THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA TA KAMPALA

(LAND DIVISION)

CIVIL APPEAL NO. 89 OF 2020

(Arising from Mengo Chief Magistrate Court's Civil Suit No. 1044 of 2016)

GRACE SEWANYANA ::APPELLANT

VERSUS

SSOZI EDWARD :::RESPONDENT

BEFORE: HON. LADY JUSTICE IMMACULATE BUSINGYE BYARUHANGA

JUDGMENT

This appeal was filed by Grace Sewanyana ***(hereinafter referred to as "the appellant"***) challenging the judgment and orders of His Worship Mushabe Alex Karocho, Chief Magistrate of Mengo Chief Magistrate's Court (***herein after referred to as "the trial court"***) which was delivered on 5th November, 2020. The trial court decided the case in favour of Ssozi Edward (***hereinafter referred to as "the respondent"***) and ordered the appellant to pay the respondent a sum of Uganda shillings 3,000,000 (three million shillings) as the balance on the purchase price of land comprised in Bulemezi Block 105 plot 32, ordered the appellant to pay the respondent a sum of Uganda shillings 22,400,000 (Twenty two million, four hundred thousand shillings) as interest on the same land sale transaction, the

respondent was awarded general damages of Uganda Shillings 1,000,000 (One million shillings), interest at the rate of 10% on interest and general damages from the date of judgment till full payment and the respondent was equally awarded costs of the suit.

Background

The respondent/plaintiff instituted Civil Suit No. 1044 of 2016 in Mengo Chief Magistrate's court against the appellant/defendant seeking for recovery of Uganda shillings 3,000,000, accumulated interest of Uganda shillings22,400,000, general damages interest at the rate of 30% per annum from the date of filing till full payment on the Uganda shillings 3,000,000, interest at the rate of 30% per annum on the general damages from the date of Judgment till payment in full and costs of the suit.

The respondent in his plaint averred that by an agreement dated 8th November 2013, the respondent sold to the appellant land comprised in Bulemezi Block 105 plot 32 measuring approximately 44 acres at Uganda Shillings 29,520,000 (Twenty nine million, five hundred twenty thousand) and that by an addendum to the said agreement dated 14th February 2014, the appellant was to pay the remaining balance of Uganda shillings 4,000,000 (Four million shillings) within two months from the date of execution of the addendum failure of which the appellant would pay monthly interest of 20% per month on the balance till payment in full. The respondent averred in his plaint that the appellant neglected to pay the said balance and that on 19th August 2016, the appellant paid an additional Uganda Shillings 1,000,000 (One million shillings leaving a balance of Uganda shillings 3,000,000 (Three million shillings) and accumulated interest of Uganda shillings 22,400,000 (Twenty-two million four hundred thousand shillings) accruing from April 2014 to August 2016 (28 months). The respondent prayed for general damages interest and costs.

On the other hand, the appellant filed a written statement of defence wherein he stated that the respondent sold to the appellant land free of encumbrances and was fully paid but failed to grant the appellant vacant possession because of the squatters on the suit land hence making the appellant's occupation of the suit land futile. The appellant averred that the squatters were occupying the entire suit land. The parties agreed on the following issues for determination at the trial;

1. Whether there was breach of contract and if so, by who?
2. What remedies are available to the parties?

The trial court decided in favour of the respondent. The appellant was dissatisfied with the judgment and orders of the trial court and filed this appeal and advanced the following grounds of appeal;

1. ***The Learned Trial Chief Magistrate erred in law and fact by holding that the agreement dated 14/04/14 was not part of the agreement for purchase of the suit land.***
2. ***The Learned Trial Chief Magistrate erred in law and fact by failure to conduct locus in quo to ascertain who was in occupation of the suit land.***
3. ***The Learned Trial Chief Magistrate erred in law and fact by failing to properly evaluate evidence on record when he dismissed the counter claim and evidence of mobile money payments to the respondent.***
4. ***The Learned Trial Chief Magistrate erred in law and fact by failing to properly evaluate evidence on record on who was responsible for relocation of the squatters.***

Counsel Kamugisha Vincent of M/S Kamugisha & Co. Advocates appeared for the appellant while Oasis Advocates represented the respondent.

