

THE REPUBLIC OF UGANDA
 IN THE HIGH COURT OF UGANDA AT KAMPALA
 LAND DIVISION
 CIVIL SUIT NO. 155 OF 2020

5 KATO EVARESTO-----PLAINTIFF

VS

1. KIMBOWA ERIC

2. LERA MAISHARAH-----DEFENDANTS

10 Before: Hon. Lady Justice Olive Kazaarwe Mukwaya

JUDGMENT

The Plaintiff Mr. Kato Evaresto brought this action against the Defendants jointly and severally seeking;

- 15 1. A declaration that the Defendants breached the agreement for sale of a house located at Katooke Wamala-Nabweru Division district measuring 40ft by 70ft between the Plaintiff and the Defendants dated 1st July 2018.
2. An order for rescission of the sale of land/house agreement between the Plaintiff and the Defendants.
3. An order for vacant possession of the house located at Katooke Wamala-Nabweru
20 Division, Wakiso District.
4. General damages for breach of contract.
5. Punitive and exemplary damages.
6. Interest at commercial rate on 4 and 5 from the date of judgment until payment in full.
- 25 7. Costs of the suit.

PLAINTIFFS' CLAIM

Mr. Kato Evaresto, the Plaintiff purchased a plot of land on Kabaka's land measuring 40ft by 70ft situate at Wamala Kalongoti, Kyadondo from Mr. Kibirige Noah at UGX 10,000,000/= on the 15th October 2014. He later developed it by erecting a residential house where he lived with his family until 2018, when he decided to sell it to get a bigger house.

On the 10th April 2018, the Plaintiff sold the suit property to the Defendants, a married couple, at UGX 80,000,000/=. They took possession upon execution of the agreement after making a deposit of UGX 24,000,000/=. Under the agreement, completion of payment of the balance was to be made by the end of December 2018. Another term of their agreement was that the Plaintiff would take possession of the Defendants' house situate at Kazo Angola, as security for completion of payment of the purchase price. And that the Plaintiff would vacate the house thereafter.

But less than two months later, in June 2018, the Plaintiff was forcefully evicted from the Defendants' house. They had sold it without his knowledge and in breach of the sale agreement. Consequentially, the Plaintiff was forced to rent a house from Mr. Manzi Ronald at Kazo Central at UGX 500,000/=, from June 2018 to July 2019.

Meanwhile, the Defendants refused to pay the Plaintiff's balance on their purchase of the suit property. He sought the assistance of the LC1 Chairperson Mr. Kisembo Francis and his lawyer friend, a Mr. Seyiga Abdul Swabuk to help him secure his money. Following a meeting with the Defendants, the parties entered a final agreement dated 1st July 2018 which cancelled the first agreement.

According to the 1st July 2018 agreement, the Defendants would pay the balance of UGX 56,000,000/= not later than 31st December 2018. If they failed to do so, the Plaintiff reserved the right to sell the suit property and refund the Defendants' money. The Defendants failed to pay the balance by 31st December 2018. All efforts by the Plaintiff to sell the house were unsuccessful since the Defendants refused to hand over possession, effectively repelling all prospective buyers.

Around January 2019, the Plaintiff sold his car and with the proceeds attempted to refund the Defendants' money so they could vacate the suit property. They declined the money and held on to the suit property.

5 In response, the Plaintiff filed a suit at the Chief Magistrates' Court of Nabweru vide Civil Suit 2 of 2019 after the Area Local Council failed to resolve the matter. This suit was determined in the Plaintiff's favour and a decree was issued ordering the Defendants to vacate the suit property. It later turned out that the decree was set aside since the Grade One Magistrate lacked jurisdiction to entertain the suit.

10 Eventually, the Plaintiff instituted this suit to enable him obtain justice and fairness by being granted the prayers contained in his pleadings. He contended that he has suffered inconveniences, stress, trauma, suffering and unprecedented rental costs as a result of the eviction from the Defendants' house and their refusal to pay his outstanding balance.

DEFENCE AND COUNTERCLAIM

15 The Defendants denied the Plaintiff's claim and asserted that in April 2018, the Plaintiff agreed to trade the suit property valued at UGX. 80,000,000/= in exchange for the Defendants' house. Since the Plaintiff's house was of more value than theirs, they agreed to give the Plaintiff some money in addition to his house as per the agreement dated 10th April 2018.

