

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
HCCS NO. 702 OF 2021

1. NSEKO GLADYS ONGUZU
2. FETA DANIEL PLAINTIFFS

VERSUS

1. KANJEYO MOREEN
2. ASIMWE GORRETH DEFENDANTS

BEFORE

HON. LADY JUSTICE FLAVIA NASSUNA MATOVU

JUDGMENT.

1. INTRODUCTION:

This suit arose out of a contract of sale of land that was executed between the plaintiffs and the defendants on 13/2/2020. By the said contract, the plaintiffs sold to the defendants land comprised in Kyaddondo Block 250 Plot 284, measuring approximately 0.205 Hectares at Bunga Hill at a consideration of. Ug.shs. 100 million. The said money was to be paid in full by 15th April 2020. The defendants did not pay as agreed whereupon the plaintiffs filed the instant suit seeking inter alia for a declaration that the defendants breached the said contract, an order of specific performance of the said contract, general damages for breach of contract, special damages, interest and costs of the case.

2. BACKGROUND:

The plaintiffs were the registered proprietors of land comprised in Kyaddondo Block 250 Plot 284 at Bunga Hill hereinafter referred to as the suit land. On 13/3/2020, the plaintiffs and defendants executed a contract of sale of the suit land by which the plaintiffs sold the said land to the defendants at a consideration of Ug.shs. 100 million which was to be paid in full by 15/4/2020. The defendants

made a down payment of Ug.shs. 10 million but thereafter defaulted in payment as agreed and at the time of filing this suit i.e.17/8/2021, they had only paid ug. Shs. 52 million leaving an outstanding balance of Ugs.shs. 48 million. In spite of this ,the defendants tried to forcefully take over the said land, threatened the tenants on the said land, and lodged a caveat thereon. The plaintiffs alleged that the actions of the defendants were fraudulent and tantamount to breach of contract. They therefore filed the instant case seeking for the afore mentioned remedies.

The defendants did not deny having executed the above-mentioned contract of sale of land. They maintained that they were ready and willing to pay the balance of Ug. Shs. 48 million on the said contract. They however maintained that the payment schedule was frustrated by the out break of COVID 19 whereupon the country was placed under lock down and they were further frustrated when the plaintiffs stopped them from making further payments. Further that the plaintiffs did not meet their obligation of clearing the land for vacant possession as agreed. They also denied having been fraudulent in this transaction. They thus called upon the court to dismiss the case with costs.

3. ISSUES

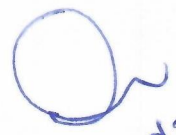
- a. Whether the defendants were in breach of contract of sale of land.
- b. Whether defendants committed any acts of fraud.
- c. What are the remedies available?

4. LEGAL REPRESENTATION

The Plaintiffs were represented by Ms. KOB Advocates & Solicitors while the defendants were represented by Ms. Sewankambo & Co. Advocates.

5. LAW APPLICABLE

The Constitution of the Republic of Uganda 1995


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The Judicature Act Cap 13

The Civil Procedure Act Cap 71

The Civil Procedure Rules

The Contracts Act 2010

Common Law and Case law.

6. PLAINTIFFS' EVIDENCE.

The plaintiffs called three witnesses who all gave sworn evidence. All witnesses made witness statements which were filed in court and admitted as their evidence in chief.

PW1 was Gladys Anguzu. Briefly, she testified that she together with Feta Daniel were the registered proprietors of the suit land. That on 13/3/2020, they executed a contract of sale of the said land to the defendants at 100 million. The defendants paid a deposit of Ug.shs. 10 million. The balance of 90 million was supposed to be paid in instalments of 40 million not later than 27/3/2020 and 50 million upon them (the vendors) clearing the land to provide vacant possession and this was supposed to be done not later than 15/4/2020. However, the defendants did not pay as agreed and did not communicate to the plaintiffs until 15/6/2020, when they deposited 15 million on her account. After this deposit the family agreed to stop the defendants from making further payments because they were out of schedule. They therefore wrote to the defendants stopping them from making further payments. On 23/6/2020, the defendants wrote back to them insisting that the agreement could not be stopped. In June 2020, PW1 started receiving phone calls from a police officer at Kanyanya Police station summoning her to go police over this transaction.

