

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)

HCT-00-LD-CS-0419-2018

DR. DENIS KARUHIZE BYARUGABA :::::::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

RICHARD LUMU :::::::::::::::::::::::::::::::::::DEFENDANT

BEFORE: HON. JUSTICE BERNARD NAMANYA

JUDGMENT

Introduction:

1. The plaintiff brought this action by way of an ordinary plaint seeking for the following reliefs: i) a declaration that the defendant breached the contract for sale of land when he failed to hand over land comprised in Busiro Block 423 Plot 36 at Mbubuli (“suit land”) to the plaintiff free of encumbrances; ii) a refund of UGX. 170 million being the purchase price paid by the plaintiff; iii) interest of 32% per annum on UGX. 170 million from the date of receipt of the money until repayment; iv) general damages for breach of contract; and v) costs of the suit.

Background:

2. The background to the suit is as follows:
 - a) On the 23rd day of August 2013, the plaintiff and the defendant entered into a contract for sale of the suit land at a purchase price of UGX 170 million which was fully paid by the 7th day of January 2015.



- b) At the time of execution of the contract for sale of land, the title deed for the suit land was registered in the names of Edward Muyise, and the defendant undertook to effect transfer of the suit land directly from the said Edward Muyise into the plaintiff's names; which he did while there was a subsisting caveat in favour of Edward Muyise;
- c) The defendant warranted that the suit land was free from any encumbrances;
- d) Later on, the plaintiff discovered that there were third party claims on the suit land, who even erected permanent structures; and
- e) The defendant filed a written statement of defence in which he denied the plaintiff's averments, and claimed that he sold the land free from any encumbrances.

3. At the hearing held on the 31st day of October 2022, the plaintiff was represented by *Mr. Muhimbura Paul*. Neither the defendant nor his lawyers appeared in court for hearing of the case. However, the defendant filed a written statement of defence through the law firm of *M/s Nalukoola, Kakeeto Advocates*, which is on court record.
4. When the suit was called for hearing, counsel for the plaintiff presented two affidavits of service dated 4th July 2022 and 10th August 2022 respectively to prove that the defendant's lawyers, *M/s Nalukoola, Kakeeto Advocates* were duly served but failed to appear.

Bernard Harcourt

5. Having been satisfied that the defendant was duly served, I ordered hearing of the suit to proceed in the absence of the defendant pursuant to ***Order 9 Rule 20 (1) (a)*** of the ***Civil Procedure Rules (S I 71-1)***.
6. The plaintiff adduced evidence from only one witness (*Dr. Denis Karuhize Byarugaba*) whose *Witness Statement dated 11th January 2021* together with documents attached was admitted as his evidence in chief.

Issues:

7. Pursuant to ***Order 15 Rule 5*** of the ***Civil Procedure Rules***, I adopt the following the issues for determination of the suit:
 - i) Whether the defendant committed breach of the contract for sale of land?
 - ii) Whether the breach of the contract for sale of land entitles the plaintiff to rescind the contract?
 - iii) What are the remedies available to the parties?

Consideration and determination of the issues:

8. Before I delve into the determination of the issues in this case, I wish to observe that the plaintiff argued several points to prove his case, including allegations of professional misconduct on the part of the defendant, but I will not deal with every single point that has been argued, because, as ***Justice HHJ Paul Mathews*** said in the case of ***David Dunbabin v. David Dunbabin [2022] EWHC 241 (Ch)***:



“[...] judges are not obliged to deal in their judgments with every single point that is argued, or every piece of evidence tendered. They deal with those that they think are the most significant.”

Issue No. 1: Whether the defendant committed breach of the contract for sale of land?

9. In a contract for sale of land, the vendor has a primary obligation to convey the land to the purchaser free from any encumbrances (*Megarry & Wade: The Law of Real Property, 9th Edition, Stuart Bridge, Elizabeth Cooke and Martin Dixon, Sweet & Maxwell, London, 2019 at paragraphs 14-088; and 14-089*).
10. The vendor will be in breach of the obligation to convey the land free from encumbrances, where there remain on the land, persons who are lawfully in possession such as tenants or licensees; or where there are trespassers on the land; or where there are legal impediments to the enjoyment of the property (*Megarry & Wade [ibid] at paragraphs 14-088; and 14-089*).
11. The evidence on record proves that the plaintiff and defendant entered into a contract for sale of the suit land dated 23rd August 2013 (*Ex. P1*) at a price of UGX 170 million, and the same was fully paid by the plaintiff (see the testimony of PW1 – Dr. Denis Karuhize Byarugaba, *Witness Statement dated 11th January 2021 (paragraphs 2 and 3)*).
12. Clause 3 of the contract for sale of land (*Ex. P1*) provides that:

“The vendor hereby sells to the purchaser all his interest and claims in the said land free of any encumbrances and the purchaser hereby



buys from the vendor the said property on the condition that it is free of any encumbrances and that he shall enjoy quiet and uninterrupted possession or use of the same.”

