

Qulay¹

The counter claimant then filed **Civil Suit No.604 of 2007** against both counter defendants upon which the two suits were consolidated following a consent of the parties.

On 30th September 2013, this court presided over by Lady Hon. Justice Eva K Luswata (as she then was) dismissed the matter for non-appearance of either party.

The same was however later reinstated. On 5th December 2014, the suit and counter claim were both dismissed for a second time, for non-appearance. The counter-claimant then filed **Miscellaneous Application 1631 of 2017** seeking to have the matter reinstated.

This court by an order dated 19th February 2020 then reinstated the counter claim, and set it down for hearing. When the matter last came up for hearing, 12th March 2022, neither the counter defendants nor their counsel entered appearance and upon satisfying itself that counsel for the counter claimant had taken all the necessary steps to engage the counter defendants with no results, this court set the matter down for formal proof.

The counterclaimant did not however file written submissions, as directed by court.

Representation:

The counter claimant, John Baptist Kizito Mbooli who was initially represented by **M/s Rwakafuuzi Co. Advocates** was during the trial represented by **M/s Lubega Babu & Co. Advocates**, who filed notice of instructions on 23rd January, 2019.

The 1st counter defendant, Ms Nabawanuka Namuswe Annet filed a defence to the counter claim which she however never followed up despite the fact that on 4th October, 2021 and 16th November, 2021 respectively, she had been duly served with notices of the hearing date.

On 21st February, 2022 the firm of **M/s Sekabanja & Co. Advocates** which at all material times was representing the 1st counter defendant acknowledged receipt of a letter from **M/s Lubega Babu & Co. Advocates** requesting for a



meeting, for a possible settlement, which apparently never materialised. Subsequently on 4th April, 2022 they acknowledged receipt of the counter claimant's witness statement.

The 2nd counter defendant, John Muwanga Musisi was represented by **M/s Nyanzi, Kiboneka, Mbabazi Advocate**. He did not file a defence to the counter claim despite the fact that he was served with both the witness statement on 4th April, 2022 and a counterclaim scheduling conferencing notes on 6th April, 2022, which the firm had duly acknowledged receipt of on both occasions.

On 12th April, 2022, the date fixed for the formal trial, this court having satisfied itself that all necessary steps had been taken by the counter claimant side to make the two counter defendants aware of the proceedings proceeded *ex parte* against them.

Counter-claimant's case.

The gist of the counter claimant's action is that on 24th January 1996, he entered into an agreement with the 1st counter defendant to purchase land comprised in **LRV Folio 20 Kyaggwe Block 193 plot 350 at Mukono** (hereinafter referred to as the 'suit land') as well as the developments thereon for a total consideration of **Ugx 40,000,000/= (Uganda shillings forty million only)**.

The counter claimant made an initial payment of **Ugx 20,000,000/= (Uganda shillings twenty million only)**, while the balance of **Ugx 20,000,000/= (Uganda shillings twenty million only)** was to be paid on, or before the 3rd day of May, 1996, but not later than 3rd June 1996.

On 27th April 1996, the counter claimant paid the 1st counter defendant **Ug. Shs. 14,000,000/= (Uganda shillings fourteen million only)**, leaving a balance of **Ugx 6,000,000/= (Uganda shillings six million only)**, for which no date of payment was set.



It was agreed that the same would be paid after the counter claimant had returned from the Kenya side of the lake where he had gone to check on his workers.

The 1st counter-defendant then gave him a note to deliver to a one Mrs. Kayizi Margaret, who was in possession of part of the property introducing him as a purchaser, asking her to hand over the keys of the property to the counter claimant

With the permission of the 1st counter defendant he took possession of the suit property from July 1996, until sometime in May 2007 when he was evicted by court bailiffs, on behalf of the 1st counter defendant.

The counterclaimant alleged that at the time he took possession of the suit premises, he found a huge electricity bill of over **Ug. Shs. 520,000/= (Uganda Shillings five hundred twenty thousand only)** which he had cleared and although he brought the same to the attention of the 1st counter defendant, she refused to refund the money.

