

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT NAKAWA
CIVIL APPEAL NO. 42 OF 2012

FRED NUWAGABA:.....APPLICANT/APPELLANT

VERSUS

ADE MUSANA KAGUMA:.....RESPONDENT/DEFENDANT

BEFORE: HON. MR. JUSTICE WILSON MASALU MUSENE

JUDGEMENT

This is an appeal from the Judgment of the Learned Magistrate's Court at Nakawa by Her Worship Esta Nambayo in Civil Suit No. 15 of 2010 delivered on 23/03/2012 in Nakawa wherein the Learned Magistrate entered Judgment against the Appellant. The Appellant being dissatisfied with the whole decision of the Learned Magistrate, appealed to this Honourable Court on the following grounds:-

1. The Learned Magistrate erred in law and fact when she held that the Appellant breached the sale agreement to the suit land dated 28th February 2007.
2. The Learned Magistrate erred in law and fact when she held that the Appellant made a misrepresentation to the Respondent.
3. The Learned Magistrate erred in law and fact when she did not award the Appellant costs of the suit.

The Appellant prayed that the Appeal be allowed and make an Order awarding the Appellant costs of the suit and Appeal, with interest.

The brief facts of the case is that by an agreement dated 28th February, 2007, the Respondent sold to the Appellant land at Kitukutwe, Wakiso District comprised in Kyadondo Block 180 Plot 197 at a price of Shs. 42,000,000= . That the price was payable in instalments that Shs. 30,000,000/=

on the execution of the agreement and the balance of Ug. Shs. 12,200,000/= was to be paid within 30 days of signature of the sale agreement. The Certificate of title was handed over to the purchaser's advocate and the agreement allowed the purchaser to take possession of the land on execution.

The Appellant sued the Respondent for refusing to receive the balance of the purchase price. He sought specific performance of the agreement. The Trial Magistrate held that the Appellant had breached the agreement by failing to pay the first instalment immediately on signing the agreement. She also held that the Appellant made a misrepresentation to the Respondent. She accordingly dismissed the suit but ordered that the suit land be given back to the Respondent. The Respondent was also ordered to refund to the Appellant the first instalment of Shs. 30,000,000/=

Thus this Appeal.

The Appellant Fred Nuwagaba was represented by M/S Nambale, Nerima & Co. Advocates, while the Respondent, Ade Musana Kagumaho was represented by M/S Rubumba & Co. Advocates.

When the Appeal came up for hearing, the Advocates for parties were directed to file written submissions which are on record.

The powers of the High Court as an Appellate Court subject to such conditions and limitations as may be prescribed are stipulated in Section 80 of the **Civil Procedure Act Cap 71**. The High Court accordingly has power to determine the case finally to frame issues and refer them for trial, to take additional evidence or to require such evidence to be taken and to order a new trial. **According to Section 80 (2) of the Civil Procedure Act, the High Court has the same powers and nearly the same duties as are conferred on Courts of original jurisdiction in respect of suits instituted in it.**

I shall now proceed to consider the grounds of appeal as set out in the Memorandum of Appeal.

The first ground was that the Learned Trial Magistrate erred in law and in fact when she held that the Appellant breached the sale agreement to the suit land dated 28th February, 2007. Counsel for the Appellant's submissions were that, the Trial Magistrate found as a fact that the

Respondent allowed to go with the Appellant to the Bank to be paid the first instalment of Shs. 30,000,000= . Counsel for the Appellant further submitted that the Respondent did not receive Shs. 30,000,000= immediately on the signing the agreement. That however, she later accepted to receive the money through the bank account of Jackline Kiconco after the agreement had been signed.

Counsel for the Appellant further submitted that the evidence of PW1, PW2 and DW2 was that the initial deposit of Shs. 30,000,000= was paid through the bank account of Jackline Kiconco (PW2/DW2). PW2/DW2 Jackline Kiconco tendered a statement of account from her Stanbic Bank account as exhibit P3. The Statement clearly shows that on 28th February, 2007 Shs. 30,000,000= was credited thereon. She made withdrawals in cash which she paid to the Respondent.

Counsel for the Appellant further submitted that, the Respondent later attempted to refund this money to the Appellant. The Bank draft for refund and the covering letter were tendered as exhibit D2 and D1 respectively. And that if the Respondent had not received Shs. 30,000,000= she would not have bothered to process a refund. Why would she refund what she had not received?

In my view, the Appellant did not breach the agreement since the Respondent allowed to be paid through the Bank Account of Jackline Kiconco. It is a contradiction for the Trial Magistrate to hold that the Respondent allowed to be paid through the Bank but at the same time claim that it was a breach of the agreement. There was no breach because the Respondent waived the non-payment of cash as she agreed to be through the Bank.

The Trial Magistrate relied on the Parole Evidence rule to disregard the Respondent's above said consent. However, she ignored the exception found in Section 92 (d) which allows proof of the existence of any distinct subsequent oral agreement to rescind or modify any written contract.

Furthermore, the Respondent willingly having received the money through the Bank, she is also estopped under Section 114 of the Evidence Act from raising the complaint of non-payment in cash on signing the agreement.

Clause 1 (b) of the sale agreement states that the balance was to be paid not later than 30 days from the date of signing the agreement and the agreement was signed on 28th February, 2007 and the 30 days would expire about 30th March, 2007. This agreement is however silent as to how and where the balance was to be paid. The Appellant therefore, had to devise means of reaching the Respondent to pay the balance.

