

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**[LAND DIVISION]**  
**HCCS. NO. 0017 OF 2020**

**KAKEMBO PHILIP**

**PLAINTIFF**

**V**

**KABENGWA FLORENCE**

**DEFENDANT**

**BEFORE: HON. LADY JUSTICE P. BASAZA – WASSWA**

**J U D G M E N T**

Representation:

Mr. Lubega Robert for the Plaintiff.

None for the Defendant.

Introduction:

[1] Mr. Kakembo Philip (the Plaintiff) brought the present suit, by ordinary plaint, against Ms. Kabengwa (the Defendant), for alleged breach of an agreement of sale of land.

[2] In his pleadings, Mr. Kakembo contends that;

- i) By an agreement of sale of land dated February 21, 2019 he bought an unregistered piece of land at Katimbo village, Lukuli Parish, Makindye Division, on Mubuke Road, measuring **70ft. by 58ft. by**

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**70ft**, with a residential house thereon. (Hereinafter referred to as **'the suit property'**).

- ii) That out of the purchase price of UGX. 70M, he paid UGX. 40M to Ms. Kabengwa, leaving unpaid UGX. 30M. That he looked for Ms. Kabengwa to pay her the said outstanding balance but his search for her was in vain.

[3] He seeks for the following orders against Ms. Kabengwa;

- i) An order for specific performance of the agreement, for the hand over to him of vacant possession of the suit property.
- ii) An award of general damages, interest and costs of the suit.
- iii) In the alternative, an Order that Ms. Kabengwa refunds to him the sum of **UGX. 40M** that he claims he paid to her, with interest thereon at the commercial rate of 25% per annum.

[4] Although duly served with court process by way of substituted service<sup>1</sup>, Ms. Kabengwa did not file a defence, nor did she attend court. The hearing of this suit thus proceeded *ex-parte* of her under the provisions of Order 9 Rules 10 & 11 (2) of the CPR.

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<sup>1</sup> See the affidavits of service by a one Achom Cissy dated July 8, 2020 and May 6, 2022 together with the accompanying extracts of the Daily Monitor of March 4, 2022 & May 4, 2022 respectively.

Issues for determination:

[5] There are two (2) issues for this Court's determination;

1. **Whether there was breach of an agreement of sale of land by the Defendant?**
2. **Whether the Plaintiff is entitled to the remedies he seeks?**

Determination of issues:

Issue No. 1: **Whether there was breach of an agreement of sale of land by the Defendant?**

[6] PW1: Mr. Kakembo (36), the sole witness in this case, testified that by a sale agreement dated February 21, 2019 (**EXB PE 1**) between Ms. Kabengwa and himself, he paid to her a 1<sup>st</sup> installment of **UGX. 30M** on the day of execution of the agreement, and that later, on March 3, 2019 he paid her a 2<sup>nd</sup> installment of **UGX. 10M** at a restaurant in Nsambya.

[7] He testified further that the payment of the 1<sup>st</sup> installment was witnessed by a lawyer, a one Balikuddembe, and by Ms. Kabengwa's Daughter; a one Joan, and by a broker; a one Brian. That the payment of the 2<sup>nd</sup> installment was acknowledged by all Ms. Kabengwa's children; the heir to her husband, a toddler (*sic*) and her daughter Joan.

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- [8] He also testified that he paid an additional sum of **UGX. 3M** to Ms. Kabengwa, which brought his total payments to her to **UGX. 43M**. That he left unpaid a balance of **UGX. 27M** out of the purchase price of **UGX. 70M**.
- [9] He stated that when he paid the 2<sup>nd</sup> installment to Ms. Kabengwa, she undertook to hand over the suit property to him within a week from that date, but later gave excuses until a month elapsed. Whereupon he ran out of patience and engaged the Police to track her down, but in vain. That by which time, Ms. Kabengwa had stealthily moved her family to another location.

Submissions of Counsel on issue No. 1:

- [10] Mr. Lubega; learned Counsel for the Plaintiff filed written arguments to the effect that Ms. Kabengwa was in breach of the agreement of sale when she left the suit property and handed it over to unknown people without the Plaintiff's consent. He cited Clauses 1, 2 & 5 of the sale agreement. **(PE 1)**, and relied on a number of authorities.

Analysis by this Court:

- [11] I have carefully assessed the evidence adduced by Mr. Kakembo and I find that his claim; **'that he entered into an agreement for the sale of the suit property with Ms. Kabengwa'**, is a claim that is supported by the existence of the sale agreement itself' **(PE. 1)**.

