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THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)**

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CIVIL SUIT NO. 0462 Of 2018

**1. DR. EMMANUEL MUGISHA
2. MS. DIANA BONABANA ::
PLAINTIFF**

15

VERSUS

**YUSUF MPIIMA ::
DEFENDANT**

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(BEFORE: LADY JUSTICE IMMACULATE BUSINGYE BYARUHANGA)

JUDGEMENT

The Plaintiffs brought this suit against the Defendant seeking the following orders:

- a) A declaration that the Defendant breached the sale agreement.
- b) Special damages of **Ug. Shs. 51,100,000/= (Fifty-one million one hundred thousand shillings only)**.
- c) Compensation valued at the current market value for the loss of expected benefits from the suit land.
- d) General damages for breach of the sale agreement.
- e) Interest at commercial rate on (b) from the date of filing the suit until judgement.
- f) Interest at commercial rate on (c) from the date of judgement until payment in full.
- g) Interest on (d) and (e) at the court rate from the date of judgement until payment in full.
- h) A declaration that the Defendant is obliged to indemnify the Plaintiffs of all losses that may arise as a consequence of the failure of the suit transaction due to the Defendant's fraud.
- i) Costs of the suit.

j) Any other relief that this court may deem fit.

According to the plaint, the Plaintiffs purchased the suit land measuring 20 acres comprised in East Buganda, Buganda **Plot No. 1222 Block 57** at Bukimu from the Defendant and upon the purchase the Defendant transferred the Certificate of Title to the Plaintiffs who got registered on 19th April 2011 but they never got vacant possession as per the agreement. The Plaintiffs further alleged that there were several occupants on the suit land whom the Defendant had promised to remove but up to now the said occupants are on the suit land and they even brought suits against the Plaintiffs.

On 19th July 2018, the Defendant filed a Written Statement of Defence and pleaded that he had sold to the Plaintiffs an encumbrance free land which the Plaintiffs took and even effected a transfer into their names. The Defendant stated in the Written Statement of Defence that he could not be held liable for what happened subsequent to the sale transaction. The Defendant denied fraud and indicated that the Plaintiffs would be put to strict proof.

The matter came up for mention on 14th May 2019 and in court the Defendant was absent. However, Court directed that parties should file a Joint Scheduling Memorandum, trial bundles and witness statements by 28th June 2019. The case was fixed for hearing on 29th August 2019. On 29th August 2019, the case did not take off. On 14th September 2020, Niwagira Gerald for the Plaintiffs appeared while Mugendada Nicholas held brief for Patrick Furah for the Defendant. On 14th September 2020, I directed that on 29th September 2020 court would mark exhibits and the case would be heard. Both advocates were directed to file a Joint Scheduling Memorandum, Trial Bundles and Witness Statements before 29th September 2020. I also directed to court annexed Process Server (Kojjo Noah) to effect service if hearing notice on the Defendant. On 28th September 2020, the court annexed Process Server (Kojjo Noah) filed an affidavit of service indicating that on **23rd September 2020, Fitz Patrick Furah & Co. Advocates received the hearing notice and even stamped on the hearing notice. The affidavit equally indicated that the Defendant was called through a telephone but he did not pick the calls of the Process Server.** On 29th

September 2020 when the matter came up for hearing the Defendant and his Counsel were absent. Court relied on the affidavit of the Process Server and proceeded ex parte under **Order 9 Rule 20 (1) (a) of the Civil Procedure Rules**. On 26th August 2019, the Plaintiff had filed a Trial Bundle which had the Plaintiffs' Scheduling Notes (pages 18 - 19) where the following issues were framed;

1) Whether the Defendant breached the sale agreement.

2) Whether the actions of the Defendant purporting to sell the suit land were fraudulent?

3) Whether the Defendant is liable to indemnify the Plaintiffs for the loss suffered?

4) Whether the Plaintiffs are entitled to the remedies sought.

Resolution of Issues

Issue 1

On the first issue Counsel for the Plaintiff submitted that in all civil matters, the onus rests on the Plaintiff who must adduce evidence to prove his or her case on a balance of probabilities under Sections 101 - 103 of the Evidence Act. Counsel made reference to Section 10 (1) of the Contracts Act which defines a contract as an agreement made with the free consent of the parties with the capacity to contract for a lawful consideration and with a lawful object with intention to be legally bound. Counsel cited the case of **Henry Ssempe vs. Kambagambire HCCS No. 408 of 2014** to that effect. In addition, Counsel referred to the evidence of **PW1** and Exhibits **PE1** (sales agreement) and **PE2** (Certificate of Title in the names of the Plaintiffs) and called upon court to find for the Plaintiffs. According to Counsel for the Plaintiffs, **Clause 4.2 of Exhibit PE1**, clearly showed that the defendant was supposed to remove all the occupants from the suit land and he failed to do so therefore he breached the contract for sale of land.

