

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
CIVIL APPEAL NO 63 OF 2021

1.KIWANUKA GODFREY

2.KULDA NABIRYO-----APPELLANTS

VERSUS

WASSWA CHARLES-----RESPONDENT

(Suing through his lawful attorney

KATANA ANGELLA)

Before: Hon. Lady Justice Olive Kazaarwe Mukwaya

JUDGMENT

The Appellants, Mr. Kiwanuka Godfrey and Ms. Kulda Nabiryo, being dissatisfied with the judgment and orders of Her Worship Ajuna Doreen made on the 12th October, 2017 lodged an appeal to this court on the following grounds;

1. The learned trial magistrate erred in law and fact to hold that the Plaintiff/Respondent were entitled to a refund of UGX 13,500,000/=.
2. The learned trial magistrate erred in law and fact when she failed to evaluate the evidence on record hence arriving at a wrong conclusion.

BACKGROUND TO THE APPEAL

The Respondent, Mr. Wasswa Charles sued the Appellants in the Magistrate Grade I court at Nabweru by way of summary suit for recovery of a sum of UGX 13,500,000/= as money had and received. This was due to failure to deliver up land sold to him by the

Appellants comprised in Kyadondo Block 200 Plot 1001 at Kawempe. By an agreement dated 14th April 2012, the Appellants sold the suit land at a consideration of UGX 16,400,000/=. In total, the Respondent paid a sum of UGX 13,500,000/= in two instalments of UGX 8,000,000/= upon execution of the agreement and UGX 3,500,000/= on the 3rd May 2012. It was agreed that the balance of UGX 2,900,000/= would be paid after the Appellants had handed over the certificate of title to the land to enable the Appellant carve out the 50ft by 80ft he had purchased out of it.

Before their transaction was completed, the Appellants transferred the land which was comprised in Kyadondo Plot 1001 Block 200, Kawempe, to their son, Nsubuga Daniel on the 26th September 2012. On the same day the land, measuring 0.125 Hectares was mortgaged to Centenary Rural Development bank for a loan facility of UGX 25,000,000/=.

The Respondent was later prevented from taking possession of the land he had purchased, by Auctioneers who informed him that it was the subject of a forced sale by the bank following default of repayment of the loan by Mr. Nsubuga. It was only after the Respondent had repurchased the property from the bank that he was able to take possession of it. His claim before the lower court against the Appellants was therefore for money had and received of UGX 13,000,000/= plus interest.

In their defence, the Appellants asserted that according to the terms of the sale agreement, the Respondent failed to make the payment of UGX 2,900,000/= being the balance on the purchase price which was the condition upon which he could get title to the land. The Respondent was therefore in breach of their sale agreement. To date the balance has never been paid. The Appellants maintained that the Respondent had no cause of action and prayed that the suit be dismissed.

The learned trial Magistrate Grade I, agreed with the Respondent. She found that time within which to pay the balance was not of the essence under the contract between the parties, there was an intention on the part of the Appellants to sell the land to the

Respondent creating a valid contract between the parties which had imparted an equitable interest in the land upon the Respondent. She held that the actions of the Appellants of transferring the land to their son were unlawful and that ordered that Appellants refund the UGX. 13,500,000/= with interest.

5 Hence this appeal.

DUTY OF FIRST APPELLATE COURT

It is the duty of the first appellate court to give the evidence led by the trial court, a thorough reevaluation and draw its own conclusion. See Kifamunte Henry v Uganda
10 (Criminal Appeal-1997/10) [1998] UGSC 20 (15 May 1998) where it was held that;

'The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and
15 *considering it.'*

REPRESENTATION

The Appellants were represented by Mr. Kasirye Kiiza from M/S Tumwebaze, Kasirye & Co. Advocates while the Respondent was represented by Mr. Hamza Muwonge from
20 M/S MSM Advocates.

RESOLUTION

I shall determine both grounds of appeal concurrently.

25 Ground 1 & 2

The learned trial magistrate erred in law and fact to hold that the Plaintiff/Respondent were entitled to a refund of UGX 13,500,000/= and the learned trial magistrate erred in law and fact when she failed to evaluate the evidence on record hence arriving at a wrong conclusion.

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Section 10 of the Contracts Act 2010 defines a contract as follows;

10. Agreement that amounts to a contract

(1) A contract is an agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound.

Counsel for the Appellant submitted that there was no contract between the parties. In reply, Counsel for the Respondent submitted that the lower court considered the evidence before it including the sale agreement. The latter position is correct. The denial of the existence of the sale agreement by Counsel for the Appellants is a demonstration that he did not scrutinise the lower court record prior to filing this appeal. Under paragraphs 5 and 6 of the Written Statement of Defence filed by the Appellants on the 18th November 2014 they duly acknowledge that they entered into the sale agreement dated 14th April 2012 with the Respondent for the purchase of land at a consideration of UGX 16,400,000/=. Parties are bound by their pleadings under **Order 7 rule 7 of the Civil Procedure Rules** and it was not open to the Appellants to shift their position at this stage.

The learned trial Magistrate Grade I, found that the contract was valid and that the Appellants had failed in their duty to pass on good title in the land to the Respondent, hence the order for refund.

I agree with the learned trial Magistrate and find that the bulk of the lawful consideration for the land had been paid by the Respondent by the 3rd May 2012. Only a balance of UGX 2,900,000/= remained. I could not find any evidence of the numerous efforts the Appellants had made to remind the Respondent to pay the balance so he could carve out his land measuring 50ft x 80ft from their certificate of title.

Section 33(1) of the Contracts Act 2010 provides for the obligation of the parties as follows;

33. Obligation of parties

(1) The parties to a contract shall perform or offer to perform, their respective promises, unless the performance is dispensed with or excused under this Act or any other law.

5 In my view, the Appellants were bound by their promise under the agreement to create a title for the Respondent for the land he had purchased, as they undertook to do. What the Appellants did instead was to clandestinely alienate the land by transferring it to their son, four months later, on the 25th September 2012. I find that this act amounted to breach of contract. Its long term effect was to compel the Respondent to redeem the
10 land by purchasing it once more from the mortgaging bank which had put it up for sale to recover the monies advanced to the Appellants' son.

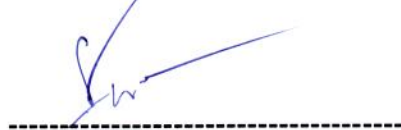
I find that I am unable to fault the learned trial Magistrate Grade I for her decision to order a refund of UGX 13,500,000/= to Respondent. In my view, she gave the evidence
15 a thorough evaluation and correctly arrived at her decision.

Ground 1 & 2 of the appeal fail.

Before I take leave of this matter, I noted that Counsel for the Appellants submissions comprised arguments that were a total departure from his client's pleadings at the lower
20 court. And I find that It was erroneous and misguided for Counsel to resort to such desperate measures. In the end, they were quite unhelpful and unreliable.

In conclusion, the decision of the lower court is upheld and this appeal is accordingly dismissed with costs to the Respondent.

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Olive Kazaarwe Mukwaya
JUDGE

30 **28th April 2023**

Delivered by email to Counsel for the parties