THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

CIVIL SUIT NO. 464 OF 2016

CISSY GUSKO :: PLAINTIFF

VERSUS

1. **TUGUME NELSON OWAARWE**
2. **NIXON OWAARWE TUSIIME :::::::::::::::::::::::::::::::: DEFENDANTS**

Before : Lady Justice Alexandra Nkonge Rugadya

JUDGMENT:

Background:

The plaintiff, Ms Cissy Gusko filed this suit against the defendants seeking among others, an order of specific performance; release of a caveat by the 2nd defendant on the suit land; an order for a permanent injunction against the defendants restraining them from dealing in/or transacting on the suit property, special and general damages for breach of contract, fraud and misrepresentation, economic loss, interest at a commercial rate and costs.

The defendants filed a joint defence denying liability and a counterclaim seeking an order that the transaction between the plaintiff and the 1st defendant be declared void; or that the consideration be refunded by the counter claimants within six months from the date of judgment, or as court may deem reasonable.

In the alternative, that the counter defendant removes her perimeter wall to the extent of the encroachment on ***plot 1159;*** that the counter defendant retains land measuring 27.7 decimals covered by the six residential apartments; the deed plan for ***plot 1158*** be adjusted to 27.7 decimals measurements accommodates the six (6) residential apartments and parking yard; complete the

process of titling and handover the residue to the 1st counter claimant within three months from the date of judgment; and for the suit to be dismissed with costs.

The parties were directed to file written submissions, which they did.

Preliminary objection by the plaintiff:

Counsel for the plaintiffs in the submissions objected to among other things, the defendants' alleged departure from their first amended WSD when they altered their pleadings and relied on facts and evidence obtained from a court survey. Counsel therefore requested court to disregard the WSD as a complete departure from their original pleadings, which offended the rules governing pleadings.

Order 6 rule 7 of the Civil Procedure Rules states that a pleading shall, not being a petition or application *except by way of amendment* raise any new ground of claim or contain any allegation of fact inconsistent with the previous proceedings of the party.

The effect of this rule is that since pleadings form the factual basis upon which each party's case is built, parties in action are bound by their pleadings, as such in the course of the proceedings would not be allowed to allege new facts or make claims outside or inconsistent with the original pleadings.

As indeed pointed out by the defence side in their submissions, this court has the discretion at any stage of the proceedings, to allow as it did, alterations or amendment of the pleadings for the purpose of determining the real questions in controversy between the parties. ***(Order 9 rule 19 of the CPR)***.

Since the amendments in this case were made with leave of court, ***order 6 rule 7 of the CPR*** was therefore not applicable in this instance and it is for that reason that this objection, and any others relating to the changes in the amended plaint (as alluded to in the defence submission), are overruled as the

amendments to the pleadings were intended to guide court in determining the real questions in controversy.

Representation:

The plaintiff was represented by ***M/s Apio, Byabazaire, Musanase & Co. Advocates***. The 1st and the 2nd defendants on their part were represented by ***M/s Muhwezi Law Chambers Advocates.***

Agreed facts;

The facts agreed upon by both sides as confirmed at the scheduling conference were as follows:

1. *There was an agreement dated 31st March 2016 to sell and purchase part of the land comprised in Kyadondo Block 185 plot 4912 land at Namugongo between the plaintiff and the 1st defendant.*

2. *The 1st defendant declared to the plaintiff that the suit land was the subject of a mortgage with Housing Finance Bank.*

3. *While the plaintiff was trying to complete the transaction, she was informed that a caveat had been placed on the suit land by a one Apollo Karugaba who was claiming an interest in the same having purchased the suit land together with the 1st defendant.*

4. *The plaintiff consulted with the 1st defendant on the interest being claimed by Apollo Karugaba and the 1st defendant confirmed Mr. Karugaba's interest in the suit land.*

5. *The plaintiff thereafter agreed with the 1st defendant and Mr. Karugaba to make a payment of Ugx 50,000,000/= (Uganda shillings fifty million only) as part of the purchase price in full and final settlement of Karugaba's claims.*

6. *The plaintiff accordingly agreed to pay a total of Ugx 702,000,000/=...as the purchase price for the suit land which payment was made in various instalments.*

7. *The suit agreement was ambiguous on the area sold/purchased.*

At the scheduling conference, several issues were also agreed upon as follows:

1) ***Whether the plaint discloses a cause of action/whether the cause of action is frivolous and vexatious.***

2) ***Whether the transaction between the plaintiff and the 1st defendant is valid.***

3) ***Whether the plaintiff purchased part of the property comprised in Kyadondo block 185 plot 4912 land at Namugongo and if so, what size of the property had been purchased.***

4) ***Whether any of the parties breached the terms of the sale and purchase agreement.***

5) ***Whether the plaintiff is entitled to an order for the release of the caveat by the 2nd defendant on the suit land.***

6) ***Whether the 1st defendant is liable for misrepresentation, fraud and economic loss to the plaintiff.***

7) ***What are the possible remedies available to the parties.***

<u>Issue No. 1 :Whether the plaint discloses a cause of action against the defendants and whether it is frivolous and vexatious?</u>

This was raised as a preliminary objection by the defendants and at the scheduling became one of the issues to be determined by this court.

I have carefully perused the pleadings and arguments raised by either side in their submissions, and in this judgment duly considered each point raised. I do not therefore intend to reproduce each point as raised.