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**purchase price of UGX. 70M, is indeed in breach of the said agreement of sale of the suit property (PE. 1) after failing, and still fails, to hand over to Mr. Kakembo vacant possession of the suit property, contrary to clause 3 of PE. 1.**

[15] Under clause 3 of PE 1, Ms. Kabengwa undertook to hand over to Mr. Kakembo vacant possession of the suit property at the execution of the agreement of sale dated February 21, 2019. It is now two (2) years and some months since then, yet she has failed to perform that obligation.

[16] In the result, **issue No. 1 is held in the affirmative. Ms. Kabengwa is in breach of the agreement of sale (PE 1) of the suit property.**

Issue No. 2: Whether the Plaintiff is entitled to the remedies he seeks?

[17] Having concluded as I have under issue No. 1, it follows that Mr. Kakembo is entitled to relief against Ms. Kabengwa. The question this court has to determine therefore is; the nature and extent of such relief.

[18] First Mr. Kakembo seeks for an order for specific performance of the agreement (**PE 1**). He seeks that Ms. Kabengwa be ordered to hand over to him vacant possession of the suit property.

[19] I have considered the factors below, and I find that this prayer for specific performance of the agreement, is untenable.

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- i) Court visited the locus on June 22, 2022 and discovered that; contrary to the testimony of PW1, who told court that the suit property was an abandoned property, the suit property was in fact occupied by a third party, an occupant with his family, allegedly since December 2019.

The occupant identified himself as a one **Kasereka Kamuha Paulin** and claimed that he was the owner of the suit property, and that he bought it from a one **Tumwine Abel** in December 2019.

- ii) An order for specific performance would tantamount to issuing an eviction order against the said 3<sup>rd</sup> party who was never given an opportunity to be heard.

Had the Plaintiff and his Counsel exercised prudence at the appropriate time, which they failed to do, they ought to have applied to join both **Kasereka Kamuha Paulin and Tumwine Abel** as co-defendants in this suit. In that way, all questions of ownership and possession of the suit property would be adjudicated upon and resolved. As it were, they did not. In the absence of doing so, an eviction order against the said duo or any one of them, cannot be made. To do so would be a derogation from the fundamental principle '**that no person shall be condemned unheard**'. (Arts. 28 & 44 of the 1995 Constitution of the Republic Uganda).

*M. S. M. W. 22/7.*

iii) The provisions of sec. 64 (2) of the Contracts Act, 2010<sup>5</sup> prohibit the remedy of specific performance in circumstances such as are manifest in this case, as described in (i) & (ii) above.

[20] In the premises, and also since Ms. Kabengwa warranted in the agreement (PE. 1), under clause 5 (ii)<sup>6</sup>, that she would refund the amount paid to her by Mr. Kakembo, I find this relief apt. and do hereby grant it.

[21] In addition, I will award general damages on account of the anguish and frustration that Mr. Kakembo asserts that he suffered resulting from the actions of Ms. Kabengwa.

[22] In my assessment, indeed anguish and frustration are a natural consequence resulting from the Plaintiff paying **UGX. 40M** towards the purchase of a residential house that he has never possessed, where the one who should have handed over to him possession, has absconded, and taken flight to some unknown place. To this end, I find an award of **UGX. 5M** appropriate. In arriving at this figure, I have looked at and taken into account similar awards made in various previous decisions, involving similar circumstances.

Decision of Court:

[23] In the final result, Judgment is hereby entered for the Plaintiff; Mr. Kakembo against Ms. Kabengwa (the Defendant) in the following terms;

*M. Kakembo*

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<sup>5</sup> Act No. 7 of 2010

<sup>6</sup> Under Clause 5 (ii) of PE 1, it was agreed that a refund would be made by Ms. Kabengwa to Mr. Kakembo in the event of any 3<sup>rd</sup> party claims, or any failure to attain quiet enjoyment of the suit property by Mr. Kakembo.



1. Ms. Kabengwa is Ordered to immediately refund to Mr. Kakembo the sum of **UGX. 40M (forty Million)** that he paid to her as part payment towards the purchase of the suit property.
  
2. Ms. Kabengwa is also ordered to pay to Mr. Kakembo;
  - i) General damages of **UGX. 5M (Five Million)** for breach of the agreement of sale of the suit property.
  
  - ii) Interest at the rate of 18% per annum, on the amount of **UGX. 40M** ordered to be refunded under clause 1 above, calculated from March 3, 2019 until the date payment is made in full.
  
  - iii) Interest at 6% per annum on the amount of **UGX. 5M** awarded as general damages, calculated from the date of this Judgment, until the date payment is made in full.
  
  - iv) Costs of this suit.

I so Order,



**P. BASAZA - WASSWA**  
**JUDGE**

July 22, 2022

Judgment delivered via e-mail and uploaded on the ECCMIS system.