THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL APPEAL NO. 093 OF 2019

(ARISING FROM CIVIL SUIT NO.10 OF 2017)

MANEGULE STEPHEN::APPELLANT

VERSUS

KAREMERE FRED::RESPONDENT

JUDGMENT

BEFORE: **HON. MR. JUSTICE HENRY I. KAWESA**

This appeal arises from the judgment of His Worship Tibayeita Edgar Tusiime; a Grade One Magistrate at the Chief Magistrates Court of Nakasongola at Nakasongola wherein he adjudged the matter in favour of the Respondent.

The background of the appeal is that: - the Appellant instituted **Civil Suit No.10 of 2017** against the Respondent claiming, among others for;

i) Recovery of land arising out of breach of contract for sale of land,
ii) Vacant possession,
iii) eviction,
iv) A permanent injunction and;

v) An order that the Appellant refunds Ushs.10,000,000/- (*ten million shillings)* only to the Respondent plus interest thereon.

In the suit, the Appellant claimed that he sold to the Respondent land comprised in LRV HQT972, Folio 2 at Nakasongola, measuring about 59.6950 hectares, on the 18th of April, 2008, at Ushs.27,000,000/- *(twenty seven million shillings)* only That the Respondent paid him Ushs.10,000,000/- (*ten million shillings)* as per Clause 2(i) of the sale agreement, leaving a balance of Ushs.17,000,000/- *(seventeen million shillings)* payable by 13th of 2008. That since the certificate of title of land was not ready by the 13th of June 2008, the Respondent was, under clause 2(iii) of the written agreement, obligated to pay the Appellant Ushs.7,000,000/- *(seven million shillings)* only. That despite several reminders from the Appellant, the Respondent never complied with any of the aforesaid clauses but rather took possession of the suit land. That this prompted him to construct a perimeter wall on the suit land which the Respondent destroyed.

On the other hand, the Respondent admitted purchasing the suit land from the Appellant and admitted paying Ushs.10,000,000/- *(ten million shillings)* to the Appellant upon execution of the written agreement but, added that part of the balance of Ushs.17,000,000/- *(seventeen million shillings)* was paid to Him (Appellant) in installments. Further that by 31st December 2013, the outstanding balance was Ushs.8,100,000/- *(eight million, one hundred thousand shillings)* only, which the Appellant acknowledged in writing in the presence of the area L.C.1 Chairperson.

He stated further that he has not paid the Ushs.8,100,000/- *(eight million, one hundred thousand shillings)* because he is yet to receive his certificate of title from the Appellant and that he is ready to pay the balance upon receiving the certificate of title from the Appellant in his name.

At trial, the Appellant produced one witness, that is: PW1; Kwikiriza Emmanuel while the Respondent produced 5 witnesses that is DW1; Karemire Fred, DW2; Kikomeko Francis, DW3; Kaliisa John, DW4; Kakuba David, and DW5; Nyakanini Annet.

The issues for determination were:

1. **Whether there was breach of contract by the Defendant.**
2. **What remedies do the parties have**.

Upon evaluation of the respective evidence, the trial Magistrate found issue one in the negative, and consequently dismissed the suit with costs, hence this appeal.

The grounds of the appeal are:

1. That the learned trial Magistrate erred in law and fact when he delivered judgment without properly evaluating the evidence on record thereby occasioning a miscarriage of justice.

2. That the learned trial Magistrate erred in law and fact when he ruled that the Respondent did not breach the terms of the agreement entered into between the Appellant and Respondent despite the evidence to the contract thereby arriving at a wrong conclusion.

3. That the learned trial Magistrate erred in law and fact when he held that one witness could not establish the Appellant's case yet there was no legal requirement from corroboration.

4. That the learned trial Magistrate erred in law and fact when he delivered judgment in violation of the right to fair hearing.

Court directed both parties to file written submissions which they did. At first, the Respondent defaulted on the directive and Court adjusted the time within which to file his submissions on condition that they are strictly filed by 21st of November, 2020. It turned out that the Respondent again defaulted, by filing his submissions on the 22nd of November 2020, and without any explanation. Accordingly, Court shall disregard the Respondent's submissions in determining the above grounds.