20 Initially, Mr. Kimbowa, the 1st Defendant, paid an instalment of UGX 8,000,000/= as consideration. However, the Plaintiff later convinced him that he should sell off his house which he was in occupation of and give him the proceeds. The Plaintiff also suggested that the 1st Defendant could pay the balance of the consideration at a later date.

25 It was after this arrangement that the 1st Defendant identified buyers for his house while the Plaintiff was still in occupation of it. They paid the purchase price to him and he in turn paid the Plaintiff another instalment of UGX 16,000,000 on 22nd July 2018. The Plaintiff agreed to immediately move out so that its buyers could move in. At this point, the 1st Defendant had made a total payment of UGX 24,000,000/= to the Plaintiff, leaving a balance of UGX 56,000,000/= for the suit property.

Sometime later, the Plaintiff approached the 1st Defendant, in the company of PW2, Mr. Seyiga Abdul Swabuk with a better deal. They proposed execution of a fresh agreement in respect of the suit property. The Plaintiff convinced the 1st Defendant that he had secured the certificate of title for the suit land and wanted to sell him his legal interest in it.

Upon that understanding, the parties signed a new agreement dated 1st July 2018 which had the effect of cancelling their prior agreement. Subsequently, it was frustrated when the 1st Defendant discovered that the suit land was Kabaka's land and not Private Mailo land as the Plaintiff had indicated. For this reason, the 1st Defendant declined to pay the balance of UGX 56,000,000/= and requested a refund of his UGX 24,000,000/= deposit instead; as a condition to return the 1st Defendant's land and house.

The Plaintiff refused and demanded the Defendants vacate his house since they had failed to pay the balance by 31st December 2018 as agreed. And with the aid of the area L.C 1 Chairman, the Plaintiff attempted to forcefully evict them without making the refund. Fearing for the safety of their lives, the Defendants deployed security guards at a very costly expense to protect themselves from the Plaintiff's threats.

To amicably settle the matter, the 1st Defendant/ 1st Counter Claimant made a proposal to the Plaintiff which was rejected. He maintained that this whole situation is a product of the Plaintiff's making and prayed that the Court dismiss the Plaintiff's suit with costs and allow the Counterclaim prayers to wit;

1. A declaration that the counter defendant is in breach of the contract.
2. General damages for breach of the agreement.
3. Special damages of UGX 24,000,000/=
4. Interest on (b) and (c).

REPLY TO THE COUNTERCLAIM

The Plaintiff asserted that the 1st Counterclaimant knew that the land is Kabaka's land as it was clearly stated under the recitals of the final purchase agreement dated 1st July 2018. He was therefore in breach of the terms of the purchase agreement when he failed to pay the outstanding balance of UGX 56,000,000/= by 31st December 2018 and refused

to vacate the suit property despite several requests. For these reasons, the Counterclaimants were not entitled to any reliefs sought.

REPRESENTATION

The Plaintiff was represented by Mr. Musiige Faisal of M/S MSM Advocates while the
5 Defendants were represented by Ms. Katerega Jennifer and Mr. Wandera David of M/S JN Katerega Advocates & Legal Consultants.

Both Counsel filed written submissions which I have duly considered.

During scheduling the following issues were agreed upon by the parties for this court's resolution;

10 ISSUES

1. Whether there was any breach of the contract dated 1st July 2018 between the parties, and if so, by whom?
2. What remedies are available to the parties?

15 I did notice however, that Counsel for the Defendants, in her submissions, belatedly introduced a 'preliminary objection' for this court's resolution as the 3rd issue between the parties. This was notwithstanding that Counsel duly executed the Joint Scheduling Memorandum. The scheduling conference is mandatory under **Order 12 rule 1(1) of the Civil Procedure Rules**. In the case of **Stanbic Bank (Uganda) Limited v Uganda Cros**
20 **Limited Tsekooko JSC**, explained that it is at the stage of scheduling conference that the proper issues would emerge.