According to the witness statement of Diana Bonabona (2nd Plaintiff) paragraphs 5 - 13 thereof, she purchased the suit land together with the 1st Plaintiff from the Defendant at a sum of **Ug. Shs. 46,000,000/= (Forty-six million shillings only)** and the Defendant signed transfer forms in their favour and they were

registered on the Certificate of Title. The land bought was **20** acres. That later on they attempted to develop the purchased land and the local residents told them that the suit land did not belong to the defendant and even warned them never to go back to the land or else they would kill them. According to **Exhibit PE1**, on 7th April 2011, there was agreement for sale of land between Yusuf Mpiima (vendor) and Dr. Emmanuel Mugisha and Ms. Diana Bonabana (purchasers) in respect of land comprised in **Plot No. 1222, Block 57** at Bukimu Estate, Bulemezi County, Mutabi VI Subcounty, Luwero District. According to Clause 3.1 of Exhibit PE1, the land to be purchased was 20 acres and consideration for each acre was **Ug. Shs. 2,300,000/= (Two million three hundred thousand shillings only)** and the total price for the 20 acres was **Ug. Shs. 46,000,000/= (Forty-six million shillings only)**. In addition, Clause 4.2 of Exhibit PE1 provided that:

“The vendor shall remove all the occupants, employees, workers, servants, agents or otherwise from the property on payment and signing of this agreement.”

According to the plaint and evidence of PW1 on record the Plaintiffs have never accessed the suit land due to the occupants who are staying on the suit land and have never been removed by the Defendant as per Clause 4.2 of Exhibit PE1. This shows that the Defendant breached the sale agreement.

Issue 2

Whether the actions of the Defendant purporting to sell the suit land were fraudulent?

On this issue, Counsel for the Plaintiffs referred to paragraph 6 of the plaint where particulars of the alleged fraud were pleaded as follows:

- a) Lying to the Plaintiffs that the occupants would peacefully vacate upon his request to them to do so.
- b) Dishonestly keeping the Plaintiffs waiting on the Defendant to settle the dispute when the Defendant had no genuine intentions whatsoever.

- c) Deceiving the Plaintiffs that we would deliver vacant possession to them immediately after the sale.
- d) Selling land to the Plaintiff well aware that the land was subject to adverse claims of ownership which he dishonestly concealed.
- 5 e) Refusal by the Defendant to join the suit instituted against the Plaintiffs well knowing his claims were not true.
- f) The Defendants lack of concern for the plaintiffs' economic loss and inconvenience.

Counsel for the Plaintiffs cited the case of **Fredrick Zaabwe vs. Orient Bank & Others SCCA No. 04 of 2006** where fraud was defined to mean:

15 ***“The intentional perversion of the truth by a person for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or her or to surrender a legal right. That it is a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations or concealment of that which deceives another so that he or she shall act upon it to his legal injury.”***

20 It was Counsel's submission that the Defendant promised to remove the occupants from the purchased land under paragraph 4.2 of the agreement that he failed to do so. Counsel further submitted that the defendant was aware that the land he was selling was subject to adverse claims but promised the plaintiffs that he was going to
25 remove them and when the said occupants sued the Plaintiffs the Defendant refused to join the said suits and Counsel referred to the actions of the Defendant as amounting to fraud. The pleadings of the suit which was brought against the Plaintiffs was tendered in court as Exhibit **PE5**. According to Counsel, since the Defendant had already
30 been paid the purchase price and he avoided the Plaintiffs after receiving the money, this pointed to the deliberate scheme of the Defendant to defraud the Plaintiffs.

The case of **Fredrick Zaabwe (Supra)** as cited by Counsel for the Plaintiffs defines fraud in the legal sense by making reference to
35 **Black's Law Dictionary 6th Edition page 660**, where fraud is defined as follows.:-

5 **“An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth, or look or gesture... A generic term, embracing all multifarious, means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated. “Bad faith” and “fraud” are synonymous, and also synonymous of dishonesty, infidelity, faithlessness, perfidy, unfairness, e.t.c...**

10 **As distinguished from negligence, it is always positive, intentional. It comprises all acts, omissions and concealment involving a breach of legal or equitable duty and resulting in damage to another. And includes anything calculated to deceive, whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false whether it be by direct falsehood or by innuendo, by speech or by silence, by word of mouth, or by look or gesture...”**