The counter-claimant contends that the counter claimant's attempts to pay the balance of the purchase price had failed. The 1st counter defendant instead sold and transferred the suit premises to the 2nd counter defendant on 10th November 2006.

According to him, the subsequent agreement had varied the original agreement which ceased to bind him, and that since he had by the consent of the 1st counter claimant taken possession of the suit premises, the property therein had passed onto him. Thus the 1st counter claimant had no title to pass onto the 2nd counter defendant.

Particulars of fraud:

The counter claimant claimed that fraud had been committed. The particulars were that the vendor purported to sell the suit property to the 2nd counter defendant, well knowing that the property in the goods had already passed to him; also aware the counterclaimant had taken possession of the suit property, having already paid her 95% of the purchase price.


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Against the 2nd counter defendant, the counter claimant alleged fraud on grounds that he purported to purchase the suit property without conducting a search so as to establish the actual status of the premises at the time.

That he also failed to inquire from the counterclaimant who was in physical possession of the suit property at the time, so as to establish the circumstances of the counter claimant's occupation of the property.

The counter claimant further contended that trespass had been committed owing to the fact that he was evicted from the suit property which he had occupied for a number of years by virtue of the 1st counter defendant's consent who later passed possession to the 2nd counter defendant.

That by evicting him, the counter claimant not only suffered physiological torture and mental anguish, but also suffered loss of business and profits for which he claims general damages.

That while the counter claimant lost over **Ug.x 9,000,000/= (Uganda Shillings nine million only)** because he was not given a chance to personally remove his property from the suit land, he was entitled to receive approximately **Ug.x 139,500,000/= (Uganda Shillings One Hundred thirty-nine million five hundred thousand only)**, money that the counter defendants have been collecting from the suit premises since May 2005.

The counter claimant then prayed that judgement be entered in his favour, and against the counter defendants in the following terms;

a. An order directing the Registrar of titles to cancels the certificate of title for the property comprised in Leasehold Register Volume 1846 Folio 20 Kyaggwe Block 193 plot 350 land at Mukono, now in the names of the 2nd counter defendant;

b. An order of specific performance of the contract in respect of the 1st counter defendant;

c. An order that the 1st counter defendant is only entitled to the balance of Ug. Shs. 6,000,000/= (Uganda Shillings six million only);

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d. An order directing the counter defendants to pay the counter claimant Ug. Shs. 139,500,000/= (Uganda Shillings One Hundred thirty-nine million five hundred thousand only) being money received by them from rent collection from the suit property for the time they have been in control of the same as well as the money that was lost during the eviction carried out by the 1st counter defendant;

e. Interest on (d) above at the commercial rate of 25% from the date of judgment till payment in full;

f. General damages;

g. Costs of the suit.

When the matter came up for hearing on 12th April 2022, this court noted that all the necessary steps had been taken to engage the counter defendants who were non-responsive. The counter claimant was allowed to proceed *ex parte*.

Court then directed counsel for the counter claimant to file written submissions by 26th April 2022. However, the same was not complied with, upon which court proceeded to determine this matter without the submissions.

Issues raised in the counterclaim:

The following were identified as the issues in the counter claim for determination:

- 1) **Whether the counter claim is entitled to the suit property;**
- 2) **Whether the 1st counter defendant lawfully sold the suit property to the 2nd counter defendant;**
- 3) **Whether there was fraud attributable to counter defendants.**



Consideration of the issues.

I will deal with the first two issues jointly.

The counter claimant who was a sole witness to his claim testified as **Pw1**. From the evidence on record, it is not in dispute that there was a contract for sale of the suit premises between the counter claimant and the 1st counter defendant.

The counter claimant presented a copy of the memorandum of sale of land dated 24th January 1996 (**PExh.2**) wherein it was agreed that the counter claimant would purchase the suit property at **Ugx. 40,000,000/= (Uganda Shillings forty million only)**, which was to be paid in two instalments.

