THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

(LAND DIVISION)

CIVIL SUIT NO. 454 OF 2014

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1. ANDREW MUWONGE

2. LENARD PRICE

(suing through his lawful Attorney

NSAMBA MICHAEL.....PLAINTIFFS

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VERSUS

EDWARD KABUGO SSENTONGO.....DEFENDANT

Before: Lady Justice Alexandra Nkonge Rugadya

JUDGMENT

15 The 1st plaintiff in the amended suit, Mr. Andrew Muwonge filed this suit seeking recovery of a certificate of title for the suit land comprised in ***LRV 1882 Folio 17 Mawokota block 211-215 plot 2, Serinya*** or balance of the purchase price among other things.

The 2nd plaintiff, Lenard Price claimed to have bought the same portion of land 20 from the 1st plaintiff on 4th September, 2010, at ***Ugx 80,000,000/=.*** The initial deposit of ***Ugx 70,000,000/=*** was paid by him, leaving a balance of ***Ugx10,000,000/=.***

Immediately after the deposit was made he obtained vacant possession of the suit land, which he left in the care of his attorney Mr. Nsamba Michael.

25 In 2012, the said attorney left the land but did so after developing the same with an incomplete building structure. The 2nd plaintiff claimed that he never

obtained the certificate of title from the 1st plaintiff. The 2nd plaintiff joined this suit by a court order dated 22nd April, 2021.

It is the 1st plaintiff's claim that he believed that the 2nd plaintiff had lost interest in the said land and that is why he sold it to the defendant at a cost of ***Ugx 140,000,000/=***.

The initial deposit of ***Ugx 30,000,000/*** was made by the defendant upon the execution of the sale agreement and the balance of ***Ugx 110,000,000/=*** was payable within an agreed period of two months.

However, that after the two months which ended on 3rd July, 2013 the defendant paid only ***Ugx 17,000,000/=*** did not complete the payment for the total consideration.

The defendant has since defaulted, ignored and/or failed to pay the outstanding balance of ***Ugx 93,000,000/=*** or return the title, despite the several demand notices and reminders from the 1st plaintiff and his lawyers which forced him on 25th July 2014 to terminate the sale agreement, and demanded for the certificate of title.

Defendant's facts:

As stated in the scheduling memorandum the defendant claimed that he bought the land in 2013, after he had been approached by Mr. Ssemuju Abbas and Mr. Yiga Lawrence, a son to the 1st plaintiff. The two informed him about the 1st plaintiff's intention to sell the suit land; showed him the certificate of title for the suit property; and together they inspected the property.

He claimed that at the time of inspection, a portion of the land was bushy, with scattered trees of various types. At the lower end was a plantation of eucalyptus trees.

He also found an old structure and eucalyptus on the land which he was led to believe were part of the suit land which induced him to buy the land after finding that it would be suitable for the establishment of a forest park.

The defendant did not dispute the fact that by a sale agreement dated 3rd May, 2013 the 1st plaintiff as the registered proprietor of the suit land land willingly sold the land to him at ***Ugx 140,000,000/=*** and upon execution, had paid ***Ugx 30,000,000/=,*** leaving only a balance of ***Ugx110,000,000/=.***

The certificate of title was deposited with the defendant lawyers from ***M/s Lukwago and Co. Advocates*** for safe custody, pending the full payment, and also for purpose of carrying out a search, survey and opening boundaries to confirm the true acreage of the land.

In that agreement, it was indicated that the land was vacant and free from third party claims. The interests of the 2nd plaintiff were never disclosed to him. At the time of sale and execution he was led to believe that the 1st plaintiff owned the buildings, which had interested him into buying the suit property.

However, that upon opening the boundaries a third party interest in a *kibanja* belonging to Nicholas Mugisa was discovered. It was also discovered that the access road did not touch the land as presented by the 1st plaintiff and that the buildings which induced him to purchase the land were on ***plot 10*** belonging to one Bonny Kiwanuka and Ntege Musoke Francis.

Furthermore, that the same Bonny Kiwanuka holds a *kibanja* interest in land measuring 4.4 acres on ***plot 2*** and that the 1st plaintiff had never compensated that interest.