15 In this case, the Defendant and paid the full purchase price for the 20 acres. An agreement was signed by the vendor and purchasers (Exhibit PE1). Under the said agreement Clause 5.2, the vendor
20 guaranteed good title and quiet possession. Paragraph 4.2 of the said agreement provided that the vendor was to remove all the occupants from the purchased land upon payment and signing of the agreement. In his Written Statement of Defence, the Defendant did not deny the said transaction. However, there is no evidence that he
25 assisted the Plaintiffs to possess the suit land as a vendor in according with the terms set in paragraph 4.2 of the sale agreement.
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The conduct of the defendant imputes fraud on his side. As a genuine vendor, the defendant ought to have complied with the terms of the sale agreement. The defendant unfairly cheated the plaintiffs and this amounted to fraud.

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Issue 3

Whether the Defendant is liable to indemnify the Plaintiffs for the loss suffered?

On this issue, Counsel for the Plaintiffs submitted that under Clause 5.2 of Exhibit PE1, the vendor agreed to indemnify the purchases of any loss and damage that may be suffered in the event of the vendor's ownership or title to the said land is found defective. This was to the full extent of any claims or liabilities from any third parties.

Counsel cited the case of **Birmingham and District Land Co. vs. London and North Western Railway Co. (1887) 34 Ch. D 261 at 271** where a distinction was drawn between the rights to indemnity as against the right to damages in the following terms:

"A right to indemnity as such is given by the original bargain between the parties. The right to damages is given in consequences of the breach of the original contract between the parties."

Counsel for the Plaintiffs submitted that in the present case, the entitlement to indemnity was expressly provided in the agreement. He called upon court to direct the Defendant to indemnify the Plaintiffs for loss suffered.

I have perused Exhibit PE1 and paragraph 5.2 of the said exhibit is the one which provides for indemnity as follows;

"The vendor hereby gives the purchasers a warrant of good title and quiet possession of the said land and developments thereon and hereby undertakes to fully indemnify the purchasers of any loss and damage that may be suffered in the event the vendor's ownership or title to the said land is found defective. The vendor hereby further undertakes to indemnify and keep

indemnified the purchasers to the full extent of any claims or liabilities from any third parties.”

Indemnity was in respect of ownership and defects in the title and claims or liabilities from third parties. In the instant case, the Plaintiffs indicated that they are registered owners of the suit land and no evidence has been brought to prove that the third parties have been directed to recover from the plaintiffs at this stage. That being the case, I would not order the Defendant to indemnify the Plaintiffs at this point of the case. The indemnity clause in the agreement (Exhibit PE1) was very clear.

Issue No. 4

What remedies are available to the parties?

In respect of this issue, Counsel for the Plaintiffs prayed for special damages of **Ug. Shs. 51,100,000/=** general damages and compensation for the loss of the suit land amounting to **Ug. Shs. 416,000,000/= (Four hundred sixteen million shillings only)** that is compensation at a value of **Ug. Shs. 320,000,000/= (Three hundred twenty million shillings only)** plus interest of 30% on **Ug. Shs. 320,000,000/=** which is **Ug. Shs. 96,000,000/=** interest under Section 26(1) of the Civil Procedure Act and costs of the suit.

On the aspect of the special damages, it should be noted that special damages must be specifically pleaded and proved (**Haji Asuman Mutekanga Versus Equator Growers (U) Ltd. SCCA No.07/95**). In this case Exhibit PE1, paragraph 3.1 indicates that the total purchase price was Ug. Shs. 46,000,000/= which was paid upon signing of the agreement. It has been proved that the vendor breached the sale agreement, therefore, he has to refund the purchase price to the tune of Ug. Shs. 46,000,000/=. Regarding the stamp duty of **Ug. Shs. 500,000/= (Five hundred thousand shillings only)**, the Plaintiffs did not adduce proof of this amount. There is no way I can order for this refund without proof. Under Sections 100 - 103 of the Evidence Act, he who alleges must prove. The Plaintiffs should have attached the stamp duty assessment forms by the Chief Government Valuer and proof of payment to the Uganda Revenue Authority Account. The same applies to the sum of

Ug. Shs. 4,600,000/= (Four million six hundred thousand shillings only) which is termed as commission to brokers. There is no proof and I cannot order for refund without specific proof.