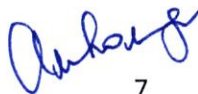
Under the terms of payment, it was stated that:

1. Shs. 20,000,000 (shillings twenty million only) has been paid by the purchaser to the vendor immediately after execution of this agreement, the receipt whereof the vendor hereby acknowledges.

2. The last and final balance of shs. 20,000,000/= (shillings twenty million only) shall be paid on, or before 3rd May 1996 but not later than 3rd June 1996.

The counter claimant in his evidence in chief stated that three weeks to the deadline of paying the 2nd instalment of the purchase price, he called the 1st counter defendant whom he requested that he pays **Ugx. 14,000,000/=** which she accepted; and that the same was given to a one Robert Senyonnjo to deliver to the 1st counter defendant, who acknowledged that she had received the money.

He further stated that after paying the aforementioned monies, he again requested the 1st counter defendant to give him part of the building on the land which was empty, to use as a store to keep flour imported from Kenya, and which he wanted to sell in order to pay the balance of **Ugx. 6,000,000/=**; and that the 1st counter defendant agreed to the counter claimant's request.



She then sent him to a one Mrs, Kayizzi who was a tenant on the premises to give her the keys to the rooms which were empty.

According to the clause relating to the issue of vacant possession in the agreement, it was agreed that the vendor, would only hand over vacant possession of the property to the purchaser after payment of the full purchase price.

The outstanding balance was to be paid by 3rd May, 1996, but not later than 3rd June, 1996.

The gist of the counter claimant's case is that the original written agreement had been varied verbally between himself and the 1st defendant to the counter claim suggesting therefore that there was a major change in the character of the sale agreement.

Section 67 of the Contracts Act (Variation of contracts) provides as follows:

Where any right, duty, or liability would rise under agreement or contract, it may be varied by the express agreement or by the course of dealing between the parties or by usage or custom if the usage or custom would bind both parties to the contract.

It is important to note that any such variation of the contract by the parties must be agreed upon between them and once any such variation is denied by one of them, it cannot stand unless it is proved against the party in denial. (See: ***Makubuya Enock Willy vs Songdoh Films & Another Civil Suit No.349 of 2017***).

The counter claimant herein argued that the original agreement of sale of the suit property was varied when the 1st counter defendant allowed to be paid the ***Ugx. 14,000,000/- (Uganda shillings fourteen million only)*** instead of the total balance of ***Ugx. 20,000,000/= (Uganda shillings twenty million only)***.



The date for the payment of the balance of **Ugx. 6,000,000/= (Uganda Shillings twenty million only)** was not provided for, thereby varying the terms of payment agreed upon in the memorandum of sale.

Further, the 1st counter defendant also allowed the counter claimant to take possession of the suit property without paying the full purchase price, contrary to the original agreement.

In **Globe Motors Inc. & others v TRW Lucas Varity Electric Steering Limited & another 2016 EWCA Civ 396**, court noted that an oral variation or a variation by conduct could be effective where the evidence establishes - on the balance of probabilities - that the variation was agreed. As long as the law or the contract itself does not say otherwise, parties to a contract can change it by oral or written agreement.

In the present case, it was more likely than not in the above circumstances that the contract of sale between the counter claimant and the 1st defendant to the counter claim was indeed varied.

The 1st defendant to the counter claim agreed to the payment of the balance of the purchase price on terms other than what was agreed upon in the original agreement.

This coupled with granting the counter claimant partial possession of the suit property amounted to a variation and a waiver of the rights set out under the original agreement.

Sharif Osman versus Hajji Haruna Mulangwa SCCA No.38 of 1995, wherein **Tsekoko J.S.C.**, quoted, with approval, the observations of **Lord Selborne, L.C., in Philips vs. Silvester (1872) 8 Cha. A. 173** that:

"By the effect of the contract, according to the principles of equity, the right to the property passes to the purchaser, and the right of the vendor is turned into a money-right to receive the purchase money, he retaining a lien upon the land which he has sold until the purchase money is paid. The vendor became a trustee for the purchaser".