In this suit, the two issues above emerged. I find that it was improper for Counsel for the Defendant to raise a third issue that was not agreed upon between Counsel for the parties
25 under their Scheduling Memorandum. The disadvantage that is created affects not only the opposite side but the court as well. In my view, the 3rd issue was irregularly before this court and I decline to address it.

RESOLUTION

Whether there was any breach of the contract dated 1st July 2018 between the parties, and if so, by whom?

5 A contract is defined under **section 10 the Contracts Act 2010** as follows;

10. Agreement that amounts to a contract

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.

10 **Section 33 of the Contracts Act 2010** provides for the obligation of the parties as follows;

33. Obligation of parties

15 *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.*

The subject matter of this suit is the agreement between the Plaintiff and the 1st Defendant dated 1st July 2018. By that agreement, Exb. P.1, Mr. Kato Evaresto, the 1st Defendant is the purchaser and Mr. Kimbowa Eric, the Plaintiff was the vendor. The land is described
20 under paragraph 4 of the agreement as;

'...Kabaka's land at Wamala, Kalongooti, Kyadondo measuring 40ft by 70ft by 40ft by 70ft described on the land title as...'

25 On that date it was agreed by both parties under clause (a) that the consideration for the land was UGX 80,000,000/=; under clause (b) that the Plaintiff had already received UGX 24,000,000/= as part payment for the purchase of the land from the 1st Defendant and under clause (c) that the payment of the balance would be not later than 31st December 2018. I shall reproduce Clause (d) below in its entirety;

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'The purchaser/buyer irrevocably covenants that should he fail to pay the said money before the date stipulated herein above, the vendor shall have a right to sell the property and reimburse the purchaser up to an amount which he will have deposited on the purchase of the said property'

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It is an undisputed fact that the 1st Defendant failed to pay the UGX 56,000,000/= within the stipulated time. **Section 47 of the Contracts Act 2010** provides;

47. Failure to perform within a fixed time

10 *Where a party to a contract promises to do a certain thing at or before the specified time but fails to do the thing at or before the specified time, the contract or the part of the contract that has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time was of the essence to the contract.*

15 The 1st Defendant testified that he discovered that suit land was not Private Mailo land but it was Kabaka's land, which led to frustration of the contract. He, therefore demanded his refund of the deposit he made before could vacate the suit premises. Counsel for the Plaintiff dismissed the 1st Defendant's claims as ridiculous since the land is described as Kabaka's land under the agreement Exb. P.1. Counsel relied on the cases of **William**
20 **Kasozi v DFCU Bank Ltd HCCS No. 1326 of 2000; Harry Sempa v Kabagambe David HCCS No. 408 of 2014 and Future Stars Investment (U) Ltd v Nasuru Yusuf HCCS No. 0012 of 2017**; to submit that the 1st Defendant was in breach of contract, by defaulting on his payments and refusal to vacate the suit premises.

25 Counsel for the Defendants argued that with regard to the 2nd Defendant, she was not a party to Exb.P.1, so she could not be in breach. With respect to the 1st Defendant, Counsel submitted that the 1st Defendant gave reasons why he did not fully perform his obligations. She argued that his obligations were vitiated by a mistake as to the subject matter.

30 A reading of Exb. P.1 demonstrates that both parties treated time as of the essence. In particular, the Plaintiff testified that he made several attempts to find buyers for the house.

The 1st Defendant admitted that he resisted the sale of the suit land. But he maintained that the breach was justified since he was waiting for the refund of his UGX 24,000,000/=, as a prerequisite to relinquish possession to the Plaintiff. To assert his position, he fortified the suit premises with security guards which move inevitably kept the Plaintiff locked out and unable to sell the house. From the 1st Defendant's point of view, he was protecting his interests.

The contractual principle of respecting the contractual wishes of the parties was expounded in **Crane Bank Ltd v Nipun Narottam Bhatia (Civil Appeal 2 of 2014) [2015] 16 (20 August 2015)**; where **Arach-Amoko, JSC** held;

'In my opinion, the Learned Justices, having rightly found that there was indeed a defect in title which had prevented the respondent from transferring the title to the appellant, should have respected the wishes of the contracting parties and allowed them to exercise the agreed solution under clause 2 of their agreement, which was simply, to allow the respondent to refund the deposit in full so that the beneficial interest in the suit property could revert to the estate of the Respondent's late parents.'

