

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
CIVIL SUIT NO. 271 OF 2019

5 **NAMUGERA JOHN**-----**PLAINTIFF**
VERSUS
KINALWA MICHAEL-----**DEFENDANT**

Before: Hon. Lady Justice Olive Kazaarwe Mukwaya

10 **JUDGMENT**

The Plaintiff filed this suit against the Defendant seeking; -

1. An order of specific performance or in the alternative the Plaintiff be allowed to deposit the said UGX 10,600,000/= as balance of the purchase price in Court.
2. An order granting the Plaintiff vacant possession of the property comprised in
15 Kibuga Block 1 Plot 538 at Rubaga.
3. General damages.
4. Costs of the suit.

The Defendant filed a defence in Court however despite being duly served with hearing notices he failed to appear in court. This matter proceeded ex parte against him.

20 **Plaintiff's Claim**

Mr. Namugera John, PW1 and his advocate, PW2, Kateregga Hassan testified for the Plaintiff. In the month of December 2017, the Plaintiff was approached by land brokers; Mr. Lubega Habib and Mr. Nsubuga Arthur. They informed him that the Defendant was selling his land comprised in Kibuga Block 1 Plot 538 at Rubaga (herein referred to as the
25 suit land). Subsequently, the land brokers took the Plaintiff to visit the land where he met

the Defendant who confirmed that he was the owner of the suit land and gave him a copy of the certificate of title, which was admitted into evidence and marked Exb.P.1.

Later, the Plaintiff instructed his lawyer to carry out a search in respect of the suit land. The search revealed that there were no encumbrances on the land however the land was registered in the names of the Defendant as an administrator and not as registered proprietor. Before the sale of land could take off, the Plaintiff advised the Defendant to transfer the suit land into his name, which he did. After the transfer of the suit land into the name of the Defendant, both parties agreed upon the purchase price of UGX 60,000,000/=.

On the 16th December 2017, Exb. P.2, the purchase agreement was duly executed and upon signing the agreement, the Defendant received UGX 44,400,000/= part payment. It was agreed that the balance of UGX 15, 600,000/= would be paid within two months, not later than 16th February 2018. Thereafter, the Defendant passed over duly signed transfer forms, a duplicate certificate of title and passport photos to the Plaintiff since it was a term of the agreement.

Prior to the deadline, upon the request of the Defendant, an additional sum of UGX 5,000,000/= was paid to him on the 2nd January 2018, leaving an outstanding balance of UGX. 10,600,000/=. A copy of the acknowledgment receipt of that sum was admitted into evidence and marked Exb.P.3.

To conclude the transaction, the Plaintiff contacted the Defendant to receive the balance on the purchase price on the 16th February 2018. The Defendant told him that he was outside Kampala and he would collect the money when he returned, but he never did. After two weeks, the Plaintiff demanded that the Defendant grant him vacant possession of the suit land, which he refused to do. In a bid to protect his interests, the Plaintiff transferred the suit land into his name.

The Plaintiff contended that the Defendant has never handed over the suit land to him. And he has deliberately failed to acknowledge payment of the purchase price which actions amount to breach of their purchase agreement. As a result, the Plaintiff has

suffered loss and damages since he has been denied use of the land, for which the Defendant should be held liable.

Furthermore, the Defendant has no interest whatsoever in the suit land having sold it to the Plaintiff, save for the UGX. 10,600,000/=, the unpaid balance that the Defendant
5 deliberately refused to pick, despite several reminders. It is thus the Plaintiff's prayer that the Court grants the remedies sought the plaintiff.

PW2, the advocate who carried out the search in respect to the suit land after receiving instructions from the Plaintiff corroborated the testimony of the Plaintiff. PW2 testified that it was he who advised the Defendant to transfer the suit land into his own name. After
10 that, the Defendant gave PW2 instructions to carry out the transfer. When the transfer was concluded, PW2 drafted the purchase agreement of the suit land between the parties. PW2 clarified that the transaction between the Plaintiff and the Defendant was a sale of the suit property and not a money lending transaction.

Representation

15 The Plaintiff was represented by Mr. Matovu Akram of M/s Matovu, Kateregga and Co. Advocates.

Counsel for the Plaintiff filed final submissions which I have considered. He formulated the following issues for Court's consideration.