Role of the 1st Appellate Court

The duty of this court as a first Appellate Court is to re-evaluate the evidence adduced at the trial and subject it to a fresh scrutiny, weighing the conflicting evidence and drawing its own conclusion and inferences from it. However, the first appellate court has to bear in mind that it has neither seen nor heard the witnesses and should therefore, make due allowance in that respect. ***See Fredrick Zaabwe versus Orient Bank & 5 others, S.C.C.A No.4 of 2006 and Banco Arabe Espanol versus Bank of Uganda S.C.C.A No. 08 of 1998.***

This Court therefore has a duty to re-evaluate the evidence to avoid a miscarriage of justice as it mindfully arrives at its own conclusion.

I will therefore bear these principles in mind as I resolve the grounds of appeal in this case.

In reevaluating the evidence and subjecting it to the fresh scrutiny, I will keep in mind the issues raised at Trial and the evidence adduced by both parties in order to resolve the grounds presented in the memorandum of the appeal.

Both Counsel filed written submissions and I shall put them into consideration before making my decision.

Preliminary Objection

Counsel for the respondent raised a preliminary point of law on late service of the memorandum of appeal. Counsel submitted that the respondent was served with a record of appeal on the 29th day of March 2022 which had the memorandum of appeal on page one which was endorsed by the Registrar on 10th December 2020. Counsel for the respondent submitted that prior to the service of the record of proceedings, the appellant had never served the respondent with the memorandum of appeal.

Furthermore, Counsel submitted that Order 43 of the Civil Procedure Rules is silent on the mode of service of appeals, however he relied on Order 49 rule 2 of the CPR and following several authorities, counsel submitted that the memorandum of appeal should be served upon the respondent within 21 days, failure of which is proof of lack of interest in the appeal.

In reply, counsel for the appellant submitted that the respondent's counsel was first served with the memorandum of appeal on 16th December 2020 however, counsel in personal conduct was out of office and the respondent counsel's office has a policy that counsel receives documents personally. Counsel for the appellant submitted that when his clerk went back on 21st December 2020 for her copies, she was informed that counsel had not yet signed and that showed how cumbersome it was to serve the respondent's counsel.

Counsel for the appellant also submitted that counsel for the respondent was served with a hard copy of the written submissions on 18th August 2022, however, the appellant counsel's clerk was asked to return for her signed copy but the same had not been signed by 26th August 2022 when the clerk returned for her copy. Counsel for the appellant submitted that he resolved to serve counsel for the respondent by email on 26th August 2022, 28th September 2022 and 12th October 2022, however, Counsel for the respondent only acknowledged receipt on the 12th of October 2022.

Counsel for the appellant prayed that the said preliminary objection be dismissed as counsel for the respondent has been untruthful.

I agree with Counsel for the respondent that Order 43 of the Civil Procedure Rules is silent on the timelines for the service of a memorandum of appeal on the respondent hence recourse is made to **Order 49 Rule 2** which provides:-

"All orders, notices and documents required by the act to be given to or served on any person shall be served in a manner provided for the service of summons."

The implication of **Order 49 rule 2 (supra)** is that a Memorandum of Appeal has to be served within 21 days following the dictates of **Order 5 rule 2 of the Civil Procedure Rules. (*See Nakirabi Agnes & Others V Kalemera Edward &another HCMA No.403 of 2018)***

In the case of **Lubega Robert Smith & Others V Walonze Malaki High Court Civil Application No.036 of 2016** it was held that;

> *"Even if it were to be argued that a memorandum of appeal is a special genre of proceedings, under Order 43 Rule 11, it is incumbent upon the appellant to take out a notice of the hearing date of the appeal and serve it upon the respondent in the same manner as one would serve summons in an ordinary suit as quoted above. Indeed it has been previously held by the Supreme Court in **Kanyabwera vs. Tumwebaze (2005) EA 86** quoted with authority in **Orient Bank Ltd vs. AVI Enterprises HCCA 2/2013** that service of hearing notices should follow the provisions of Order 5 CPR. The respondent has since filing her appeal, never fixed it for hearing or taken out a notice for its hearing."*

> *"Order 5 rules 1 and 3 CPR appear to have been couched in mandatory terms and I am aware that this court has on several previous occasions chosen to treat it as such. See for example **Orient Bank Ltd vs. AVI Enterprises (supra).** I would have no reason to depart from that decision."*

According to **Order 5 rule 16 of the Civil Procedure Rules**, proof of service of summons is by an affidavit of service, and this must state the time when and the manner in which summons was served, and the name and address of the person, if any, identifying the person served and witnessing the delivery of summons.

In the instant appeal, there is no return on service to prove Counsel for the appellant's submission on their predicaments in as regards the service of the memorandum of appeal on Counsel for the respondent.