In arguing the grounds, Counsel for the Appellant started with ground four, then ground one and two and lastly ground three. I shall consider the same order also.

Ground Four:

That the learned trial Magistrate erred in law and fact when he delivered judgment in violation of the right to fair hearing.

Counsel for the Appellant referred me to page 142 and 143 of the record of appeal, and argued that the trial Magistrate denied the Appellant his right of fair hearing. That this is because the trial Court did not give him an opportunity to testify as a witness in his own matter yet he was not excluded by **Section 117 of the Evidence Act Cap 6**. Further that a close scrutiny of the record of proceedings shows that the Appellant did not waive his right to testify as a witness.

In arguing that the Appellant has a right to a fair hearing, Counsel cited **Article 28(1) of the Constitution of the Republic of Uganda, 1995,** which provides for the said right; and the case of ***Mpungu & Sons Transporters Ltd versus Attorney General S.C.C.A. No.17 of 2001*** where Court commented on the principle of natural justice; and

Counsel *argued that principle requires that no man should be condemned unheard*. Further, that the trial Court ought to have addressed the issue of the Appellant not testifying in his own case while the trial was still proceeding rather than raising it in its judgment.

That the Appellant was duly not accorded the opportunity to be heard in his case by testifying, which accordingly contravened **Article 28 of the Constitution**; a fundamental right which is non-derogable by virtue of **Article 44(d) of the Constitution of the Republic of Uganda**. In conclusion, he urged Court to exercise its Appellate powers to set aside the trial Court's judgment and order a retrial, take or order that the Appellant's evidence be taken as additional evidence in the matter.

I took time to peruse the record concerning the Appellant's case. It is indicated that the Appellant called one witness; and at page 12 of the record of appeal, after the Respondent cross-examining him, he closed his case.

Order 18 of the Civil Procedure Rules regulates how trials are conducted. I shall set it out in part below.

1. *Right to begin.*

   The Plaintiff shall have the right to begin unless the Defendant admits the facts alleged by the Plaintiff and contends that either in point of law or on some additional facts alleged by the Defendant the Plaintiff is not entitled to any part of the relief which he or she seeks, in which case the Defendant shall have the right to begin.
2. *Statement and production of evidence.*

   (1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his or

her case and produce his or her evidence in support of the issues which he or she is bound to prove.

(2) The other party shall then state his or her case and produce his or her evidence, if any, and may then address the Court generally on the whole case.

Under **Rule 1** above, the Appellant/Plaintiff was entitled to begin; and **Rule 2(1)** entitled him to produce his evidence by calling witnesses, including himself.

What happened is that the Appellant called one witness, PW1, and then closed his case. Upon closure of the case, the Respondent/Defendant was entitled to open his case, which he did and closed it afterwards. Having heard the case, the Court was duty bound by **Section 25 of the Civil Procedure Act and O.21 of the Civil Procedure Rules,** pronounce judgment in open Court. It is evident that there is no irregularity in the trial Court's proceedings in view of the above provisions.

What the Appellant queries is that the trial Court ought to have insisted that he appears and gives evidence as a witness. This query lacks legal standing. The Court's duty was to receive evidence tendered before it in accordance with the law, and the right to produce the same was with the parties. The record shows that each party was accorded this right, but each chose to limit it by calling a given number of witnesses. For the Appellant, he chose to call one witness, and excluded himself and having done so, he cannot turn around and put his fault on the trial Court.

In view of the above observations, I find that the trial Court did not violate the Appellant's right to a fair hearing.

Consequently, I find no merit in this ground.

Ground One and Two

Ground one:

That the learned trial Magistrate erred in law and fact when he delivered judgment without properly evaluating the evidence on record thereby occasioning a miscarriage of justice.

Ground Two:

That the learned trial Magistrate erred in law and fact when he ruled that the Respondent did not breach the terms of the agreement entered into between the Appellant and Respondent despite the evidence to the contrary thereby arriving at a wrong conclusion.