Order 7 rule 11(a) and (e) of the CPR gives this court power to reject the plaint where it fails to disclose a cause of action or where it is shown to be frivolous and vexatious.

In ***Wabwire Vs Kazoora (Civil Suit No. 187 of 2019),*** a cause of action was defined as every fact which is material to be proved to enable the plaintiff succeed or every fact which if defined the plaintiff must prove in order to obtain a judgment.

The plaint ought to show that the plaintiff had previously enjoyed a right, that right has been violated and that the defendant is liable. (***Tororo Cement Ltd Vs Frokina International Ltd SCCA No. 2 of 2001; Cottar vs Attorney General for Kenya 193 AC P. 18).*** Thus if any of those essentials is missing no cause of action has been shown and no amendment is permissible.

The question as to whether or not a cause of action has been disclosed must be determined upon a perusal of the plaint and its annextures, which are also considered as part of the pleadings. (***Castelino v. Rodrigues 1(1972) E.A.223 (CA).***

In her pleadings as amended, the plaintiff claimed that she bought the entire piece of land currently comprised in ***plot 11558*** measuring 57.7 decimals not 0.577 decimals as claimed as the same would be less than what is occupied by the apartments and parking yard.

That in any case no certificate of title could be created for land which less than 11 decimals at ***Ugx 702, 000,000/=*** and to her that would amount to fraud on the part of the defendants.

It was later discovered that the 2nd defendant who was not party to the contract between the plaintiff and 1st defendant intending to deny her of her interest in the suit land had lodged a caveat on the property, preventing her from obtaining title in the property.

Arguments by the 1st defendant:

The 1st defendant, Mr. Tugume Nelson ***(Dw1)*** who is the current registered owner of ***plot 4912*** measuring 0.378 hectares (0.934 acres) averred in *paragraph 4(a)* of his defence, that he was approached by the plaintiff who wanted to buy part of his property and all developments thereon which comprised of 6 residential compartments and its paved compound/parking yard enclosed with live fence. He refuted the claim that the plaintiff had bought the undeveloped area, which at the time was covered by a swamp.

In *paragraph 8* of his statement, that he knew that the actual size of the land occupied by the residential apartments parking yard and former swampy land now plaintiff's playground was approximately 57 decimals. The land had been surveyed and mark stones fixed, although no records had been kept.

The entire plot ***(4912)*** before the subdivision had been mortgaged to the Housing Finance Bank Ltd, a fact which had been disclosed to the plaintiff. That immediately after execution of the agreement the plaintiff took possession of the apartments block, and the parking yard.

That she later changed the boundary by relocating the gate to the upper side of the land that had not been sold to her; removed the live fence which separated the part she had bought from the swampy portion which she had not bought and which she turned into a playground.

On the side bordering another ***plot 11559,*** she put up a perimeter wall which encroached on the said plot. Yet the portion occupied by the apartments and in respect to which the agreement was executed was only about 27 decimals, which therefore prompted the 2nd defendant who had interest in the land to lodge the caveat.

That the survey report indicated 61.7 decimals which she is currently in possession not the 27.7 decimals sold to her. He further claimed that the agreement for sale had been drafted by the plaintiff's lawyers who referred to an area sold that did not make sense, and neither party noticed it.

He had signed transfer forms and mutation forms leaving out the plot numbers and size of the plot to be curved out as these were pending a surveyor's report and his approval. That it was not until after the suit was filed that he saw the deed plans, after the plaintiff and her agent had picked the title from the bank.

The 1st defendant therefore denied having dealt with the plaintiff's agents adding that his spouse had signed for only 0.577 decimals, not 57 decimals and claimed that he was willing to refund the amount to the plaintiff, but without any interest since the plaintiff has been collecting rent of more than ***Ugx 432,000,000/=*** from the apartments from 2016.

Arguments by the 2nd defendant:

The 2nd defendant testifying as ***Dw2*** on his part, in denying liability confirmed that the 1st defendant had sold only a portion on which the residential apartments were built, together with paved parking yard which was demarcated from the rest of the land beyond the live fence and chain link.

In the counterclaim he contended that he has an undisclosed equitable interest in the undeveloped portion which had not been covered in the agreement between her and the plaintiff, land which the plaintiff had transformed into a playground. He therefore also refuted the claim that he had sold to her 0.577 acres, equivalent to 57.7 decimals.

According to the defendants therefore the plaint did not disclose a cause of action against them and was not therefore entitled to specific performance in respect of an agreement which has been rendered void on account of the mistake in the actual measurements.

It is a fact admitted that while the plaintiff was trying to complete the transaction, she was informed that a caveat had been placed on the suit land by a one Apollo Karugaba who was claiming an interest in the same, having purchased the suit land together with the 1st defendant.

In June, 2016 soon after the agreement was signed, another caveat was lodged by the 2nd defendant who was not registered owner of the suit land but whose claim was that he owned part of the land in dispute.

Under those circumstances, there is no doubt as established from the pleadings that a cause of action was disclosed.

Issue No. 2: Whether the transaction between the 1st plaintiff and 1st defendant is valid?

And

Issue No. 3 : Whether the plaintiff purchased part of the property comprised in Kyadondo block 185 plot 4912 land at Namugongo and if so, what size of the property had been purchased.

Section 10 of the Contracts Act 2010 defines a contract as an agreement made with the free consent of the parties with capacity to contract for a lawful consideration and with a lawful object, with the intention to be legally bound.