On 3/3/2021, the defendants deposited Ug.shs. 27 million on PW1's account and on 19/3/2021, their tenant on Magala George received a letter from the defendants introducing themselves as the new landlords. Later on defendants deposited stones

on the suit land and after sometime the said stones were removed. The plaintiffs were summoned to Kabalagala police station and charged with theft of stones. They thus filed this suit seeking for the aforementioned remedies.

In cross examination, PW1 stated that the agreement was executed on 13/3/2020 and she was aware that the country went into lock down on 27/3/2020. That she was the one still collecting rent from the premises and the defendants had never collected rent from any tenant. The defendants deposited 15 million on 15/6/2020 after they had reminded them.

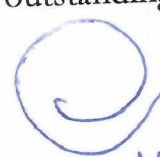
In re-examination she stated that during lock down banks were operational. That the land was not handed over to the defendants because they had not completed payment. In support of her evidence she tendered to court inter alia , copy of certificate of title for the suit land, copy of the agreement of sale of the said land, and copies of statement of her account showing the several deposits of money by the defendants.

PW2 was Feta Daniel. His evidence in chief was to a large extent similar to that of PW1. In cross examination he stated that the 40 million was not paid by 27/3/2020 and they did not tell tenants on the land to vacate because the defendants had not completed payment.

PW3 was Aleesi Brenda. Her evidence was also largely similar to that of PW1 and PW2. She was a witness to the said agreement and confirmed what the two witnesses stated in relation to the said transaction.

7. DEFENDANTS' EVIDENCE

The defendant called only one witness Asiiimwe Gorreth who also gave sworn evidence. She made a witness statement which was tendered to court and admitted as her evidence in chief. She testified that, it is true she together with 1st defendant executed a contract of sale of the suit land in March 2020. The purchase price was 100 million out of which they deposited 10 million. The payment of the outstanding


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balance was frustrated due to outbreak of COVID 19 pandemic and subsequent lock down of the country. During lock down she called the 2nd plaintiff and informed him that in spite of the delay in payment, they were still willing to pay the balance. On 15/6/2020, they deposited 15 million on the 1st plaintiff's account. After this payment, they received a letter from the plaintiffs purportedly terminating the agreement. That since the plaintiffs were not picking their calls and yet they had paid them 25 million, the defendants decided to report the matter to Kanyanya police station. Eventually they made an additional payment of 27 million. Their lawyers then wrote to the tenants on the suit land and introduced the defendants as the new landlords. They also lodged a caveat on the said land. After some time, the plaintiffs wrote to them and told them to stop making further payments. That they were willing to pay the outstanding balance of 52 million but not any damages.

In cross examination she stated that she did not comply with the terms in clause 2 of the agreement and communicated their inability to pay to the plaintiffs through phone. However, her calls were not answered by the plaintiffs, she did not send SMS or WhatsApp messages. She next talked to the plaintiffs on 15/6/2020 after the 15 million was deposited. No body authorised her to deposit the 15 million. That they made the payment of 50 million a year later and to date had not made attempts to pay the balance. That they had instituted two police cases against the plaintiffs arising from this transaction.

8. LOCUS PROCEEDINGS:

Both parties agreed and rightly so, that it was not necessary to visit locus in this case. Therefore, the court did not visit locus.

9. PLAINTIFFS' SUBMISSIONS:

The plaintiffs filed written submissions which I have carefully studied and need not reproduce them here. Briefly counsel for plaintiff submitted that pursuant to the contract of sale that was executed by the parties on 13/3/2020, the defendants were expected to pay Ug.shs. 40 million by 27/3/2020 which they did not do and had no


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justifiable reason. Even by the time of filing the instant case they had not completed payment of the entire purchase price. They were thus in breach of contract of the said agreement for which the plaintiffs were entitled to damages. He cited several authorities in support of his submissions which I have carefully studied.

10. DEFENDANTS' SUBMISSIONS

Counsel for the defendants on the other hand submitted that the defendants were not in breach of the contract of sale. He submitted that performance of the said contract was frustrated because shortly after execution of the same, there was outbreak of COVID 19 pandemic and the country went into lock down. Therefore, the defendants could not pay as agreed. They were further frustrated when the plaintiffs blocked the account on which the defendants were expected to deposit money which made performance of the contract impossible. He also cited several authorities in support of his submissions which I have carefully studied.