Ultimately, the learned Justice of the Supreme Court observed that:

“even if there remains unpaid balance, the property in the lands passed to the purchaser when a deposit was made.”

In light of the above authority, it is the finding of this court that the property in the suit property had passed onto the counter claimant at the time he made the deposit totalling up to ***Ugx. 34,000,000/= (Uganda Shillings thirty-four million only)***, and this was further acquiesced to by the 1st defendant to the counter claim who went on to grant the counter claimant possession of the suit property.

It follows therefore that the suit land having passed onto the counter claimant, rendered the 1st counter defendant's ownership of that land encumbered; and for that reason she could not lawfully pass any title onto a 3rd party.

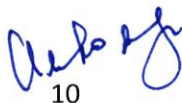
It is the position of the law that one cannot pass on valid title to what he did not lawfully own. The common law principle of *nemo dat quod non habet* has long held that no one can give a better title than he himself possesses. (***See: Halling Manzoor vs Serwan Singh Baram Supreme Court Civil Appeal No.9 of 2001***).

Thus Ms. Annet Nabawanuka Namuswe, the 1st defendant to the counter claim had no title to pass on to the 2nd defendant to the counter claim since she was merely a trustee as the property in the land had passed onto the counter claimant.

The question remains whether the counterclaimant under those circumstances was entitled to specific performance.

Whether the 1st counter defendant lawfully sold the suit property to the 2nd counter defendant:

It is well established that fraud must relate and be attributable either directly or by necessary implication to the transferee. The transferee must be guilty of some fraudulent act or must have known of such act by someone else and taken advantage of such act. (***Ref. Florence Namuli Matovu vs hellen Oyeru CACA No. 15 of 2006***).



Fraud is such grotesque monster that courts should hound it wherever it rears its head and wherever it seeks to take cover behind any legislation. It unravels everything and vitiates all transactions. (***Fam International Ltd and Ahmad Farah vs Mohamed El Fith [1994] KARL 307***).

- 5 It is also trite law that that fraud that vitiates a land title of a registered proprietor must be attributable to the transferee and that fraud of a transferor not known to the transferee cannot vitiate the title. ***See: Wambuzi C.J, Kampala Bottlers vs Damanico (U) LTD, SCCA No. 27 of 2012.***

10 In the instant case, the agreement of the parties provided a specific time when the purchaser would take possession, that is, after payment entire purchase sum. The counter claimant in this case took possession before completing the payment, which was not disputed.

The provision for possession ought to have been strictly construed. In ***Shaiff Osman vs Haji Haruna Mulangwa SCCA 38/95*** court ruled that in absence
15 of a contrary intention time is of essence of a contract even though the parties have not expressly provided for it.

In that case it took two years to rescind the contract, which court took as evidence that time of payment of the purchase price was not of essence to the contract and therefore the purchaser was not in breach of the contract for
20 failure to pay the balance by the agreed date. In alignment with the above authority therefore, no breach was committed by the counter claimant.

In the case of ***Uganda Posts & Telecommunication V. Abraham Katumba (supra) citing Taylor vs. Stilbert [1803-13] ALLER 432*** court held that failure to make reasonable inquiries of persons in possession and use of the
25 land or the purchaser's ignorance or negligence to do so formed particulars of fraud and the purchaser acquires and takes such purchased land subject to its equities let alone a finding that he or she committed fraud.

The counter claimant in this case alleged that the 2nd defendant at the time of purchasing the suit property failed to inquire from the counter claimant
30 who was in occupation of the suit property so as to establish the circumstances under which he occupied the same.

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It follows therefore that the 2nd defendant acquired the suit land with the aim of defeating the counter claimant's interest therein which amounts to fraud by necessary implication.