In the case of ***Green Boat Entertainment Ltd vs City Council of Kampala HCCS No. 0580 of 2003*** court noted that in law, a contract is an agreement enforceable at law.

For a contract to be valid and legally enforceable, there must be capacity to contract, intention to contract: *consensus ad idem;* valuable consideration, legality of purpose; and sufficient certainty of terms.

Consensus of idem or the intention to contract which is the meeting of the minds as can be inferred from the terms of the agreement as well as the general circumstances of the case, means that the parties have understood and agreed on the terms of the agreement, are at the same level and in relation to the same points.

An agreement will fall into a category of a legally enforceable document if it is clear that the parties intended it to be binding and the terms are clear and certain enough so as to be legally enforceable.

In the defendants' amended WSD it was contended in *paragraph 14* that the agreement of sale was vague and impossible of performance and therefore void for enforcement by court.

A declaration was sought for want of *consensus ad idem* on the part of the contracting party on the area that was subject of sale. In *paragraph 15* they further pointed to the inconsistencies in the sale agreement, deed plan, mutation form, amended plaint and findings in the survey report which demonstrated that the agreement was incapable of being performed, making it void for enforcement by court.

Counsel for the defendants also raised an argument that by virtue of ***sections 91 and 92 of the Evidence Act, Cap. 6*** any admission of extrinsic evidence adduced in court to prove any term outside the written agreement offended the parole evidence rule.

That the plaint in this case falls short of proving the requirement that the plaintiff had a right to 57 decimals and the claim that the defendants had violated it. He implored court therefore to strike out the plaint under ***order 6 rule 30 of the CPR,*** as frivolous and vexatious.

Generally, a court would not consider evidence outside the contract to interpret its terms when it finds that contract is not clear. It will only normally interpret the language of the contract according to what the parties claim their intent was when they made it.

In addressing this objection however, and given the circumstances of this case, one would find the defendant's arguments on the application of the above provisions of the law however rather self-defeating.

In the first place, the defendants acknowledged the fact that the sale agreement bears an error on the actual measurements of the area, indicating that the size of the land purchased by the plaintiff was 0.577 decimals, whereas not.

The error in measurements was confirmed by Ms Violet Waiswa, who drafted the agreement and who testified as ***Pw6***, confirming that neither the parties nor their counsel at the time was able to detect the said error.

The plaintiff's claim was that she had bought 0.577 of an acre while the defendants maintained that what had been sold to her was only 27.7 decimals, which figures do not however appear anywhere in the agreement.

Based on the independent survey, ***CExh1,*** 27.7 decimals could only cover the area taken up by the apartments and part of the parking yard. Under those circumstances, court could not therefore ignore or disregard evidence extrinsic to the agreement so as to understand the intention of both parties.

It was acknowledged by the parties that despite the said discrepancies, the full consideration had been paid by the plaintiff upon the mortgage on the title settled and title handed over to her for subdivision.

Where an obvious error is made, what a court would do therefore is to objectively assess the terms and circumstances so as to establish the intention of the parties, which terms however must be identified with certainty definiteness.

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(Olanya vs Acullu Civil Appeal No. 38 of 2016; *refer also to:* ***Ndawula Vs Mutabazi (Civil Appeal 43 of 2020).***

The plaintiff in this case relied on the evidence of seven witnesses. The two defendants on their part relied on their own evidence. The sale agreement in contention tendered in as ***PExh 6***, was made on 31st March, 2016 in respect of what was ***plot 4912,*** prior to the subdivision. It covered a total area of 0.96 acres, part of which the plaintiff intended to buy.

It is not in dispute that the 1st defendant became registered owner of ***plot 4912*** on 25th September, 2009. The title had been mortgaged in *Housing Finance bank Ltd* on 20th August, 2010 and a further on 31st August, 2011. The certificate of title was tendered in as ***PExh 1.***

The agreement indicates that the land purchased by the plaintiff was 0.577 decimals, with all the developments thereon at a total consideration of ***Ugx 702,000,000/=.***

As per the terms of the agreement, a sum of ***Ugx 330,000,000/=*** was to be paid by the plaintiff upon execution. An amount of ***Ugx 50,000,000/=*** to be paid to one Apollo Karugaba for release of caveat which he fixed on the land.

The plaintiff was also under obligation to pay ***Ugx150,000,000/=*** on 13th April, 2016; and ***Ugx 172,000,000/=*** by 28th February, 2017 to the account provided by the bank. The said sum was to appropriated towards the payment of the mortgage held in that bank.

It was also agreed that the plaintiff as the purchaser would continue to service the loan until payment in full. From the record, on 1st April, 2016, a day after signing the agreement, she lodged a caveat for the ***plot 4912*** to protect her acquired interest.

It is not in contention that upon payment of the entire sum the mortgage was released and the title handed over to the plaintiff by the bank on 14th June, 2016.

It is evident from the pleadings that although the parties agreed on the consideration which was paid by the plaintiff to redeem the entire ***plot 4912*** and that the plaintiff took possession of ***plot 11558*** as one of the plots which had been curved out of the original ***plot 4912***, there was no *consensus ad idem* on the actual measurements of the land to be sold to the plaintiff which therefore rendered the contract dated 31st March, 2016 void on account of that mistake.