In his submissions, Counsel for the Appellant rightly argued that the Appellant bore the burden of proving his case on the balance of probability. He ably supported this with **Section 101(1) and (2) of the Evidence Act Cap 6,** and the case of ***Nsubuga versus Kavuma (1978) H.C.B 307, and Yakobo & Others versus Crensesio Mukasa C.A No.17 of 2014*****.** Counsel then referred me to page 143 of the record of appeal wherein the trial Court observed that:

> *"The Plaintiff did not lead evidence whatsoever on whether the title was ready and neither did he lead evidence on the steps taken thereafter. That the Plaintiff has not discharged the burden of proof placed on him to prove that the Defendants breached Exh.B (the land sale agreement). Despite the lack of documentation to support the various payments claimed to have been made to the Plaintiff by the Defendant, the prior relationship existing between the Plaintiff and all the defense witnesses, including the Defendant himself, as established by the defense evidence, gives me no reason to doubt their honesty and I find it more likely than not that the Defendant made a further payment of Ushs.8,900,000/= (eight million, nine hundred thousand shillings) only to the Plaintiff, basing on his own testimony and that of his witnesses produced in Court. I* accordingly resolve that the Defendant did not breach the contract he entered into with that Plaintiff.

It was his submission that the trial Magistrate failed to properly evaluate the evidence on record as a whole, and urged this Court to re-evaluate the same. He referred me to

the case of ***Muluta Joseph versus Katama Sylivano S.C.C.A. No.11 of 119*** wherein the *Supreme Court* observed that;

> "*Where it is apparent that the evidence has not been subjected to adequate scrutiny by the trial Court, the first Appellate Court has the obligation to re-evaluate the same*".

Counsel also made reference at how the evaluation ought have been done and referred to several principles of contract law, which I will consider in resolving the aforesaid grounds.

The existence of a contract of sale of land between the Appellant and the Respondent was undisputed, the same was admitted as DEXH1. It was also undisputed that on the total purchase price of Ushs.27,000,000/- *(twenty seven million shillings*) only, the Respondent paid to the Appellant the first installment of Ushs.10,000,000/- (*ten million shillings)* as per Clause 2(i) of the agreement. What is disputed is in respect of Clause 2(ii) and (iii). I shall produce the clauses for reference:

> *The said consideration shall be paid as follows:-*
>
> *ii). Shs. 17,000,000/= (seventeen million shillings)....on the 13th June 2008 provided that the certificate of title shall be ready and available to the Buyer.*
>
> *iii). In the event that the said title is not ready on the above said date, the Buyer shall pay to the Seller Shs.7,000,000/=…. (seven million shillings) And the balance of Shs.10,000,000/= (ten million shillings*) *shall be paid at any time thereafter when the said is ready.*

Whereas the Appellant asserted that the Respondent breached the above clauses; the Respondent denied breaching any of the said clauses and asserted that part of the balance of Ushs.17,000,000/- *(seventeen millions shillings)* was paid to the Appellant

in installments. It is his assertion that by 31st December, 2013, the outstanding balance was Ushs.8,100,000/ (*eight million, one hundred thousand shillings)*.

PW1 testified that the Respondent only paid Ushs.10,000,000/ *(ten million shillings)* as per the agreement, leaving a balance of Ushs.17,000,000/- (*seventeen million thousand shillings*) only payable by 13th June, 2013. That he called the Respondent to pay the balance but was adamant. That he also asked the Respondent to pay Ushs.7,000,000/- (*seven million shillings)* as per Clause 2(iii) above to enable the Plaintiff to process title but he refused.

It was also his evidence that at last, the Respondent failed to pay the balance even when his title was ready. Further that they hired surveyors whom they requested to subdivide the suit land; and that since the Respondent had paid Ushs.10,000,000/- (*ten million shillings),* they gave him 50 acres of land an equivalent of what he had so far paid, which he refused and insisted on the 150 acres. That they called a community meeting in 2018 to try to mediate, which the Respondent attended and the members resolved that he pays Ushs.20,000,000/- *(twenty million shillings)* only to the Appellant within a week's time, afterwhich he was to get his title. That the Respondent rejected the member's resolution and offered to pay Ushs.14,100,000/- (*fourteen million, one hundred thousand shillings*) only. It was his evidence also that another meeting was held after a week but, still the Respondent was adamant to pay.