He also discovered further that by the time the 1st plaintiff executed the agreement with him, he had already entered into an agreement with one Sajjabi Francis, who had lodged a case of threatening violence at Kamengo police Station and that later on, with the consent of the 1st plaintiff the defendant on 21st February 2014 paid a sum of ***Ugx 800,000/=*** to Sajjabi as a refund of the money

he had paid to the 1st plaintiff and his son, Paul to enable Ssajjabi vacate the land.

Following a bitter exchange of words between Bonny Kiwanuka who had engaged his own surveyor, the attempt to cross check and confirm the findings from the defendant's surveyor however aborted. The possibility of amalgamation of ***plots 2 (suit land) and 10*** was considered but the process has never been completed.

It is further alleged by the defendant that the 1st plaintiff did not respect the agreement when he cut down the mature trees and sold them as fire wood and carried away all the eucalyptus trees; and to date still lets out part of that land to Charles Lubega Wasswa.

That at all material times he had been willing to pay the balance but the 1st plaintiff has not yet completed the process of settling the third party claims affecting the land.

That the 1st plaintiff using an interim order kept the defendant off the suit land while letting out the same to other persons only to withdraw later ***MA No. 1344 of 2014*** the application for a temporary injunction, fraudulently apply for a special certificate of title on the basis that the duplicate certificate had got lost yet fully aware that the duplicate was still in the custody of the defendant's lawyers.

The Commissioner, Land Registration acting on that application proceeded by notice in the gazette to notify the public of such intention to issue a special certificate of title to the 1st plaintiff.

The defendant also refuted the truthfulness of the claim that the 2nd plaintiff had purchased the suit land alleging that the agreement he presented to back up the claim had been backdated to create an impression that the 2nd plaintiff had bought the same property earlier, which afterthought was created with the malafide intention of defeating the defendant's interests in the suit land.

Agreed facts:

During the scheduling, the following were accordingly identified by the parties as the agreed facts:

1. *The 1st plaintiff by a sale agreement dated 3rd May, 2013 sold land comprised in* ***LRV 1882 Folio 17 Mawokota block 211-2015 plot 2 at Serinya*** *at a cost of* ***Ugx140,000,000/=*** *and a sum of* ***Ugx 30,000,000/=*** *was paid as part payment of the purchase price on the execution of the sale agreement.*

2. *The agreement between the 1st plaintiff and the defendant stipulated terms of payment and the balance was to pay the balance of the purchase price of* ***Ugx 110,000,000/=*** *within two months.*

3. *By a notice of acknowledgment dated 3rd May 2013 the certificate of title for* ***LRV 1882 Folio 17 Mawokota block 211-2015 plot 2 at Serinya*** *was deposited with the defendant lawyers of* ***M/s Lukwago & Co. Advocates*** *for safe custody until full payment.*

4. *The defendant paid an additional sum of* ***Ugx 17,000,000/=*** *to the plaintiff as further payment of the balance of the purchase price.*

5. *By a notice dated 25th July, 2014, the plaintiff terminated the sale agreement and demanded for the return of his certificate of title.*

Representation:

The 1st plaintiff was represented by ***M/s Asasira & Co. Advocates.*** The 2nd plaintiff was represented by ***M/s Nakagga & Co. Advocates*** while the defendant was represented by ***M/s Lukwago & Co. Advocates.***

Issues for determination

At the scheduling the following issues were also agreed upon:

1) ***Whether the 2nd plaintiff has a cause of action against the defendant.***

2) ***Whether the sale agreement between the 1st and 2nd plaintiffs/counter defendants dated 4th September, 2010 of land comprised in LRV 1882 Folio 17 Mawokota block 211-2015 plot 2 at Serinya is illegal and fraudulently procured;***

3) ***Whether the 2nd plaintiff has legal and enforceable rights and interests in the suit land***

4) ***Whether the defendant/counterclaimant breached the sale agreement dated 3rd May, 2013 between the 1st plaintiff and the defendant for the sale of land comprised in LRV 1882 Folio 17 Mawokota block 211-2015, plot 2 at Serinya;***

5) ***What remedies available to the parties.***

Preliminary objection:

At the preliminary stage of the trial, Nsamba Michael who testified as ***Pw2*** purported to testify as a holder of powers of Attorney for the 2nd plaintiff. Counsel for the defendant raised an objection that ***Pw2*** was not a competent witness, given the fact that the instrument of power which he relied on was not notarized as required under ***section 84 and 85 of the Evidence Act***.