By virtue of ***section 10 (5) of the Contract Act,*** a contract the subject matter of which exceeds 25 currency points is required to be in writing. Courts have also considered the presence of signed documents as enough to indicate the presence of a written contract. ***(Musoke Kitenda vs Roko Construction Ltd Misc. Civil Application No. 1240 of 2020).***

It was held in that case that the writing envisaged does not require a formal written contract. This requirement is satisfied by any signed writing that reasonably identifies the subject matter of the contract, sufficient to indicate that a contract exists. It must state with reasonable certainty the material terms of the contract. It can be a receipt or even a formal letter.

Furthermore, that part performance makes the contract enforceable in equity especially where the party does not deny taking benefit of the services rendered by the other party. (***See: also Face Technology PTY Ltd vs Attorney General & Anor, Civil Suit No. 248 of 2008).***

Under the present circumstances, there was part performance of a contract which was however declared void by this court. Both parties had nonetheless derived benefit out of the impugned contract.

The intention of the parties to enter into a binding relationship could also deduced from the documents, interactions and conduct of the plaintiff and the 1st defendant, all of which were considered crucial to the relationship as created. I will high light these as follows:

a) Findings from independent surveyor's report:

The issue was whether what was intended was the sale of 27.7 decimals which is covered by the 6 apartments and parking yard as claimed by the defendants; or the 57.7 decimals covering the area of the 6 apartments, the parking yard, as well as the swampy area, as claimed by the plaintiff.

In light of the inconsistencies, this court directed that an independent surveyor be appointed to establish the actual measurements on the ground. Court was also under obligation to conduct a *locus* visit to the area in dispute.

The surveyor appointed from the firm of *Geo-Earth Consultant Surveyors,* was directed by this court to verify the size, dimensions, boundaries and location of the two parcels of land; confirm the developments if any; establish what covers 57.7 decimals and what covers 27.7 decimals; mark out any encroachment; and any other helpful information.

The report filed in court on 11th May, 2021 by ***Cw1,*** indicated that since the subdivisions were still at deed print level, the current cadastral prints of the area showing the sub-division and adjacent surveys had been obtained to guide the survey.

On *page 6* of the survey repor***t CExh 1*** dated 4th May, 2021, the findings were that the plot was developed with a storied apartment block/building which has a plan area of approximately 0.050 hectares or 0.124 acres, which translates to 12.4 decimals. The total area covered by the perimeter wall around the suit land plot 1158 was approximately 0.240 hectares or 0.593 acres, translating to 59.3 decimals.

Several other observations were made and these were not disputed. The findings confirmed that the land comprised in ***plot 4912*** had been subdivided into two plots, ***11558 and 11559*** vide I.S *No. MA/Z/6/3723* in May, 2016.

Plot 4912 was still however registered under the names of the 1st defendant. ***(Ref: also to PExh1:*** *certificate of title and* ***PExh 12:*** *Search certificate).* *Appendix D,* the deed plan for *plot 11558* which was signed on 4th May, 2016 showed that ***plot 4912*** in its original form had an area of 0.378 hectares.

Upon subdivision into ***plots 11558 and 11559, plot 11558*** was 0.250 hectares while ***plot 1159,*** the residue by balance had measurements of 0.128 hectares.

The defendants claimed that the land occupied by the plaintiff exceeded what had been intended. They did not explain however which part of the area belonged to Apollo Karugaba whose interest the plaintiff had purchased or if (and why) it was not considered to have been added as part of ***plot 1158*** after she had bought that interest. The agreement remained vague on that component.

The survey report tendered in by ***Cw1*** indeed indicated that the plaintiff was in occupation of included an additional area of *4* decimals which constituted the access road, as well as 1.7 decimals which was encroachment by the plaintiff on ***plot 11559***.

The area claimed and occupied by the plaintiff according to ***CExh 1*** had the six apartments, a pit latrine, a guard house, a hedge fence, paved/parking area and a compound, playground, which were all enclosed in the perimeter fence.

The 27.7 decimals on the other hand was covering the apartment building block, a pit latrine, part of the parking space, part of the hedge fence, a small part of the compound and part of the perimeter wall area, from the western boundary of the same plot towards the old palm tree. This is the area which according to the 1st defendant had been sold to the plaintiff.

There is nowhere in the documents relied on by the parties to show that the plaintiff had bought the area covered the apartments but only a portion of the parking yard.

b) The intention of the parties as established from the e-mail correspondences between them:

Pw1 testified that prior to signing of the agreement ***PExh6***, the parties had various engagements regarding the sale of the suit property both at the suit property and on-line; in addition to the survey that was done in the presence of the 1st defendant and ***Pw3, Pw4 and Pw7,*** before the transaction.

The correspondences presented to court between the plaintiff, the 1st defendant and his counsel then, Mr. Nicholas Mwasame, were exhibited as ***PExh19***.

Based on that communication, on 20th March, 2016 prior the signing of the agreement, the 1st defendant had written to the plaintiff and among the requests he made was the appointment of an independent surveyor to do the openings and a request to her to send a draft agreement to his email.

On 14th June, 2016, after signing the agreement, the 1st defendant had written to the plaintiff to request for the mutation form and on the same day at 7 pm had this to say:

> *As you are aware it is important to go to the bank when the parties are on the same page. Kindly get in touch with my lawyer Nicholas Mwasame copied in to handle those issues in the ...morning..*
>
> *He can even represent me even when I am unable to make it. (emphasis added).*

That correspondence was sufficient evidence that at the material time the 1st defendant had able legal representation, trusting his lawyer then to liase with the plaintiff on the processes and transfer instruments during the transaction.