On the other hand. DW1 testified that on 13th June, 2008, he met the Appellant at a place called Migeera, and gave him Ushs.6,000,000/- (*six million shillings)* only and that later on 20th June 2008, he also gave the Appellant Ushs.1,000,000/- (*one million shillings)* only, at the same place, in the presence of DW3. This testimony was

corroborated by DW3. Further, that he waited for his certificate of title from the Appellant in order to pay the balance of Ushs.10,000,000/- (*ten million shillings)* but was delayed. It was his evidence again that the Appellant called him again, asking for more money to complete procession of his title, prompting him to add him Ushs.1,400,000/- (*one million, four hundred thousand shillings)* only in 2012, at Migeera in the presence of DW4 and DW5. This testimony was corroborated by DW4 and DW5.

Further, that on 31st December, 2013, he again paid to the Appellant Ushs.500,000/- (*five hundred thousand)* only, in the presence of the area L.C.1 Chairperson, DW2; and that the Appellant acknowledged in writing that the balance was Ushs.8,100,000/- *(eight million, one hundred thousand shillings*) only. It was his further evidence that at the same moment, a one Kabagambe George who had also purchased land from the Appellant also paid Ushs.500,000/- *(five hundred thousand)* only to him; so that DW2 drafted one agreement which they both signed. This testimony was corroborated by DW2 and *a copy of the said agreement was admitted as DEXH2*.

Lastly, he testified that the Appellant continued demanding for the balance of Ushs.8,100,000/- *(eight million, one hundred thousand shillings*) only, which he refused since he was yet receive his certificate of title.

Counsel for the Appellant ably cited ***United Building Services Ltd versus Yafesi Muzira t/a Quickest Builders & Co Ltd H.C.C.S. No.154 of 2005***, wherein breach of contract was defined *'as the failure to fulfill obligations imposed by the terms of the contract'*.

The contract in this case had time limitations within which to pay, that is: the Respondent had to pay Ushs.17,000,000/= *(seventeen million, shillings*) only on the 13th June 2008 provided that his certificate of title was shall ready. In the event that it was not ready, his obligation was to pay to the Appellant Ushs.7,000,000/= *(seven million shillings only)* by that date, and the balance of Ushs.10,000,000/= *(ten million shillings)* only when the certificate of title was ready.

Under **Section 42(2) of the Contracts Act, 2010**, where a promise is to be performed on a specific day, it may be performed at any time during the usual hours of business on that day, at the place at which the promise ought to be performed.

According to ***Shamim Boutique Ltd versus Noratan Bhatta HC.C.S. No.411 of 1998*,** it was observed that;

> "*Where payment in a contract is fixed at a particular date, then time is of essence*".

In this case, payment of Ushs.17,000,000/- (*seventeen million, shillings*) only or Ushs.7,000,000/- (*seven million shillings*) only, in case the title was not ready, on 13th June 2008 was of essence. It was therefore incumbent on the Appellant to demonstrate that the Respondent did not make any payment to him on that date.

PW1 insisted that the Respondent did not make any payments on the aforesaid date, much as he lacked knowledge of whether the Respondent effected any payments on the Appellant. During cross-examination, particularly when asked about the payments which the Respondent allegedly made onto the Appellant, PW1 denied being aware of the same.

On his part, the Respondent insisted that he paid Ushs.6,000,000/- *(six million shillings)* onto the Appellant on 13th June 2008, and then Ushs.1,000,000/- *(one million shillings)* on 20th June 2008, then Ushs.1,400,000/- *(one million, four hundred thousand shillings)* in 2012, and lastly Ushs.500,000/- *(five hundred thousand shillings)* on 31st December, 2013. This mode of payment would ideally be a breach of the time clause, which stipulated that either Ushs.17,000,000/- *(seventeen million shillings)* or Ushs.7,000,000/- (*seven million shillings*), be paid on 13th June, 2008.