That if he had conducted sufficient due diligence before purchasing the suit property, he would have discovered that the counter claimant was in physical occupation of the same and that he had already purchased the suit property.

The circumstances however as shown in this case indicate that the 2nd counter defendant got registered on the title on 10th November, 2006. On 10th April, 2006, counsel for the 1st counter defendant wrote to the Registrar of this court referring to the warrant to give vacant possession of the suit land which was dated 15th July, 2004.

In that correspondence he also referred to an interim order issued vide **MA No. 658 of 2004**, dated 11th August 2004, which had expired and no further orders had been issued in the above matter. Counsel thus sought renewal of the execution warrant.

Court in a hand written response to him dated 18th April, 2006 had this to say:

The interim order has been extended for more than 3 times without fixing the main application. That is an abuse of court process. So execution is to issue accordingly.

Execution/eviction therefore arose out of a lawful order of court upon which the 2nd defendant became registered on the title on 10th November, 2006. This implies that by the time the counter claimant filed **Civil Suit No. 604 of 2007**, which (by consent of the parties dated 16th December, 2010) was consolidated with the reinstated **Civil Suit No. 1753 of 2000**, the execution had already been ordered, concluded and property already passed onto the 2nd counter defendant.

This therefore makes the order sought for specific performance impracticable to implement.



Issue No. 3: Remedies

In this counter claim which succeeds in part, the following were sought as reliefs:

1) *An order directing the Registrar of titles to cancel the certificate of title for the property comprised in **LRV 1846 Folio 20, Kyaggwe Block 193, plot 350 land at Mukono** now in the names of the 2nd defendant on the counterclaim;*

2) *An order for specific performance of the contract in respect of the 1st defendant on the counterclaim;*

3) *An order that the 1st defendant on the counterclaim is only entitled to the balance of **Ugx 6,000,000/=**;*

4) *An order directing the defendants to pay to the counter claimant **Ugx 139,000,000/=** being money received by them from rent collection from the suit property for the time they have been in control of the same and money that was lost during the eviction exercise carried out by the 1st defendant;*

5) *Interest at commercial rate of 25% from the date of judgment till payment in full; general damages and costs.*

General damages.

General damages are awarded at the discretion of court. In **Uganda Commercial Bank Vs Kigozi (2002)1 EA 305**, the consideration for an award of damages was based mainly on the value of the subject matter, the economic inconvenience that a party has been put through and the nature and extent of the breach or injury. The record is does not give any clear indication of the value, leaving all in the discretion of court.



Refund of rent collection:

The counter claimant also sought an order directing the defendants to pay him **Ugx 139,000,000/=**, being money received by them from rent collection from the suit property for the time they have been in control of the same and money that was lost during the eviction exercise carried out by the 1st defendant.

Court however was not provided with any information as to how the counter claimant had arrived at that figure. There were no specific details as to how much rent was collected each month; how many tenants and rent payable by each tenant. For lack of adequate proof, I would therefore decline to grant the prayers sought for that amount.

He also sought another sum of **Ugx 9,000,000/=** as cash lost during the eviction claiming that he was never given a chance to remove his property. There were however no supporting documents or other evidence to back up that claim.

Order for specific performance:

As already noted by court, by the time the counterclaimant had filed his suit in 2007, the subject matter was no longer in existence. Court orders are not issued in vain.

In light of the above, the counter claim succeeds in the following terms.

1. The counter claimant is entitled to a refund from the 1st counter defendant of Ugx 34,000,000/=, the money paid as purchase price for the suit property comprised in LRV 1846 Folio 20, Kyaggwe Block 193, plot 350, land at Mukono;


2. The 1st counter defendant shall pay a sum of Ugx 30,000,000/= (thirty million shillings) as a compound sum for the compensation and damages to the counter claimant, payable with interest of 15% from the date of the eviction, until the date of delivery of this judgment; and for:

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3. Costs of the counter claim.

I so order.

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Alexandra Nkonge Rugadya

Judge

10 **9th May, 2023.**