The plaintiff on her part on that same day wrote back suggesting a meeting at the bank on the following day to conclude the transaction and hand over the title. This correspondence defeated any suggestion as alluded to, that the plaintiff had gone behind the 1st defendant's back to pick the title from the bank.

The plaintiff furthermore on 15th June, 2016 at 10.57 am via email informed the 1st defendant that she had showed Nelson Mwasame the 1st defendant's lawyer, the mutation form and deed prints, as per subdivisions. That he (Mwasame) could confirm so in a separate email.

By that same correspondence, she even went ahead to remind the 1st defendant that he had already signed the transfer form. This was after the sale agreement had been signed, the mortgage released as per letter dated 14th June, 2016, ***PExh 8***; the mutation signed by him as per ***PExh 11;*** the land subdivided and the two adjacent plots created out of the original ***plot 4912.***

It is not clear how all this could have been achieved without the 1st defendant's involvement and participation.

Mwasame as a matter of fact had written back on that same day at 10.57 am to the 1st defendant, confirming that he had seen the deed prints, one of them ***(plot 1158)*** *measuring 61 decimals, being the 57 decimals plus the 4 decimals of the road.* He also indicated that the second one ***(plot 1159)*** was the 1st defendant's residue.

On 15th June, 2016, the 1st defendant in his email to both the plaintiff and the said counsel went on to request for an independent surveyor to verify the deed prints to confirm before mutation.

If, as claimed, the 1st defendant wanted verification of the measurements from another surveyor, I do not see anything from the above correspondences that could have prevented him from hiring one.

The above exchanges were enough to prove that the 1st defendant and his counsel at the time and the plaintiff were in constant communication before and even after the transaction was signed and that at all material times the 1st defendant was not only on the ground but was also represented by his counsel and kept abreast of all the developments.

At no time during the discourse did the parties discuss sale of land equivalent to 27.7decimals. What came out clearly was the area indicated in the deed print was approximately 61 decimals constituted in ***plot 11558***, after a subdivisions approved by the 1st defendant.

Moreover, given the fact that the 1st defendant was on the ground he had an edge over the plaintiff during the negotiations channeled at times through his counsel, while the plaintiff was more often than not, communicating by email as she was resident abroad.

c) Results from the survey made prior to the transaction:

Upon request by the 1st defendant and prior to the signing of the agreement, a survey had been made to identify the boundaries for the area that was to be sold to the plaintiff.

PExh 23 (b) is a sketch tendered in court by Mr. Hubala Ally Nassura, ***Pw7*** the plaintiff's surveyor, field coordinator for mapping and surveys from *M/s Atlas Consultants Surveyors*. In *paragraph 10* of his statement he stated that the total area of the land in ***plot 4912*** to be subdivided was 0.378 ha.

The defendants in their efforts to prove the invalidity of the transaction maintained that the sketch drawn by the surveyor and presented to court as ***PExh 23(b)*** had been made in April, 2016, after, but not before the agreement had been signed as ***Pw7*** wished court to believe.

No explanation was made however by the defendants as to why, if that was the case, a survey had not been conducted earlier by the 1st defendant in whose interests it would have been made, prior to and not after the subdivision if at all to preserve the area covered by ***plot 11559***.

According to the defendants however, the sketch drawing was not dated or authenticated or accompanied by any explanation and therefore of no value to the plaintiff.

The defendant could not deny however that the measurements as indicated on the sketch had been later drawn to the attention of 1st defendant's lawyer, ***Pw3*** as per the email correspondence in June, 2016 and neither the lawyer nor the 1st defendant questioned those measurements at the material time.

The earlier survey as alluded to by the 1st defendant, which indicated an area of 27.7 decimals to be sold to the plaintiff was neither presented in court by way of a report and indeed no surveyor was called in as a witness, nor did therefore that survey form the basis of the sale agreement later signed between the parties.

The argument by the defence counsel in *para 3.1.60 on page 11* of their submissions that there was no prior survey contradicted the 1st defendant's claim during cross examination that indeed an earlier survey had been made.

The 1st defendant who was introduced to him by one Galiwango Dimmock ***Pw2*** as the owner of the suit land was present and it was ***Pw7*** to whom the 1st defendant had handed over a copy of the title for the suit land.

In *paragraph 17,* it was ***Pw7's*** claim that him and his colleague Ronald submitted all the original deed plan and the survey was paid for by Galiwango Dimmock who had introduced them to the 1st defendant.

Both ***Pw2*** and ***Pw7*** confirmed to this court that it was the 1st defendant who directed the survey team where to survey, guiding them and giving them the specifications of the land to be curved off.

Other than the general denials, there was no evidence led by the defence to discredit these assertions and indeed both witnesses also confirmed that the deed prints were prepared after the approval by the 1st defendant. He did not deny the fact that he had signed the transfer documents.

In brief therefore, the defendants who were at all material times had legal representation had supervised the survey, had the opportunity required to

appoint their own surveyor, and correct any anomalies in the measurements before the 1st defendant signed the mutation form.

The 1st defendant did not deny any knowledge of Galiwango at the time of the survey, making it absolutely clear to court that he was directly involved in the initial exercise where measurements were made prior to the subdivisions but which he conveniently sought to challenge only after the consideration was paid and his mortgage released by the bank.