11. DECISION OF COURT

- i) **Whether the defendants were in breach of contract of sale of land.**
 - a) As rightly defined in the case of **Ronald Kasibante vs. Shell Uganda Ltd.**¹, breach of contract is the breaking of the obligation which a contract imposes which confers a right of action in damages to the injured party. In the instant case PW1, PW2 and PW3, all testified that pursuant to the contract of sale that was executed by the parties of 13/3/2020, the defendants were expected to pay Ug. Shs. 40 million by 27/3/2020. The defendants did not pay as agreed, and had no reason for not doing so. They were thus in breach of the contract of sale of land. The defendants did not deny this particular fact but pleaded frustration. They maintained that due to outbreak of COVID 19 and

¹ HCCS. No. 542 of 2006,

subsequent lock down, shortly after execution of the agreement, the contract was frustrated and they could not pay as scheduled.

b) Careful perusal of the agreement which was tendered to court as Pexh 2 shows that parties executed a contract of sale of suit land on 13/3/2020. On that day the defendants paid 10 million. Balance of 90 million was to be paid as follows:

- 40 million not later than 27/3/2020.
- 50 million to be paid upon the vendor clearing the land to provide vacant possession and this was to be not later than 15/4/2020.

Evidence on record as adduced by PW1, PW2, PW3, and DW1 shows that by 27/3/2020 the defendants had not made any additional payment to comply with clause 2(a) of the agreement. The plaintiffs claimed that this was a breach of contract, because the defendants had no legal justification for not paying as agreed. The defendants on the other hand pleaded frustration. DW1 testified that after payment of the initial deposit, the outbreak of COVID 19 pandemic, subsequent lock down frustrated the payment of the outstanding balance. Further that all land transactions were subsequently halted by the then Minister of lands and urban development.

c) The doctrine of frustration of contract applies when an unforeseen event occurs after formation of the contract that makes the performance of a contract either impossible, unlawful or significantly different. In the case of **Davis Contractors Ltd v. Hare Urban District Council**² it was held that; *“Frustration occurs whenever the law recognizes that without default on either party, a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract.”*

² (1956) 1 ALL ER 145 at 166,

In the instant case parties specifically agreed that the 2nd instalment of 40 million would be paid by not later than 27/3/2020. Shortly thereafter, there was outbreak of COVID 19 pandemic and the country went into lock down.

In my view COVID 19 pandemic and subsequent lock down were unforeseen events because as the parties were executing this contract no body anticipated they would happen.

In the case of **Monday Eliab v. A.G.**,³ the Supreme Court guided that *'the onus of proving frustration is on the party alleging it and, if that is proved, the onus is on the other party to prove that it was self-induced.'* Further **Halsbury's Laws of England**⁴ emphasizes that in order for frustration of contract to be established, the event upon which a party relies to invoke frustration must not be self-induced.

DWI testified that he could not move to the bank to do any transaction because vehicles were not allowed to move. I had no reason to doubt him because it is common knowledge that there was COVID 19 pandemic world wide and Uganda went into a lock down from 18/3/2023. Evidence showed that the 1st plaintiff always wanted her payments to be made in the bank because even when they were receiving the initial deposit of 10 million, they insisted on going to the bank to conduct payment. Time of payment in this contract was of essence and thus a major term of the contract. That is why the parties specifically agreed on the time of payment and agreed on specific dates. Indeed PW1, PW2, and PW3 testified that the intention of selling the land was to acquire property somewhere else but when the defendants did not pay as agreed the property that they anticipated to buy was sold off.

It thus true that due to COVID 19 pandemic the defendant was not able to pay on the scheduled date as agreed and rightfully so because they could not move. I therefore entirely agree that the contract was frustrated by out break of COVID 19,

³ Supreme Court Civil Appeal No. 16 of 2010,

⁴ Halsbury's Laws of England⁴/Contract, Volume 22 (2019) at paragraph 261

because it became practically impossible for the defendants to pay on the scheduled date. The subsequent actions of the plaintiffs eventually blocking the account were not tantamount to frustration as alleged because by then the contract had already terminated. I therefore find that the defendants were not in breach of contract, but the contract was frustrated by outbreak of COVID 19 pandemic and subsequent lock down of the country.

ii) **Whether defendants committed any acts of fraud.**

Fraud relates to acts of dishonesty by a party. In the case of **Fredrick Zaabwe vs. Orient Bank Ltd & 5 others**⁵ the supreme court defined fraud as

“an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury”.