That being said, both parties were well represented at the appeal and both counsel were able to file written submissions in support of their clients' cases. Therefore, in accordance with Section 98 of the Civil Procedure Act and section 33 of the Judicature Act, and to ensure that this appeal is resolve on its merits so as to meet the ends of justice, I failure to file an affidavit of service by the appellant's counsel did not occasion any miscarriage of justice. Both parties were represented by advocates in this appeal. The preliminary point of law is dismissed.

I shall now proceed to resolve the grounds of the appeal.

Decision

Ground One and four

The Learned Trial Chief Magistrate erred in law and fact by holding that the agreement dated 14/04/14 was not part of the agreement for purchase of the suit land **AND** The Learned Trial Chief Magistrate erred in law and fact by failing to properly evaluate evidence on record on who was responsible for relocation of the squatters.

I shall resolve these two grounds together as they are related.

The crux of the matter in the trial court was of breach of contract. According to **Section 10 (1) of the Contract Act, 2010**, a contract is defined as;

> ***"An agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound."***

It is trite law that the parties to a contract must have intended to enter into the said contractual relations with a meeting of the mind. According to exhibit PE1, the respondent and the appellant entered into a sale of land agreement on the 8th day of November 2013 for the purchase of 44 acres of land located at Nakabito, Nakigoza, Luwero, Bulemezi Block 105 and plot 32 at a consideration of Uganda shillings 29, 520,000 (Twenty-nine million five hundred and twenty thousand shillings). PW1 (Ssozi Edward) testified that appellant made a first deposit of Uganda shillings 440,000 (four hundred and forty thousand shillings).

Subsequently, according to exhibit PE2, the respondent and the appellant entered into another agreement on the 23rd day of December 2013, wherein the appellant paid a second deposit of Uganda shillings 13,000,000 (thirteen million shillings) to the respondent.

Following the above agreement dated 23rd December 2013, the parties entered into an additional agreement on 14th February 2014, wherein the respondent corrected a few errors including the fact that the land was 44 acres however 3 acres were owned by squatters.

The respondent also confirmed that he received another deposit of Uganda shillings 12,180,000 (twelve million, one hundred and eighty thousand). This agreement was exhibited as PE3.

According to exhibit PE3, it was agreed by the parties that the balance of Uganda shillings 4,000,000 (four million shillings) would be paid within two months from the date of 14th February 2014. Furthermore, it was also agreed that in case of a default, the appellant would pay a monthly interest of 20% on the balance until the same was paid in full. This means that the balance of Uganda shillings 4,000,000 should have been paid before 14th April 2014.

In addition, according to exhibit DE1, the appellant paid the respondent a deposit of Uganda Shillings 1,000,000 (one million) on 14th day of April 2014, and it was agreed that the balance would be paid after the introduction to the Local Council (LC) officials and the tenants on the suit land.

At the trial, DW1 (the appellant in the instant appeal) confirmed to court that according to the addendum dated 14th February 2014, she undertook to pay an interest at the rate of 20% if she defaulted to pay the balance within two months.

DW1 also testified that it was agreed that the balance would be paid to the plaintiff/ respondent upon introduction to the squatters and the LC officials. The wording of exhibit PE3 is very clear, this agreement was an addendum to the agreement exhibited as PE2 and it was meant to correct certain errors. I shall reiterate the 1st paragraph of exhibit PE3 which states as follows;

> "***<u>As an addition to the agreement dated 23-12-2013,</u> the purchase price had an error and Mr. Ssozi Edward has agreed to correct that error…" (Emphasis on the underlined part)***

The agreement exhibited as DE1 introduced a new a term to the agreement and that was that the balance would be paid once the respondent introduced the appellant to the LC officials and the squatters. This agreement was signed by both parties in the presence of Wilson Sewanyana and Walakira Fred (PW2).

I am persuaded by the reasoning of Sir George Jessel in **Printing and Numerical Registering Co v Sampson (1875) LR 19 462**, where it was held that;

> *If there one thing more than another which public policy requires, it is that men of full age and competent understanding shall have utmost liberty in contracting and then contracts when entered freely and voluntarily, shall be held sacred and shall be enforced by courts of justice."*

In my opinion, exhibit DE1 created a new obligation for the respondent to introduce the appellant to the LC officials and the squatters before the balance could be paid however, this did not extinguish the payment of interest upon default as per exhibit PE3. The parties were very clear about their intentions in exhibit DE1 and the same was restricted to the respondent introducing the appellant to the LC officials and the squatters before the balance was paid.