The defendant's claim in *paragraph 4(1),* was that the title was removed by the plaintiff from the bank in his absence. That the plaintiff took advantage of the unfilled mutation forms to mutate off the land and area she wanted, despite protests and in total disregard of the 1st defendant's proprietary interest.

The 1st defendant's undoing however as deduced from the contents of *paragraph 13* of ***Pw7*** was that he had made it clear that he would not sign any document until after the sketch/drawing of the surveyed plot was presented to him.

The said condition must have been fulfilled since the 1st defendant could not deny the fact that he had ultimately signed the transfer instruments. This court has no way of understanding how he, or anyone else for that matter, in his right frame of mind could have signed empty mutation/transfer instruments before verifying the results of the survey; establishing the correctness of the mutation and subdivision of his own land and the measurements for each plot as created out of it. This court therefore imputes negligence on the part of the 1st defendant on that score.

Thus going by the ***Pw7*** testimony, the information as shown on the sketch which preceded the signing of the transfer instruments indicates that ***plot 11558*** covers an area of 57.7 decimals, specifications given to the surveyors by the 1st defendant, exactly as he had wanted. His evidence was sufficiently collaborated by the findings in the survey report ***(CExh 1).***

Through ***Cw1 and Pw7*** therefore it also made some sense that the extra 4 decimals were added to ***plot 11558*** because if it had been placed on the mother title, the owner of ***plot 11559*** could have the right to block the access to ***plot 11558.***

d) Signing of the transfer instruments by the 1st defendant:

The plaintiff led credible evidence that transfer instruments were signed by the 1st defendant. The mutation form was signed by him on 5th April, 2016. ***(Ref. PExh 10 and PExh 11).***

The department of surveys and Mapping endorsed the documents on 2nd May, 2016. The information on the mutation documents confirms that the 1st defendant as owner was aware and confirmed the area as had been surveyed by ***Pw7.***

What appears on the mutation forms tallied with the area schedule and the findings from both surveys, evidence of the intention to sell 0.250 hectares, (inclusive of the access road).

e) Bank correspondences on the settlement of the mortgage:

The plaintiff relied on a number of other correspondences between him and the bank on the one hand and between the plaintiff/her lawyers and the bank on the other hand.

This happened before and during the negotiations between the parties. From the contents of the handwritten letter ***PExh 2,*** dated 30th March, 2023 addressed to the Head of Mortgage Housing Finance Bank the 1st defendant wrote to say:

> *I am in transaction with Cissy Gusko (plaintiff) who is interested in purchasing part of the property (57 decimals). (emphasis added).*

The statement was confirmation that the actual area which the 1st defendant intended to sell to the plaintiff was 57 decimals.

The defendants in their submissions claimed that this was not an agreement that could be relied on to substitute what was in the sale agreement of 31st March, 2016.

In the view of this court the said letter however shows that by the date of that communication the 1st defendant already had in mind what he intended to sell to the plaintiff. The area had already been identified and measurements mapped out, agreed upon communicated to the bank, even before the impugned agreement was signed on 31st March 2016.

Several other correspondences ***(PExh 21, 22A- 22 C***), details of which I need not repeat here, were made to the bank by the plaintiff through her counsel, ***M/s Bwire & Waiswa Co. Advocates*** to the bank ***PExh 21, PExh 22A; PExh 22B; and PExh 22C.***

Suffice to state that the reference was made in each of those correspondences not to 0.577 decimals but to *0.577 decimals of an acre,* (approximately 0.58 acre).

The 1st defendant could not deny that at every stage of the remissions the counsel for the plaintiff kept updating the bank about the developments. Attached to the said correspondences was a copy of the sketch ***PExh 23(a) and PExh 23(b)*** indicating the subdivisions that the parties had agreed upon, with every correspondence copied in to the 1st defendant including correspondence ***PExh 22C*** where the lawyers requested the bank to hand over the title to them.

In that the correspondence dated 10th June, 2016, the letter by counsel to the bank copied to both parties stated thus:

> *Please further note that the above mentioned land was subdivided as agreed between NELSON TUGUME OWAARWE and our client (a copy of the subdivision is hereby attached and marked) (underlined for emphasis).*

The 1st defendant as the directly affected party and as customer to the bank could not therefore deny the fact that he was fully aware of the said developments in the bank.

The measurements appearing on both ***PExh 23(a) and PExh 23 (b)*** tallied with what the plaintiff claimed to have bought, which was also confirmed by the surveyors at the locus visit.

The gist of each of these correspondences was that there were a series of acts performed and a variety of documents signed and presented by the parties which all added together formed a single written binding contract, enforceable between the parties.

This is also reinforced by the fact that there had been part performance demonstrated by survey and subdivision of the land comprised in ***plot No. 4912;*** payment of the agreed consideration in full which settled the mortgage and title released, and following which the plaintiff entered the suit land as the new owner.

It is worth noting that neither the 1st defendant nor his lawyer ever sought to challenge the surveyor's work, or question the measurements taken or stop the process at any stage of the negotiations, not until after the plaintiff had redeemed the property from the bank, taken possession thereof and later filed this suit that the defendants thought it necessary to raise issues by way of counterclaim.

This court considers the contents in both the email and bank correspondences to have been key determinants of the intention between the parties. The admissions made and conduct displayed by both parties before, during and after the initial agreement was proof that the two parties intended to sell not 0.577 decimals as per the agreement or 27.7 decimals as alleged by the defendants, but rather 57.7 decimals (0.577 decimals of an acre), as duly claimed by the plaintiff.