Nevertheless, the Appellant appears to have waived his right to payment on the said date, in view of PW1's evidence that they continued to claim payment up to some-time in 2018 when they held community meetings with the Respondent. It is provided under **Section 114 of the Evidence Act Cap 6** that where **a party has by his declaration, act or omission intentionally caused the other to believe a thing to be true and to act upon such belief he cannot be allowed to deny the truthfulness of that thing. The principle in this section has been discussed** in several cases, to wit: ***Pan African Insurance Company (U) Ltd versus International Air Transport Association HCCS No. 667 of 2003*.**

In these circumstances, the doctrine of *estoppel* would preclude the Appellant from asserting that the breach was occasioned by the Respondent's failure to pay either Ushs.17,000,000/- *(seventeen million shillings)* or Ushs.7,000,000/- (*seven million shillings*), on the 13th June, 2008 as he expressly waived strict compliance with the time clause. That aside, did the Respondent effect any payments on the Appellant?

In the presence of the Respondent's evidence, it was pertinent for the Appellant to produce cogent evidence destroying the same. It suffices to add that unlike the Appellant's evidence, the Respondent's evidence was well corroborated by DW2 to

DW5, and DEXH2 alleged signed by the Appellant whilst acknowledging that Ushs.8,100,000/- *(eight million, one hundred thousand shillings)* only is the balance. This evidence operated to create an inference that some payments were made unto the Appellant. To rebut it, best evidence of the Appellant himself was needed, PW1 having showed ignorance in relation to the same; and even if he made any statements of the sort, his evidence would have constituted irrelevant hearsay. **See Section 30 of the Evidence Act Cap 6.**

It is provided by **Section 113 of the Evidence Act Cap 6**, that "*Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of….human conduct…., in their relation to the facts of the particular cas*e."

An example of human conduct upon which Court, may presume the existence of a fact, is the failure to call particular evidence within the power of a party. In regard to this, it has been observed in ***Osine s/o Rayako versus R HCCA No. 36 of 1963*** that Court may presume that such evidence if produced, would be unfavourable, if not adverse to the interest of the party withholding it. In this case, there was no reason why the Appellant did not testify in the case despite being aware of the Respondent's defence. As such, Court presumes that his evidence was adverse to him; and presumes as well that further payments were made to the Appellant by the Respondent.

Accordingly, this Court finds that the trial Court was right to find that the Appellant failed to discharge the burden of proof placed on him, and that it was more likely than not that the Respondent made further payment to the Appellant. I, therefore, disagree with all the Appellant Counsel's conclusions in respect to the aforesaid grounds as I find nothing to fault the trial Court.

Consequently, the same lack merit as well.

Ground 3:

That the learned trial Magistrate erred in law and fact when he held that one witness could not establish the Appellant's case yet there was no legal requirement from corroboration.

The Appellant Counsel's arguments in respect to this ground are in criticism of this Court the preceding observations, since they are similar to the findings of the trial Court. Indeed the trial Magistrate found it necessary that the Appellant ought to have testified. Much as it is true as argued by the Appellant's Counsel, that **Section 133 of the Evidence Act Cap 6, requires** no particular number of witnesses to prove of a fact, at the time the circumstance of the case may require more than one witness. This as well *espoused* by my brother *Hon. Justice Mubiru* **in *Uganda versus Kavuma Ismail H.C.C.C. No0819 of 2016***, Court held that;-

> "*Evidence is* **not** *to be counted but only weighed and it is* **not** *the* **quantity** *of evidence, but the quality that matters*."

In this case although the quantity could have been enough, the quality was deficient, and required some supplementation by the Appellant. PW1's evidence was, therefore, not sufficient to discharge the burden of proof placed on the Appellant. The trial Court was thus right in holding as it did.

Accordingly, this ground lacks merit as well.

All grounds of the appeal having failed, this Court upholds the trial Court's findings, and dismisses the appeal with costs to the Respondent.

I so order.

……..

Henry I. Kawesa

JUDGE

04/03/21

04/03/21:

Counsel Tumusiime Justus for the Respondent.

Appellant absent.

Clerk – Nakabuye.

Court:

Judgment delivered today.

Parties absent.