the alternative seeks special damages of Shs.55,000,000 representing a refund of the purchase price already paid, and the price of his possessions that the defendant allegedly destroyed. However, in his submissions, counsel for the plaintiff lowers his stance and instead prays that plaintiff party should be left to occupy the portion that is commensurate to the land that he paid for (he suggests 60 acres and the defendant retains 15 acres) and no further payments be made towards the contract. On the other hand, the defendant intimated in his evidence and it was reiterated by his counsel in his submissions that, he would be content to remain on 20 acres of the suit land (which contains his family home) or to refund the entire purchase price so that each party reverts to their original position.

I decline to consider the alternative prayers principally because the plaintiff did not bring any evidence to prove the losses he claimed yet this was a prayer for special damages. Also, he appears to have opted to have part execution of the contract other than a refund of the money he has already paid towards the purchase price.

There was strong evidence to indicate that the defendant was resident on the suit land before the contract was made. He continues to do so. The plaintiff has also admitted that he is unable to occupy the available 75 acres owing to the presence of the defendant. Although Clause 6.1 of the agreement appeared to imply that the land sold did not include “*a piece of land occupied and utilized by the purchaser*” that would not make any practical sense as at the time the agreement was made, it was the defendant and not the plaintiff who was in occupation of part of the suit land. Having entered into the contract in acquiescence of the fact that the defendant was already resident there, and without knowing the actual acreage of the suit land, the plaintiff cannot be allowed to now claim specific performance of the contract in its present form. The defendant cannot offer 80 acres simply because it does not exist.

Upon reading their submissions, the spirit of the parties is to continue co-existing on the suit land albeit now on proportions different from what was bargained for in 2007. However, no evidence was led to show the precise acreage that each occupies now.

In the absence of proper guidance on what each party is prepared to settle for, on 1/7/14, the court visited the locus in Maddu LC1, Maddu Sub County, Gomba District. It was of critical

interest of the court to confirm the general boundaries of the suit land and the area that each party occupied, and the distances between them. A sketch map of the area was generated by the court and will be used as a cross reference in this judgment.

It was generally agreed between the parties and their witnesses that the plaintiff's land was bordered by a swamp and land owned by one Eliab Musoke to the west. This is the boarder at which both parties stood to estimate the 80 acres to be purchased. According to the plaintiff, it would stretch endlessly up to any point at which 80 acres were achieved (even including the defendant's house). To the contrary, according to the defendant, it could only stretch up to a point (point A on the sketch map) where the plaintiff had built an old (now non-existent) latrine, and then northwards towards the land of Nasozi at the northern border. The defendant insisted that he allowed the plaintiff to build his house in that portion and from then on the defendant's animal paddock stretched eastwards, north eastwards, north, and south and south-eastwards until the eastern border. It covered an area which had a clear paddock fence, coffee and banana plantations and the defendant's house and homestead. That the extreme southern and eastern parts of the land had sitting occupants.

Going by the arguments of the defendant it would be that at the outset, his intention was to sale to the defendant less than one third of the suit land. This is inconceivable since in his testimony, he states that he was prepared to sell 80 out of 150 acres of land which would be about one half of the entire land he thought he owned. Further, the plant hedge was clear at point B and not point A; further putting doubt to his testimony. Further, apart from a few seasonal crops, there was no other evidence that there were other squatters on the land. This is because some crops could be seen littered around the suit land and therefore, could be said to belong to the defendant. Of significance also was the fact that the defendant seemed quite unaware of his boundaries even as he stood to show the court around. He was generally evasive on direct questions put to him and struck me as an untruthful witness.

On the other hand, the plaintiff struck me as a straightforward witness, who responded to questions concisely and well in memory of what was told to him at the time of the purchase. He pointed out the stretch from the swamp eastwards past point A and B right up to the defendant's house. He stated that much of the crops seen were planted by the defendant after the agreement.

Much of his testimony was supported by PW2 and Semujju David the defence Secretary of the area.

On the whole therefore after a serious scrutiny of the facts on the ground, I choose to believe the testimony of the plaintiff on a balance of probabilities.

Therefore following the authority of **Solle Vs Butcher (supra)** I will award remedies embedded in equity. The contract is not *void abinitio* but it is instead set aside on the following conditions:-

1. Both parties shall remain in possession of and obtain a registerable interest in certain portions of the suit land
2. The parties agree that each acre was sold for Shs.300,000/- therefore, the plaintiff shall be entitled to 58.35 acres which represent the sum already paid on the purchase price. That portion is to be measured starting from the border with Eliab Musoke and the swamp eastwards towards the defendant's house.
3. The defendant shall retain 16.65 acres which shall be demarcated to contain his home and the land immediately surrounding it.
4. The parties shall jointly instruct and use an independent surveyor to carry out a survey that should demarcate each party's portion. Such survey shall be completed within 30 days of this judgment.
5. Once the survey is completed and the boundaries ascertained, each party shall respect the boundaries and allow the other party quiet possession.
6. The defendant shall hand over the duplicate certificate of title and transfer forms with respect to Gomba Block 107 Plot 26 to the plaintiff to enable the latter survey off his portion. The defendant is directed to hand over those documents within 45 days of this judgment.
7. Each party shall bear their costs of this suit.

I so order.

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EVA LUSWATA K.
JUDGE
8/7/14