Section 114 of the Evidence Act, Cap 6 provides that where a party has by his consideration, act or omission intentionally caused the other to believe a thing to be true and upon such belief, he cannot deny the truthfulness of that thing.

The doctrine of estoppel has been discussed in several cases including, ***Pan African Insurance Company Uganda Ltd Vs International Air Transport Association HCCS No. 667 of 2003).***

In the case of ***Olanya Vs Acullu (Civil Appeal 38 of 2016)*** citing the case of ***Steel Makers Ltd Vs AB Steel Products HCCS No. 824 of 2003,*** it was held that it is trite law that when a document containing contractual terms is signed, then in the absence of fraud of misrepresentation the party signing it is bound.

That sufficiently addresses ***issues No 2 and 3.***

Issue No. 4 :Whether any of the parties to the agreement breached the terms of the sale and purchase agreement?

And

Issue No. 6 : Whether the 1st defendant is liable for misrepresentation, fraud and economic loss to the plaintiff.

Fraud has been defined in the case of ***Fredrick J.K Zaabwe Vs Orient Bank and 5 Others (Civil Appeal No. 4 of 2006)*** as the international perversion of the truth by a person for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right, a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations so that he shall act upon it to his legal injury.

Misrepresentation was defined ***AZK Services Ltd Vs Crane Bank (Civil Suit 334 of 2016),*** as an intentional or sometimes negligently false often for the purpose of deceiving, defrauding or causing another to rely on it, detrimentally. The particulars of misrepresentation and fraud were specifically cited in *paragraphs 5(a) to (g)* of the plaint.

Where consent to an agreement is obtained by coercion undue influence fraud or misrepresentation the agreement is a contract voidable at the option of the party whose consent was obtained by coercion, undue influence, fraud or

misrepresentation. Such misrepresentation may include failure to disclose a material fact as did happen in this case.

It was counsel's submission in this case that the 1st defendant had made false representation verbally and by his conduct in relation to the sale of the suit property, land comprised at ***Kyadondo Block 185, Plot 4912, land at Namuwongo.***

According to the sale agreement, the 1st defendant warranted and guaranteed that the plaintiff was purchasing the property free of any encumbrances and all other interest whatsoever save for the Bank mortgage with housing finance bank and the caveat lodged to Apollo Karugaba as *instrument no. AWAK, 0032209.*

This term induced the plaintiff to enter into an agreement by going ahead to purchase the interest of Mr. Apollo Karugaba for ***Ugx 50,000,000/=*** which as admitted by him, the 1st defendant had not disclosed to her prior the sale. The plaintiff as prospective buyer however had the duty to conduct her own independent investigations on the title, which apparently she did not do.

It was argued that not only did the 1st defendant misrepresent the fact that there existed no other interests to the suit property, but also that upon her discovery of the interest he went ahead to demand and extort unwarranted sums of money from the plaintiff.

Reference was made to p*aragraphs 13, 21 and 22,* where the 1st defendant demanded that the plaintiff pay ***Ugx 10,000,000 (Uganda Shillings ten million)*** as full and final settlement for the 2nd defendant's claim and further ***Ugx 100,000,000 (Uganda shillings one hundred million)*** as additional amount for the suit property without any proper or clear explanation for the added expense/monies.

It is also not in dispute that the 1st defendant did not disclose the interest of the 2nd defendant who lodged a caveat on ***plot 4912*** on 22nd June,2016. This was two months after the agreement was signed.

The 2nd defendant in his defence claimed that he genuinely lodged a caveat because he had undisclosed equitable interest on the undeveloped swampy area which was mutated by the plaintiff in excess of the area which she had not bought. The 2nd defendant had nothing to present by way of documentary proof or physical possession to show that he had any protectable interest in the suit land.

In the view of this court failure to disclose his interests if at all any; lodging a caveat after the agreement was signed and doing so after the plaintiff had already fulfilled her part of the obligation and entered possession, were acts intended to defeat the plaintiff's interest in the suit land.

This court also noted as a matter of fact that the 1st defendant never involved Karugaba, the 2nd defendant (or his spouse for that matter) in 2010 when he initially secured the mortgage or in 2011 when went for the second loan.

There is nothing registered as a complaint from the 2nd defendant at that stage of securing the loan. The spouse who according to the defence never consented to anything beyond 0.577 decimals was neither a complainant nor was she brought in as a witness in this suit.

The doctrine of estoppel therefore equally applies here to prevent both defendants from raising matters concerning the said interests which never came up before the title was released through the efforts of the plaintiff.

In any case, in the spirit of the original *paragraphs 16 and 17* of the sale agreement, and equity so demands that the 1st defendant would indemnify the plaintiff and compensate any third party claims.

Breach of contract is been defined in the case of ***Cargo World Logistics Ltd Vs Royal Group Africa Ltd Civil Suit No. 157 of 2013; Ronald Kasibante Vs Shell (U) Ltd HCCS No. 542 of 2006 reported in (2008) HCB 162)*** as the breaking of the obligation which a contract imposes, which confers a right of action for damages or the injured party.

It entitles a party to treat the contract as discharged if the other party renounces the contract or makes its performance impossible or substantially fails to perform his promise. The victim is left with suing for damages, treating the contract as discharged or seeking a discretionary remedy.

In response to ***issues No. 4,5 and 6*** therefore the said acts of misrepresentation therefore justify the removal of the caveat from the suit land.