The issue as duly noted by the counsel for the plaintiff was however never raised by counsel when the application was heard; and no application was made to this court to review that decision.

PExh 17 is the copy of the power of attorney, dated 15th September, 2019. This court noted that it had not been signed by ***Pw2*** as the donnee, but it was also never duly authenticated by a notary public, as required by virtue of ***section 84 and 85 of the Evidence Act***.

But be that as it may, the witness was allowed to testify since he was also testifying in support of the 1st plaintiff, (paternal uncle). The witness and Lawrence Iga (***Pw3)*** had been some of the witnesses to the Sale Agreement between the 1st plaintiff and the 2nd plaintiff. ***(PExh 3)*** and therefore believed to have had knowledge of these transactions concerning the land.

Now for the merits.

Issue No. 4: Whether the defendant/counterclaimant breached the sale agreement dated 3rd May, 2013 between the 1st plaintiff and the defendant for the sale of land comprised in LRV 1882 Folio 17 Mawokota block 211-2015, plot 2 at Serinya.

The Law:

Sections 101 -103 of the Evidence Act provide that whoever desires a court to give judgment for any legal right or liability dependent on the existence of any facts which she asserts, must prove that those facts exist.

The burden of proof lies on the plaintiff who is required to adduce evidence, whose level of probity is such that reasonable man, might hold more probable the conclusion which the plaintiff asserts on a balance of probabilities. *(Refer to the case* ***Sebuliba Vs Co-op. Bank Ltd (1982) HCB 130.)***

Where fraud is alluded to as in this instance, given the seriousness of any such allegation, it must not only be specifically pleaded the particulars thereof must also be proved, to a degree of proof slightly higher than the balance of probabilities required in ordinary civil suits. ***(Kampala Bottlers Ltd Vs Damanico Uganda Ltd S.C.C.A 2 of 1992.)***

S. 10(1) of the Contracts Act 2010 defines a contract to be an agreement made with the free consent of parties with capacity to contract for lawful consideration ***(George Kakoma vs A.G. (2010)1HCB 77).***

Breach of contract is defined in ***Black's Law dictionary 9th edition at page 213*** as violation of a contractual obligation by failing to preform ones' own

promise by repudiating or by interfering with another party's performance. The term presupposes that the contract was in the first place valid and enforceable.

Under ***section 64 of the Contract Act,*** where a party to a contract is in breach the other party is entitled to termination/repudiation of the contract or an order for specific performance against a party in breach.

Under those circumstances, the presupposition would of course be that the contract is valid, since parties cannot derive any benefit out of an invalid contract.

In ***Osuman vs Haji Haruna Mulangwa SCCA No. 38 of 1995,*** the term a *valid contract* was defined to mean in every case, a contract sufficient in form and substance so that there is no ground whatever for setting it aside between the parties. It should be one that is binding to both sides.

Thus 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.

If in a given transaction any of these is missing it could as well be called something else. (***Ebbzworld Ltd & Anor vs Rutakirwa Civil Suit No. 398 of 2013).***

Consideration:

It is not in dispute that the total purchase sum under the agreement between the 1st plaintiff and the defendant, ***PExh 4,*** dated 3rd May, 2013 was ***Ugx 140,000,000/=;*** and the initial deposit of ***Ugx 30,000,000/*** was made by the defendant upon the execution of the sale agreement. The balance of ***Ugx 110,000,000/=*** was to be paid within a period of two months.

However, after the two months which ended on 3rd July, 2013, the defendant admittedly, had only paid an additional sum of ***Ugx 17,000,000/=***, thus failing to complete the payment for the total consideration within the stipulated period.

The reasons given by the defendant for his failure to complete the payment included the claim that upon execution of the agreement, he had discovered that there were third party interests which were not previously disclosed to him, including those of the 2nd plaintiff.

As per the two letters by his counsel ***M/s Byamugisha Gabriel & Co. Advocates PExh 12*** and ***PExh 13*** dated respectively, 25th July, 2014 and 7th August, 2014 the 1st plaintiff purported to terminate the agreement and demanded for the return of the certificate of title which at the time of execution was left in the custody of the defendant's lawyers. Needless to add, the right to terminate iscan exercisable if the contract was valid and therefore legally enforceable.