DW1 testified that she met with the respondent on 14th April 2014 and they agreed that the interest would stop running. If this had been the intention of both parties, the same would have been put into writing in exhibit DE1 however, the same was not done.

PW2 (Walakira Fredrick) testified that upon request of the PW1 (the respondent) who was ill, he introduced the appellant to the squatters on two occasions. DW1 (the appellant) also confirmed to court that PW2 introduced her to the squatters and the LC officials.

This means that through PW2's actions who was acting on behalf of PW1, the respondent fulfilled his obligations of introducing the appellant to the LC officials and the squatters as per exhibit DE1. Counsel for the appellant submitted that the terms in DE1 varied the terms of payment in the original agreement hence freezing the interest clause.

Exhibit DE1 was silent as to its intention in as afar as whether it was a variation or addendum to PE3 which was not the case in exhibit PE3 because the latter was very clear in the sense that it was an addendum intended to correct an error in the agreement exhibited as PE2. On the face of it, exhibit DE1 was merely an acknowledgment for the balance received from the appellant wherein the respondent

agreed to introduce the appellant to the squatters and the LC officials before the balance was paid.

As earlier stated the introductions were made as agreed in DE1, one then wonders why the appellant has not paid the balance to date.

On the other hand, DW1 (the appellant) testified that she was willing to pay the balance however she withheld the same because the respondent did not relocate the squatters that had been introduced to her. I have looked at all the above exhibited agreements, relocation of the squatters was never a condition made by the appellant. On the appellant's own admission, she was aware that the land had squatters and she accepted to buy the same subject to the squatters' interests. Furthermore, during cross examination, the appellant (DW1) testified and I quote, "***No provision in the agreements puts an obligation to Ssozi to relocate the squatters"***

Had the issue of relocation of the squatters been a condition for the appellant, the same would have been included in the contract between the parties but the same was not included.

I agree with the Trial Chief Magistrate that the intention of the parties should be ascertained from the documents and as such this ground fails.

Ground two

The Learned Trial Chief Magistrate erred in law and fact by failure to conduct locus in quo to ascertain who was in occupation of the suit land.

The practice of visiting the *locus in quo* is to check on the evidence by the witnesses and not to fill in gaps in their evidence for them or lest court may run the risk of turning itself into a witness in the case. ***(Fernades v Noroniha [1969] EA 506 & Nsibambi v Nankya [1980] HCB 81.***

It is trite that visiting locus quo is not mandatory, however, when adjudicating land matters, *the court is advised to take interest in visiting locus in quo visit to check on the evidence already given and, where necessary, and possible, to have such evidence clearly demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. (**See Practice Direction 1 of 2007)***

It is essential that during locus proceedings, a Judge or Magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observations should not be substituted for evidence. (**See Mukasa versus Uganda (1964) EA 698 at page 700)**

As earlier stated, the appellant bought the suit land with the full knowledge that the suit land had squatters. The issue in the Trial Court was whether there was a breach of the sale agreement. The appellant admitted in the trial court that she had not paid the full purchase price. The documentary evidence on the court record was sufficient for the Trial Magistrate to make a fair and just decision without visiting locus in quo.

I find that no miscarriage of justice that was occasioned by the Trial Chief Magistrate's decision to not visit locus in quo. This ground equally fails.

Ground three

The Learned Trial Chief Magistrate erred in law and fact by failing to properly evaluate evidence on record when he dismissed the counter claim and evidence of mobile money payments to the respondent.

In the Trial Court, DW1 identified an airtel money mobile money statement for 0701189532 which is purportedly owned by the respondent. According to the respondent, the appellant owed the respondnet a total sum of Uganda shillings as the

purchase price and an accrued interest to the tune of Uganda shillings 22,400,000 (twenty-two million four hundred thousand).

On the other hand, DW1 (the appellant) testified that she only owed the respondent Uganda shillings 1, 7000,000 because from 14th day of April 2014, she paid the respondent Uganda shillings 1,500,000 (one million five hundred thousand).

During cross examination, PW1 testified that the appellant paid him Uganda shillings 1,000,000 (one million) through his phone on either 0752181761 or 0705394342. On the other hand, PW1 testified that he did not remember the appellant sending him Uganda shillings 500,000 on 12th October 2016 on his phone.

During the Trial court, PW1 (the respondent) admitted that he received one million from the appellant on one of his numbers namely 0752181761 or 0705394342. This means that the respondent admitted that **+256 752 181761** is his telephone number.