Issue No. 7: What are the possible remedies available to the parties?

The plaintiff claimed that she was entitled to the removal of the caveat lodged by the 2nd defendant; general, special and punitive damages as well as compensation for the fraud, misrepresentation, the inconvenience and economic loss occasioned to her as a result of the defendant's actions and breach of the sale agreement dated 31st March 2016.

The 1st defendant on his part claimed that the plaintiff was not entitled to any remedies as no economic loss was suffered by her since she was never denied access to the property or quiet enjoyment of the property. That he was ready to refund the consideration paid by the plaintiff.

Special damages:

The principle of law is that special damages must be specifically pleaded and proved. Such damages may be proved by direct evidence.

In this case, the particulars of special damages as pleaded in *paragraphs 9(a) to (c)* of the plaint were ***Ugx 30,000,000*** for the repair of the damage caused as a result of the vandalism and removal of property/fixtures in the apartment which formed part of the suit property: ***Ugx 2,000,000*** paid for the survey and subdivision of the suit property.

She also claimed ***Euros 4,086,85*** as travel expenses to and from Germany for negotiations and follow up surveys, mediations, additional discussions with the defendants when they unlawfully placed a caveat, preventing the transfer of

property into the plaintiff's name. As her proof she presented copies of the travel receipts.

Counsel submitted that by intentionally and negligently withholding information retaining to an encumbrance the plaintiff was prevented from obtaining good title in the suit property and missed an opportunity to sell the suit property to a buyer. That economic loss arises when the defendant has engaged in negligence conduct which directly causes economic harm to the plaintiff.

The evidence presented is a written offer to the plaintiff for the suit property for the sum of ***Euros 250,000.*** This offer would have gained the plaintiff a profit of approximately ***Ugx 350,000,000/=.***

She presented a number of documents in Germany ***PExh 13 (a), PExh 13(b)*** (translation), as proof of the interaction with the prospective buyers, Mr. Peer-Holger Stein, which evidence was disputed by the defendants.

Article 237 of the Constitution allows purchases of land for citizens of Uganda. For the non-Ugandans they can only acquire leases in land. The plaintiff in this case needed to go further, not only to explain more about the legality of the intended transaction between her and Mr. Peer-Holger Stein but also clear the air on the discrepancies in the area she intended to sell him since 0.577 hectares which from the correspondence she wanted to sell to him was much more than what she had purchased from the 1st defendant.

PExh 14 was her proof that between March, 2016 and July, 2016 she had made several trips from German to Uganda. Since she intended to purchase the suit land and ended up doing so during that time, this can only be considered as a business trip.

In addition, this court does not see how to distinguish between the travel expenses incurred by her to meet her family in Uganda; travel expenses involved to conclude the deal; and those incurred by her in filing and pursuing matters relating to this suit which filed on 28th July, 2016.

The determination of the damages to which the plaintiff was entitle was therefore left to the discretion of this court.

General Damages.

It is trite law that general damages are awarded in the discretion of court, to compensate the aggrieved for the inconveniences accrued as a result of the actions of the defendant. It is the duty of the claimant to plead and prove that losses or injuries were incurred as a result of the defendant's actions.

I could not agree more that the 1st defendant's actions and omissions in this case and his failure to transfer the land into the plaintiff's names were not justified. The said actions have denied her quiet enjoyment of the property; inconvenience and expenditure incurred in costs to clear the various claims on part of the suit property; conducting searches; follow up on surveys and expenses on travel, mediation and court process.

Under ***section 65(1) of the Contract's Act, 2010,*** it is provided that where there is a breach of contract, the party who suffers the breach is entitled to receive from the party who breaches compensation for any loss or damage caused to him or her.

I accordingly award the plaintiff a compensatory sum of ***Ugx 40,000,000/= and*** a sum of ***Ugx 10,000,000/=*** to cover travel expenses incurred by her each time she travelled to Uganda to attend court.

In arriving at the compensatory award, court is also mindful of the fact that the plaintiff did not produce any evidence that her tenants have been threatened by the defendants and that she remained in possession of the disputed land and continued to collect rent from the premises throughout the time when the suit was ongoing.

In the premises, the following orders are made:

1) ***The plaintiff is entitled to be registered as owner of plot 11558 measuring 57.7 (0.577 acres) (approximately 58 decimals which she duly purchased from the 1st defendant.***

2) ***The 4 decimals (access road) are to be added to the land purchased by the plaintiff, which in total adds up to approximately 61.8 decimals as per the surveyor's report.***

3) ***The said plot 11558 is to be resurveyed to reflect its correct dimensions, at the cost of the plaintiff.***

4) ***The plaintiff shall immediately give vacant possession of the area of 1.7 decimals identified as area of encroachment on plot 11559 which is covered by part of the garden, perimeter wall and part of the water tank belonging to her.***

5) ***The caveat lodged by the 2nd defendant on plot 4912 is to be immediately vacated.***

6) ***The plaintiff is entitled to a compound figure of damages of Ugx 50,000,000/= (Uganda shillings fifty million) which shall include expenses incurred by her for the journeys undertaken to attend court and follow up her case for six years;***

7) ***Interest of 15% p.a payable in respect of order 6 above, from date of delivering the judgment till payment is made in full.***

8) ***The counterclaim is accordingly dismissed with costs.***

Alexandra Nkonge Rugadya

Judge

4th August, 2023

Delivered by email

4/8/2023