5 The Plaintiffs' counsel equally prayed for **compensation of loss of the suit land and general damages**. Counsel submitted that the Defendant by his failure to fulfill his obligations under the agreement led to failure by the Plaintiffs to use their land and there is no chance of gaining possession of the land hence the Plaintiffs should receive both compensations for the land and general damages for the loss and suffering caused. Counsel referred to the valuation report (Exhibit PE3) of the suit land and asked court to compensate the Plaintiffs in accordance with the current value of the suit land which was estimated at **Ug. Shs. 320,000,000/= (Three hundred twenty million shillings only)**. Counsel cited the case of 15 **Goodman International Ltd Vs. Attorney General & Another HCCS No. 73 of 2014** where compensation was defined to mean payment of damages or any other act that court orders to be done by a person who caused injury to another. Counsel also cited the case of 20 **Campuline Mukisa & Anor vs Lutwama Henry Ssalongo HCCS No. 682 of 2018** where it was observed that breach of a legal obligation triggers compensation from the guilty to the innocent party.

According to the case of **Haji Asuman Mutekanga vs. Equator Growers (U) LTD. SCCA No. 7/1995** it is stated that “**with regard to proof, general damages in a breach of contract, are what a court (or jury) may award when it cannot point out any measure by which damages are to be assessed, except the opinion of and judgment of a reasonable man**”.

30 In this case, PW2 (Boaz Tukahirwa) testified as a valuation surveyor (per Exhibit PE4) and he put the value of the suit land at a sum of Ug. Shs. 320,000,000/= (Exhibit PE3). According to the valuation report (Exhibit PE3), the valuation was conducted in July 2019 in respect of 20.0057 acres comprised in Plot 1222, Bulemezi Block 57, Bukimu Luweero District. It should be noted that the purchase 35 between the Plaintiffs and the Defendants took place in April 2011. Since I have already ordered the refund of the purchase price, this amount has to be taken into consideration while awarding

compensation. I do appreciate that the valuation report was prepared by a valuation surveyor in July 2019, however, I have already ordered the refund of the purchase price. Since the valuation report estimated the value to be Ug. Shs. 320,000,000/=, I hereby
5 order the Defendant to compensate the Plaintiffs to the tune of **Ug. Shs. 50,000,000/= (Fifty million shillings only)** being consideration for the value of land between 2011 when the Plaintiffs purchase and the year 2020 when the suit in court is being determined.

10 On the issue of general damages, the case of ***Asuman Mutekanga*** (**supra**) shows how general damages should be awarded. According to the ***Mutekanga*** case, “with regard to proof, general damages in a breach of contract, are what a court (or jury) may award when it cannot point out any measure by which damages are to be assessed,
15 except the opinion of and judgment of a reasonable man”. In this case the defendant has been found in breach under issue one and is therefore, liable to pay the plaintiffs general damages. In my considered opinion a sum of **Ug. Shs. 50,000,000/= (Fifty million shillings only)** is awarded as general damages.

20 Regarding interest, there are grounds upon which interest must be awarded. In this case, the Plaintiffs in paragraphs 12 (g) of the plaint prayed for interest on special damages at the court rate from the date of judgement until full payment and interest at the commercial rate in respect of compensation from the date of judgment till full
25 payment. Section **26 (2)** of the **Civil Procedure Act** governs the award of interest in cases where parties have not agreed upon interest in an agreement. It provides as follows:-

30 **“Where and insofar as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such
35 rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or such earlier date as the Court thinks fit”.**

In this case, there was no proof that the plaintiffs were engaged in the commercial venture of buying and selling land. It would therefore, be unreasonable to award them interest at the commercial rate. That being the case I hereby award the
5 plaintiffs interest at the rate of 8% per annum on the compensation sum and the general damages awarded from the date of filing the suit till payment in full.

While special damages were not proved, the issue of interest does not arise in this respect.

10 The Plaintiffs are awarded the costs of the suit in accordance with **Sections S.27 (2) of the Civil Procedure Act** as the successful party. Costs follow the event.

Judgment is entered for the plaintiff in the above terms and the following **Orders** are hereby made:

- 15 a) The Defendant shall refund the Plaintiffs the purchase price of **Ug. Shs. 46,000,000/= (Forty-six million shillings only)**.
- b) The Defendant shall compensate the Plaintiffs to the tune of **Ug. Shs. 50,000,000/= (fifty million shillings only)**.
- 20 c) The Defendant shall pay to the Plaintiffs general damages of **Ug. Shs. 50,000,000/= (Fifty million shillings only)**.
- d) The defendant shall pay the plaintiffs interest at the rate of 8% per annum on items b) and c) from the date of filing the suit until
25 full payment.
- e) The Defendant shall pay costs of the suit.

30 Dated at Kampala this **4th December 2020**.

IMMACULATE BUSINGYE BYARUHANGA
35 **JUDGE**

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