The Appellant's evidence is that the Respondent was invited by phone calls and text messages to collect the balance of the purchase price but she refused. And eventually, he instructed his lawyers to send exhibit P2 to the Respondent inviting her to collect her money. That the letter was sent to her postal address by registered post as per exhibit P3. But instead of collecting her money, the Respondent replied to the Appellant's lawyers by purporting to refund the initial deposit of Shs. 30,000,000= (exhibit D1 and D2) and the Appellant lawyers rightly refused to receive the refund.

In my humble view, the Appellant paid the initial deposit of Shs. 30,000,000= and tried his best to pay the balance of Shs. 12,200,000= but the Respondent refused to receive it. Therefore, the Appellant did not breach the agreement.

Ground 1 succeeds.

The second ground of Appeal was that the Trial Magistrate erred in law and in fact when she held that the Appellant made a misrepresentation to the Respondent. According to Counsel for the Appellant's submissions, a misrepresentation is a positive statement of fact, which is made or adopted by a party to a contract and is untrue. It may be made fraudulently, carelessly or innocently. And that where one person (the representor) makes a misrepresentation to another (the representee) which has the object and result of inducing the representee to enter into a contract or binding transaction with him, the representee may generally elect to regard the contract as rescinded. See **Halsbury's laws of England, Vol 31.**

In this case, the Respondent did not prove that the Appellant made any false representation to her which induced her to enter into the contract. That the Respondent's only complaint is that she signed the contract to acknowledge receipt of Shs. 30,000,000= before actually receiving the money. However, that same day, the money was banked on the account of Jackline Kiconco with the consent of the Respondent.

The payment of Shs. 30,000,000= through the bank and not by cash was consented to by the Respondent and therefore she cannot claim that there was misrepresentation over something she agreed to.

In the instant case, the Respondent failed to prove the particulars misrepresentation pleaded by the Respondent/Defendant in their written statement of Defence. In my view, the alleged acts of misrepresentation is allegations of breach, but as noted already, the Appellant did not breach the agreement.

Therefore, ground 2 succeeds.

The third ground of Appeal is that the learned Chief Magistrate erred in law and fact when she did not award the Appellant costs of the suit. Counsel for the Appellant submitted that the Appellant paid first instalment of 30,000,000= and was ready and willing to pay the balance of the purchase price. Counsel further submitted that, the Respondent breached the contract by refusing to accept payment of the last instalment of Shs. 12,200,000=.

Counsel for the Respondent submitted that the Learned Magistrate found that the Appellant breached the contract from the onset. She further found that the Appellant had made a misrepresentation and as such there was no basis for the suit.

In my view, since the Appellant/Plaintiff had proved the case beyond reasonable doubt as indicated in the sale agreement especially where the Respondent agreed that the money be paid in two instalments and indeed it was done. Therefore, the Trial Magistrate should have entered Judgment for the Appellant and awarded him costs.

Therefore, ground 3 also succeeds.

Remedies

Counsel for the Appellant submitted that upon signing the contract, property in the land passed to the Appellant. Clause 6 of the contract allowed the Appellant to take possession of the land. Counsel further submitted that, the Respondent no longer had any lien. And that even if the Appellant had failed to pay the balance, the Respondent's remedy would have been to sue for the

balance, not to purport to rescind the agreement. Counsel for the Appellant quoted the case of **Osman Vs Mulangwa [1995 – 2998) 2 EA 275.**

Counsel for the Respondent on the other hand submitted that, the property could not pass to the Appellant on signing when the consideration had not passed. Counsel further submitted that, the trial Court having held that the Appellant breached the contract of sale, the right remedy was to return to the original position where the Respondent takes back her land.

I have carefully considered the submissions of both parties. I entirely agree with the submissions of Counsel for the Appellant that the Respondent breached the agreement. In the first place, the Respondent allowed to be paid through the Bank, which was done by depositing money on Jackline Kiconco's account 3 Exhibit P3 was tendered in Court and shows that on 28th February 2008, Shs. 30,000,000= was credited on her account. She made withdrawals in cash and paid it to the Respondent.

The roles of the 1st and 2nd Appellate Courts is not to interfere with the concurrent findings of fact of the trial Court and 1st Appellate Court except where it is satisfied that a miscarriage of Justice has occurred. The Supreme Court cases of **Henry Kifamunte Vs Uganda, Criminal Appeal No. 10 of 1997 and Bogere Moses & Another Vs Uganda, Criminal Appeal No. 1 of 1997.**

This Court has a duty to re-evaluate the evidence to avoid a miscarriage of Justice. See the case of **Banco Arab Espanol Vs Bank of Uganda, Supreme Court Civil Appeal No.8 of 1998.**

In the instant case, the Respondent breached a valid contract of sale of the suit land to the Appellant. And therefore, the Appellant is entitled to specific performance. In the case of **Manzoor Vs Baram [2003] 2 EA 580** where it was held that the Courts consider damages to be an inadequate remedy for breach of a contract for sale of land, and more readily decree specific performance to enforce such a contract as a matter of course.

I reject the submissions of Counsel for the Respondent that the Appellant breached the agreement and did not go to equity with clean hands.

Having allowed all the three grounds of Appeal, I do hereby enter Judgment in favour of the Appellant and order that:-

1. The Respondent specifically performs the agreement dated 28th February, 2007 by signing the transfer deed under clause 5.
2. The Appellant be permitted to deposit the balance of Shs. 12,200,000= in Court.
3. The Appellant is authorized to collect his certificate of title which was deposited with Barugahare & Co. Advocates. As to the costs, the discretion lies with Court. In the circumstances of this case, since the Appellant is to get the land he bought and the Respondent the balance of purchase price, each party is to bear their own cost of the Appeal.

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W. M. MUSENE

JUDGE

31/03/2014