13. According to the plaintiff, the land he purchased from the defendant had encumbrances in the form of claims by third parties, who even went ahead to erect permanent structures on the land (*paragraphs 9, 11, 13, 14 & 15 of PW1's witness statement; paragraph 4 (f) of the plaint; and Ex. P6 (survey report dated 5th June 2017).*
14. It is not clear from the evidence adduced by the plaintiff, the timing of the discovery of adverse ownership claims to the land. In *paragraph 9* of the witness statement, the plaintiff does not disclose the time when he visited the suit land. Was it before the execution of the contract for sale of land or after?
15. In *Ex. P6*, it is disclosed that *Survey Tech Solutions* acted on verbal instructions given by the plaintiff on the 2nd day of June 2017, and the said firm of surveyors indeed confirmed presence of permanent structures on the suit land. Was this the first time that the plaintiff was conducting inspection of the land having signed a contract for sale of land on the 23rd August 2013? Again the plaintiff's evidence offers no clarity on the timing of the discovery.
16. According to *paragraphs 1.2 and 1.4* of the plaintiff's written submissions, the plaintiff, having signed a sale agreement for land on the 23rd day of August 2013, visited the suit land **two years later**, after payment of the purchase price (7th day of January 2015)!

17. The defendant did not adduce evidence in court, but he filed a written statement of defence (WSD) claiming that he handed over the suit land free of any encumbrances. *Paragraphs 5, 6 and 7 of the WSD state that:*

“5. [...] upon the execution of the purchase agreement in 2013, the vendor handed over vacant possession to the purchaser and from that time on [...] the plaintiff had uninterrupted or vacant possession of the said land.

6. [...] the defendant denies having parcelled, caused the parcelling, erected, caused the erecting of any structures or sold any part of the said land to any person and if any kind of structures have been erected on his land the best option would be suing those respective individuals but not claiming for a refund of the purchase price from the defendant who dully performed his obligations under the agreement.

7. [...] And the plaintiff must have failed to protect his land against unscrupulous people which fault cannot be shifted to the defendant.”

18. Be that as it may, I am satisfied with the evidence adduced by the plaintiff that the suit land has third party encumbrances.
19. Having regard to the law and the evidence, it is my finding that the plaintiff has proved on the *balance of probabilities (more likely than not)*, that the defendant breached his primary obligation to hand over the suit land free of third party encumbrances.
20. *Issue No. 1* is therefore answered in the affirmative.

Issue No. 2: Whether the breach of the contract for sale of land entitles the plaintiff to rescind the contract

23. The facts of the case were that Mr. Howard-Jones (“purchaser”) agreed to buy property from Mr. Tate (“vendor”) for the sum of £140,000. It was a special condition of the contract that the vendor would arrange, at his own expense, for the property to be provided with a new directly metered electricity supply and a separately metered mains water supply. The vendor failed to comply with this special condition of the contract, and the purchaser commenced legal proceedings seeking an order for rescission of the contract and damages.

Bernard Harey

25. The lower court held that the vendor was in clear breach of the contract in failing to provide an appropriate water supply and electricity supply to the property, which breach went to the root of the contract, and rendered the property worthless to the purchaser because, without water and electricity, he could not use the property for the purpose of carrying on his business as a motor trader. The court held that the purchaser was not entitled to rescind the contract for sale of land *ab initio* rather that the vendor was liable to the purchaser for damages.
26. Regarding the issue of quantum of damages, the lower court found that the purchaser was entitled to the return of the purchase price of the property, and that as a consequence of that, the purchaser had to re-convey the property to the vendor. The lower court also held that the purchaser was entitled to consequential damages being his mortgage lender's survey fee; his solicitors' fees in respect of the purchase and mortgage of the property; his mortgage arrangement fees; his accountant's fees; the charges he had incurred for early redemption of the mortgages; his mortgage interest payments; the building insurance premium; and his council tax. In total, the vendor was ordered to pay to the purchaser in excess of £190,000.
27. The parties appealed and cross-appealed to the Court of Appeal (*Coram: Lord Justice Ward; Lord Justice Lloyd; and Lord Justice Kitchen*) which allowed the appeal and dismissed the cross-appeal, and held that the lower court was right to hold that the vendor's repudiatory breaches rendered him liable in damages but did not entitle the purchaser to rescind the contract *ab initio* (per *Lord Justice Kitchen*, at *paragraph 29* of the judgment).