In **Kampala Bottlers Ltd Vs. Domanico (U) Ltd.**⁶ the supreme court guided that for one to succeed in case of fraud, the plaintiff must prove that there are acts of dishonesty, attributable to the defendant or that the defendant knew of such acts and took advantage of them.

In the instant case, the plaintiffs submitted that the defendants, well knowing that they had not fully paid for the suit land instructed their lawyer to write to the tenants on the suit land introducing themselves as the new landlords. They did this with an intention of defrauding the plaintiffs of their land. The defendants denied this particular allegation.

I have carefully studied the letter referred to which was tendered to court as PExh 7. The letter was dated 19/3/2021 and its subject matter was “NOTICE OF

⁵ Civil Appeal No. 4 of 2006,

⁶ SCCA No. 22 of 1992


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CHANGE IN OWNERSHIP OF PROPERTY COMPRISED IN KYADDONDO BLOCK 250 PLOT 284". It was addressed to one Magala George and was informing him that the defendants had purchased the said land from the plaintiffs on 13/3/2020 and the purpose of the letter was to introduce them as the new landlord and directing him to deal with them in regard to the said property within a period of seven days, failure of which he would be considered a trespasser. In my view there was no fraudulent intent on the part of the defendants in writing this letter because as a matter of fact the plaintiffs had sold the land to the defendants on 13/3/2020. By the time they wrote the letter they had paid 52 million. They were thus under an honest but mistaken belief that they had acquired an equitable interest in land. In my view they had no fraudulent intent. I therefore find that much as the actions of the defendants were annoying, they were not fraudulent in nature.

iii) What are the remedies available?

The plaintiffs prayed for several remedies including specific performance, general damages, special damages, interest and costs of the case. The defendants on the other hand insisted that the only available remedy to the plaintiffs would be specific performance of the contract.

However, having found that the contract was frustrated, the court cannot order for specific performance of the same as submitted by both counsel, neither can it award general or special damages. This court is however inclined under S.33 of the Judicature Act to grant appropriate remedies to both parties in the circumstances.

It is a basic legal principle of contract law that where there is frustration, the contract automatically terminates releasing the parties from future any obligations. In the case of **Hirji Mulji Cheong Yue Steamship Co. Ltd⁷**, it was held that the effect of frustration is that it brings the contract to an immediate end whether or not parties

⁷ 1926 AC 497


wish this to be the result. According to **Halsbury's Laws of England**⁸, at common law frustration does not rescind contract ab initio. Instead, upon frustration the contract is discharged as to the future, releasing both parties from further performance.

S. 66 (1) of the Contracts Act, provides that where a contract becomes impossible to perform or is frustrated and where a party cannot show that the other party assumed the risk of impossibility, the parties to the contract shall be discharged from the further performance of the contract. S. 66 (2) of the same Act further provides that any sum paid or payable to a party under a contract before the time the parties are discharged under subsection (1) shall, in the case of the sum paid, be recoverable from the party as money received by that party for his or her use and in the case of any sum payable, cease to be payable.

In the instant case, the contract was frustrated when the defendants failed to pay the 2nd instalment of 40 million due to outbreak of COVID 19 and subsequent lock down. The contract was thus deemed terminated on the 27/3/2020. Any payments made thereafter i.e., the 42 million were therefore void and of no legal consequence, most especially because they were made without consulting the plaintiffs and without the consent of the plaintiffs. Similarly, the initial deposit of 10 million paid by the defendants is recoverable from the plaintiffs as money had and received. That being the case the plaintiffs should refund the said monies to the defendants and retain the suit land.

As regards costs, I note that as already established, the contract terminated as a result of circumstances beyond control of either party. Efforts to reach an amicable settlement of this case by both parties were all futile. In all fairness each party should meet their costs for this litigation.

⁸ **Halsbury's Laws of England** 4th edition reissue 1987 – 97 volume 9 (1) paragraph 909


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12. FINAL ORDERS.

Judgment is therefore entered as follows

- a) The plaintiffs should pay a sum of Ug.shs. 52 million to the defendants being a refund of the purchase price for land comprised in Kyaddondo Block 250 Plot 284 at Bunga Hill.
- b) Each party shall meet their costs for this suit.

DATED at Kampala this^{27th}..... Day of^{October}..... 2023


FLAVIA NASSUNA MATOVU

JUDGE.