What is unclear is whether telephone number **+256 701 189532** belongs to the appellant. According to the letter attached to the mobile money statements, the telephone number belongs to **Mbekeka Vanesa Irene.** The appellant did not adduce any evidence in the trial court show the relationship between herself and the said Mbekeka Vanesa Irene and as such this court cannot tell the whether the above mentioned Uganda shillings sent to the respondent's telephone number +256 752 181761 was in relation to the payment of the balance.

It is trite law that the contents of a document must be proved by primary evidence and in certain exceptional cases by secondary evidence. **(Section 60, 61, 62 and 63 of the Evidence Act).** In the instant case, Ms. Mbekeka Vanesa Irene was never brought to court to clarify the above mentioned transactions to court. Furthermore, an official from the Airtel Uganda who are the authors of the said mobile money statement was never brought as a witness to authenticate the above statements.

According to **Section 101(1) and 102 of the Evidence Act**, he who alleges must prove. I find that the appellant failed to discharge their burden of proving that she is the one who paid the appellant the said sum of Uganda shillings 1,500,000 (one million five hundred thousand) from the telephone number **+256 701 189532**. In addition, the documentation from the telephone company was only marked as an identified article and not exhibited. According to the case of ***Okwonga Anthony versus Uganda Supreme Court Criminal Appeal No. 20 of 2000***, there is a difference between exhibits and articles marked for identification. The term "exhibit" is confined to articles which have been formally proved and admitted in evidence. In the trial court, the telephone print out identified as DIDI was of no evidential value since it was not exhibited as an exhibit.

Therefore, this ground fails.

Interest

I am alive to the fact that the issue of interest was not raised as a ground of appeal however, according to section 26 (1) of the Civil Procedure Act it provides as follows;

> ***"Where an agreement for the payment of interest is sought to be enforced, and the court is of opinion that the rate agreed to be paid is harsh and unconscionable and ought not to be enforced by legal process, the court may give judgment for the payment of interest at such rate as it may think just"***

According to exhibit PEb3, dated 14th February, 2014 the last paragraph thereof has notes indicating that the balance of the purchase price was Uganda shillings 4,000,000 (Four million shillings) payable within two months from 14th February, 2014 and in case of default the appellant would pay a monthly interest of 20% on

the balance of Uganda shillings 4,000,000. This would translate into interest at the rate of 240% per annum. I find the interest rate of 240% per annum unconscionable. Much at the parties agreed to the same under exhibit PEb3, I would treat such an agreement for payment of interest as unconscionable under section 26(1) of the Civil Procedure Act.

I hereby invoke the provision of section 98 of the Civil Procedure Act where the inherent powers of the court may be invoked to make necessary orders for ends of justice to be met. In that respect, the order for payment of the sum of Uganda shillings 22,400,000 (Twenty-two million four hundred thousand shillings) as interest from the land sale transaction is hereby set aside. The interest of 10% in order 4 of the judgment is ambiguous and difficult to enforce. The order states that the sums in a b and c shall attract at the rate of 10% from the date of delivery of judgment until payment in full. There is nothing like a b and c in the orders. In addition, it is not clear whether the rate is 10% per month or per annum. Such an order would be very difficult to enforce.

I am awarding interest at the rate of 12% per annum on the balance of Uganda shilling 3,000,000 which was the balance on the land purchase agreement from the date of filing the suit in the lower court till full payment.

Given the above re-evaluation of the evidence above, I order as follows;

a. This appeal partially succeds.
b. The Judgment and decree of the Trial Chief Magistrate His Worship Dr. Mushabe Alex Karocho in Civil Suit 1044 of 2016 in respect of interest payable is hereby aside.
c. The appellant shall pay the respondent a sum of Uganda shillings 3,000,000 (Three million shillings) as decreed in the lower court.

d. The appellant shall pay interest at the rate of 12% per annum on the sum of Uganda shillings 3,000,000 (Three million shillings) from the date of filing the suit in the lower court till full payment.
e. The appellant shall pay the respondent a sum of Uganda shillings 1,000,000 (One million shillings) as general damages decreed in the lower court.
f. Each party shall bear its own costs in this appeal.
g. The appellant shall pay the costs in the lower court.

I so order.

Judgment delivered at High Court, land Division on this 2nd day of June, 2023.

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IMMACULATE BUSINGYE BYARUHANGA

JUDGE

02-06-2023