28. The Court of Appeal in the case of *Howard-Jones v. Tate (supra)* (per Lord Justice Kitchen, at paragraph 30 of the judgment) held that the purchaser was not entitled to recover all the moneys he had paid under the contract for sale of land, and made some important findings, which I wish to reproduce below in verbatim because of their importance to the case before me:

“Upon completion, Mr Howard-Jones [purchaser] became the owner of precisely what he had bargained for, namely the Property without a directly metered electricity supply or a separately metered water supply. Mr Tate [vendor] was not in breach of his obligation to provide the appropriate water and electricity supplies until six months later. Upon breach of that obligation, which it is accepted for the purposes of this appeal went to the root of the contract, Mr Howard-Jones [purchaser] became entitled to treat himself as discharged. After discharge, he was no longer bound to accept the further performance by Mr Tate [vendor] of his obligations. But he was not entitled to recover all the moneys he had paid under the contract unless he could say that the consideration for his payment had wholly failed. That he has not sought to do. Nor, in my judgment, could he properly have done so.” (underlining is mine for emphasis)

29. The Court of Appeal further held (per Lord Justice Kitchen, at paragraphs 31-36 of the judgment) that the lower court erred in its approach to the appropriate measure of damages. The lower court failed to identify the damage which the purchaser suffered as a result of the vendor’s breaches of the contract, but rather sought to assess the cost of putting the purchaser back into the position he would have been in, had the contract never been entered into. The Court of

Appeal held that, in the circumstances of this case, that was not a permissible approach.

30. In the case of *Howard-Jones v. Tate (supra)*, Lord Justice Kitchen (at paragraph 15 of the judgment) emphasized the critical distinction between rescission of the contract, and discharge of the contract by breach, and had this to say:

“It is, therefore, clear that rescission ab initio is very different from a failure of performance which entitles the innocent party to treat the contract as discharged. This latter situation, though still sometimes referred to as “rescission” does not have the consequence that the contract is treated as never having come into existence. Rather, the parties are absolved from future performance and the innocent party may claim damages for breach.” (underlining is mine for emphasis)

31. In the case of *Howard-Jones v. Tate (supra)*, Lord Justice Kitchen (at paragraph 14 of the judgment), quoting from the judgment of Dixon J in *McDonald v. Dennys Lascelles Ltd* (1933) 48 CLR 457 at pages 476 to 477, further emphasizes the distinction between rescission and discharge by breach, and the remedies available in each situation, in the following terms:

“When a party to a simple contract [...] elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach



alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, to the position they occupied before the contract was made. But when a contract [...] is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach.”
(underlining is mine for emphasis)

32. The facts of the case before me are that a contract for sale of land was entered into on the 23rd day of August 2013. The consideration of UGX 170 million was fully paid to the defendant by the 7th day of January 2015. Prior to that, on the 23rd April 2014, transfer of the suit land into the plaintiff's name was effected by Instrument Number WAK00017004 (*Ex. P6*).
33. It is not contested that the plaintiff is the registered proprietor of the land as he himself admitted in evidence that the defendant effected transfer of the land into his names and indeed, the title deed is in his names though with some errors (*paragraph 8 of PW1's witness statement and Ex. P4 & P6*).
34. The plaintiff raised the issue of effecting a transfer of the suit land to the plaintiff, while a caveat by a one Edward Muyise was subsisting, and argued that the transfer is invalid and void as a result. If I were to accept this argument, I would have to order the Commissioner for Land Registration to cancel the plaintiff's certificate of title, because since the plaintiff has sought a refund of the purchase price, he cannot have both the purchase price and the suit land.



40. *Issue No. 2* is therefore decided in the negative.

Issue No. 3: What are the remedies available to the parties?

41. A purchaser of land has an obligation to conduct thorough due diligence on the land and the vendor, prior to executing a contract for sale of land (*see the case of Naome Juma (supra)*).
42. The purchaser is under a duty to mitigate the loss once he or she has discovered the misrepresentation of material facts (*Megarry & Wade [ibid] at page 656*).
43. I have held in *Issue No. 2*, that the plaintiff is not entitled to rescission of the contract *ab initio*. On the authority of *Howard-Jones v. Tate (supra)*, it is my holding that the only damages which the purchaser can recover from the defendant are those that are a direct result of the vendor's breach of the contract. I am fortified in this holding by *Sections 61 (2) & (4)* of the *Contracts Act (2010)* which provide that:

“61. Compensation for loss or damage caused by breach of contract

(2) The compensation referred to in subsection (1) is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