At the time of executing the contract, the Plaintiff and the 1st Defendant were both aware that the suit land was Kabaka's land. Counsel for the Plaintiff rightly pointed out that the words, 'Kabaka's land' are used to describe the land under Exb. P.1. There was a provision for a 'Block' and 'Plot' number to be indicated, but the particulars were left blank on the contract. And there was no mention of a certificate of title in the name of the vendor and its transfer to the purchaser; two key elements when the subject matter of the sale agreement is Private Mailo land. Nonetheless, the parties affixed their signatures to the agreement; fully committing to the undertakings therein, including the 31st December 2018 deadline, within which the 1st Defendant was enjoined to pay the balance of UGX 56,000,000/= . Exb. P.1 was not a complicated agreement. And I find that it was the duty of this court to respect the parties wishes by dismissing all of the 1st Defendant's extraneous additions to the contract as mere excuses, not at all binding on the Plaintiff. I agree with Counsel for the Plaintiff and find that the 1st Defendant was in breach of Clauses (c) and (d) of the contract.

With respect to the 2nd Defendant, however, there was no evidence that she was a party to the contract. This fact was apparent on the face of the agreement. I agree with Counsel for the Defendants that since she did not participate in the contract, she could not be held liable for its breach under the Contracts Act 2010.

Issue 1 is hereby resolved in the affirmative. There was breach of contract by the 1st Defendant.

Issue 2

What remedies are available to the parties?

The Plaintiff's prayer is that the sale agreement dated 1st July 2018 be rescinded, a right accruing to him under **section 47 of the Contracts Act, 2010**, *supra*, and effected by the operation of **section 53 of the Act** as follows;

53. Consequence of rescission of voidable contract

(1) Where a person at whose option a contract is voidable, rescinds it, the other party to the contract need not perform any promise contained in the contract.

(2) A party who rescinds a voidable contract shall, if that party received any benefit from the other party to the contract, restore the benefit to the person from whom it is received.

According to **Black's Law Dictionary, 2nd Edition**; '*To rescind means to abrogate, annul, avoid, or cancel a contract; particularly, nullifying a contract by the act of a party.*'

The Plaintiff's act of taking legal action against the 1st Defendant, hardly a month after the specified payment deadline, was a clear demonstration of rescission of their agreement. And in my view, his prayer for vacant possession is justified. For almost 5 years, the 1st Defendant has illegally occupied the suit property to the detriment of the Plaintiff. General damages for the gross inconvenience suffered by the Plaintiff are in order and I award a sum of UGX 35,000,000/=. I decline to make any award for punitive or exemplary damages nor for mesne profits, since I am not persuaded that these have been sufficiently

proved. Exb. P.5, the batch of rent receipts do not indicate who the Plaintiff's landlord was. Only the name of the Plaintiff is available, rendering the receipts unhelpful.

As far as the 1st Defendant is concerned, I order a refund of UGX 24,000,000/= by the Plaintiff, at zero interest. The sum being the benefit received by the Plaintiff from the 1st Defendant, under their agreement which the former was enjoined to restore under **section 56 (a) of the Contracts Act, 2010**. The decision to order zero interest stems from the 1st Defendant's behaviour. He practically took the law into his own hands when he barricaded himself in the suit property for several years after failing to honour his end of the agreement. His actions do not deserve to be rewarded.

In conclusion, I dismiss the counterclaim, enter judgment for the Plaintiff and order as follows;

1. A declaration that the Defendants breached the agreement for sale of a house located at Katooke Wamala-Nabweru Division district measuring 40ft by 70ft between the Plaintiff and the Defendants dated 1st July 2018.
2. An order for rescission of the sale of land/house agreement between the Plaintiff and the Defendants.
3. An order for vacant possession of the house located at Katooke Wamala-Nabweru Division, Wakiso District with immediate effect.
4. General damages for breach of contract of UGX 30,000,000/=
5. Interest at court rate on (4) from the date of judgment until payment in full.
6. A refund of UGX 24,000,000/= to the 1st Defendant.
7. Costs of the suit.


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Olive Kazaarwe Mukwaya

JUDGE

19th May 2023

Delivered by email to Counsel for the Parties.