Issues

- 20
- 1. Whether the actions of the Defendant warrant the grant of an order of specific performance for vacant possession as claimed by the Plaintiff?**
 - 2. What remedies are available to the parties?**

RESOLUTION

Issue One

25 **Whether the actions of the Defendant warrant the grant of an order of specific performance for vacant possession as claimed by the Plaintiff?**

Section 64 of The Contracts Act 2010 provides for specific performance as follows;

'64. Right to specific performance

- 1) *Where a party to a contract, is in breach, the other party may obtain an order of court requiring the party in breach to specifically perform his or her promise under the contract.*
- 5 2) *A party is not entitled to specific performance of a contract where—*
- a) *it is not possible for the person against whom the claim is made, to perform the contract;*
- b) *the specific performance will produce hardships which would not have resulted if there was no specific performance;*
- 10 c) *the rights of a third party acquired in good faith would be infringed by the specific performance;*
- d) *specific performance would occasion hardship to the person against whom the claim is made, out of proportion to the benefit likely to be gained by the claimant;*
- e) *the person against whom the claim is made is at the time entitled, although in*
- 15 *breach, to terminate the contract; or*
- f) *the claimant committed a fundamental breach of his or her obligations under the contract; but in cases where the breach is not fundamental, specific performance is available to him or her subject'*

The purchase agreement, Exb. P.2 is an easy to read and straight forward agreement. It

20 specifies the parties, who are the Plaintiff (purchaser) and the Defendant (the vendor). The subject matter is land comprised in Kibuga Block 1 Plot 538 at Rubaga, the suit land. The consideration is a total of UGX 60,000,000/=. According to the Plaintiff, only UGX 10,600,000 stands unpaid to date, because of the Defendant's failure to accept the cash. Clause 3 of the agreement provides for vacant possession as follows;

25 3. Vacant possession of the Land'

'The Vendor shall give to the purchaser and the purchaser shall be entitled to vacant possession of the land upon full payment of the purchase price.'

Clause 10 of the agreement provides for Title and Transfer as follows;

10 Title and Transfer.

The Vendor shall hand over the duplicate certificate of title, and duly executed transfer forms in favour of the purchaser upon execution of this agreement for safe custody.

5 A plain reading of these clauses indicates that the purchaser was not entitled to vacant possession until the full purchase price was paid. And it is a fact that the Plaintiff has never paid the full purchase price. Secondly, under Clause 10, the title referred to is a duplicate title, but Exb. P.1 is a special certificate of title. A special certificate of title is defined under section 70 of the Registration of Titles Act cap 230.

70. Lost grant

10 *If the duplicate certificate of title is lost or destroyed or becomes so obliterated as to be useless, the persons having knowledge of the circumstances may make a statutory declaration stating the facts and the particulars of all incumbrances affecting the land or the title to the land to the best of the deponents' knowledge, information and belief; and the registrar if satisfied as to the truth of the statutory declaration and the bona fides of the transaction may issue to the proprietor a special certificate of title to the land, which*
15 *special certificate shall contain an exact copy of the certificate of title in the Register Book and of every memorandum and endorsement on it, and shall state why the special certificate is issued; and the registrar shall at the same time enter in the Register Book notice of the issuing of the special certificate and the date of its issuance and why it was issued; and the special certificate shall be available for all purposes and uses for which*
20 *the duplicate certificate of title so lost or destroyed or obliterated would have been available, and shall be equally valid with the duplicate certificate of title to all intents; but the registrar before issuing a special certificate always shall give at the applicant's expense at least one month's notice in the Gazette of his or her intention to do so.*

25 Under section 70 of the Registration of Titles Act, a special certificate is only issued after the duplicate certificate of title is lost or destroyed. The Plaintiff's claim is silent on what happened to the duplicate title which was the subject of the agreement that forced the issuance of Exb. P.1.

Thirdly, Clause 10 was clear that the handover of the transfer forms and the duplicate certificate of title was for; 'safe custody'. However, the Plaintiff not only transformed the duplicated title into a special certificate of title but went on to transfer the title in his name, in direct breach of this clause of the agreement. If he wanted to protect his interests, he could have lodged a caveat under section 139 of the Registration of Titles Act. In my view, the transfer of the land into his name spoke to extreme bad faith on the part of the plaintiff. He, in essence took the law into his own hands and then filed this suit seeking for this court to endorse his actions which were illegal.

In conclusion, I find that the Plaintiff was before this court with hands tainted with illegality and he was not entitled to any of the remedies sought. This suit is accordingly dismissed with no order as to costs.

Olive Kazaarwe Mukwaya

JUDGE

4th November 2022

Delivered by email to Counsel for the Plaintiff.