(4) In estimating the loss or damage arising from a breach of contract, the means of remedying the inconvenience caused by non performance of the contract, which exist, shall be taken into account.” (underlining is mine for emphasis)

44. In this particular case, the plaintiff must prove damages suffered as a result of the defendant's breach of the contractual condition of handing over the suit land free of third party encumbrances. The means of remedying this breach would for example, include ***the cost incurred in evicting the third party claimants who have erected permanent structures on the suit land.***
45. I have reviewed the evidence adduced by the plaintiff, and did not come across evidence of action taken (legal or otherwise) to evict third party claimants of the suit land, and the costs incurred as a result of that action.
46. Instead, the plaintiff sought to rescind the contract for sale of land *ab initio*, and seek a refund of the purchase price and other consequential damages, which is not a permissible approach as per the decision in ***Howard-Jones v. Tate (supra)*** ***[per Lord Kitchin, at paragraph 35]***.
47. In *paragraph 17 of PW1's witness statement*, the plaintiff prays for the following reliefs:
- i) A declaration that the defendant breached the contract for sale of land.
 - ii) A refund of the purchase price of UGX 170 million.
 - iii) Interest of 32 % per annum on the purchase price of UGX 170 million from the date of receipt until repayment.
 - iv) General damages.
 - v) Costs of the suit.

A declaration that the defendant breached the contract for sale of land

48. Since I have answered *Issue No. 1* in the affirmative, it follows that the plaintiff is entitled to a declaration that the defendant breached the contract for sale of land.

A refund of the purchase price of UGX 170 million

49. Since I have answered *Issue No. 2* in the negative and on the authority of ***Howard-Jones v. Tate (supra)***, it is my decision that the plaintiff is not entitled to a refund of the purchase price of UGX 170 million paid to the defendant.

Interest

50. The plaintiff has claimed interest of 32 % per annum on the purchase price of UGX 170 million from the date of receipt of the money until repayment. This is in line with *Clause 8* of the agreement for sale of land which would otherwise entitle the plaintiff to claim such interest. Counsel for the plaintiff claimed for UGX 380,080,000 for the period running from the 7th day of January 2015 to the 14th day of November 2022.

51. Since I have decided that the plaintiff cannot rescind the contract *ab initio* and is not entitled to a refund of the purchase price, the claim for interest equally fails.

General damages

52. Counsel for the plaintiff claimed for the award of general damages of UGX 350 million.
53. However, the evidence on record proves that the plaintiff did not carry out due diligence and physical inspection of the land prior to payment of the purchase price (*see the case of Naome Juma v. Nantume Ruth [supra]*).
54. The plaintiff is partly to blame for the loss he has suffered. The plaintiff is under a duty to mitigate the loss (*Megarry & Wade [supra] at page 656*). If the

plaintiff had carried out due diligence on the suit land, he probably would not have proceeded with the transaction.

55. Also, the plaintiff did not adduce evidence of the costs that he incurred that flow directly from the breaches committed by the defendant such as the costs of evicting trespassers from the suit land.
56. On account of the failings of the plaintiff in his duty, I decline to award general damages as claimed.

Nominal damages

57. It is my decision in *Issue No. 1* that the defendant breached the contract for sale of land. It is not in doubt that the plaintiff suffered a legal wrong at the hands of the defendant who failed in his obligation to hand over the land free from encumbrances. However, the defendant discharged his other obligations under the contract for sale of land and had the suit land transferred into the names of the plaintiff, who at the moment holds a title deed in his names.
58. Although the plaintiff did not claim nominal damages, the circumstances of the case require that I award a small sum of money to the plaintiff for the legal wrong that he suffered at the hands of the defendant.
59. On the authority of *Mwesigwa v. Petro Uganda Limited (Supreme Court Civil Appeal 10 of 2019) [2022] UGSC 28*, I award nominal damages of UGX 2,000,000.
60. I also award interest of 8% per annum on the nominal damages from the date of judgment until payment in full (see *Mwesigwa v. Petro Uganda [supra]*).



Costs of the suit


61. In line with *Section 27* of the *Civil Procedure Act (Cap 71)*, I award costs of the suit to the plaintiff.

Conclusion:

62. In the result, I enter Judgment in favour of the plaintiff, and grant the following reliefs:

- i). A declaration that the defendant breached the contract for sale of land;
- ii). An order that the defendant pays nominal damages of UGX 2,000,000 (Uganda shillings two million);
- iii). An order that the defendant pays interest of 8% per annum on the nominal damages from the date of judgment until payment in full; and
- iv). An order that the defendant pays the costs of the suit.

I SO ORDER.


BERNARD NAMANYA
JUDGE
11th January 2023