Consensus ad idem:

Section 13 calls for free consent or consensus of parties to a contract and where there is coercion; undue diligence, fraud, misrepresentation no free consent exists. Reciprocal rights and obligations can only be created in a valid contract made between consenting parties.

Free consent is based on the principle of *consensus ad idem.* An agreement is invalid without free consent. The test is that both parties must have a clear understanding of what they are agreeing to, and there must be no ambiguity or misunderstanding about the terms of the contract. Without *consensus ad idem* therefore a contract may not be legally binding and enforceable.

It is not the function of court to make contracts between the parties but it is court's duty to construe the surrounding circumstances so as to effectuate the intention of the parties. ***(See: Omega Bank vs O.B.C. L Ltd (2005) 8 NWLR (pt. 928) 547).***

Thus when a document containing contractual terms is signed, then in the absence of fraud, or misrepresentation the party signing it is bound by its terms. (***See: William Kasozi versus DFCU Bank Ltd High Court Civil Suit No.1326 of 2000).***

In the present case the defendant claimed that he was led to believe that the buildings were located on ***plot 2,*** which had induced him to purchase the land, whereas in actual fact after the survey it was discovered that they were located on the neighbouring ***plot 10.***

Furthermore, that the understanding between him and the 1st plaintiff of the agreement was that there were no third party interests on the suit property, as was indeed clearly spelt out under *clauses 1 and 4* of the agreement.

The defendant claimed however that he later discovered that there were several third party interests which were never disclosed to him by the 1st plaintiff at the time of execution of the agreement, including that of the 2nd plaintiff.

Among those who claimed ownership of portions of the land were: Bonny, Kiwanuka ***(Dw4),*** who claimed ownership of 4.4 acres as a *kibanja,* part of the suit land. He also owned the adjacent ***plot 10*** jointly with one Francis Musoke Ntege; Sajjabi, whose interests were however later settled by the defendant; and Nicholas Mugisa who also had a residence on part of the land in dispute.

Charles Lubega Wasswa, was allegedly utilising a portion of the land leased to him by the 1st plaintiff while the 2nd plaintiff who joined this suit later upon application never turned up in court to defend his alleged prior interests on the suit land, leaving his attorney to do so.

Dw4 in his evidence informed court that he had owned and utilised the *kibanja* measuring 4.4 acres located on the 1st plaintiff's land for a period of 36 years. That he was approached by the defendant sometime in 2013 who informed him about the land he had bought land from the 1st plaintiff.

Dw4 had also told the defendant about the disputes on the land involving Nicholas Mugisa's encroachment on that *kibanja;* had engaged his own surveyor who confirmed that the buildings claimed by the 1st plaintiff were on his jointly owned land on ***plot 10,*** but not ***plot 2*** (suit land) which the defendant claimed to have purchased.

In *paragraph 15* of his statement he further told this court that he had earlier on made a request to the 1st plaintiff to buy the legal interest for his *kibanja* on the 1st plaintiff's land which had a small house; and which he had utilised for decades. However, that the 1st plaintiff has not made any positive response to that request.

The witness denied knowledge of the 2nd plaintiff or his purported attorney purporting to be the owners of the buildings located on his *kibanja* which he claimed was forcefully utilised by the 1st plaintiff.

Court also noted that the certificate of title, ***PExh 1*** for the land comprised in ***LRV 1882 Folio 17 Mawokota block 211-2015 plot 2,*** indicated a total area of 99.59 acres.

As stated in *paragraph 12* of the defendant's witness statement, the certificate of title shown to him indicated that the land measures approximately 99.59 hectares, the same measurements as indicated in *paragraph 7* of the 1st plaintiff amended witness statement.

However, the sale agreement, ***DExh 2,*** acknowledgment of receipt of title ***DExh 3,*** both dated 3rd May, 2013; and the deed plan inside the certificate of title all showed measurements of 99.59 acres.

The two parties therefore agreed to open the boundaries in order to confirm the true acreage. Despite the said errors as noted, the two proceeded with the transaction.

The defendant claimed that the first survey had been made by a surveyor recommended by the 1st plaintiff. The findings indicated that the total area was 99.84 hectares.

Dissatisfied with the report, the defendant carried out another survey wherein it was discovered that what was on the ground did not actually tally with what was on the deed plan. The report did not indicate the boundaries of the suit land.

Dw3 Asiimwe Dennis of *M/s Survey Com Surveyors* confirmed these findings in his report on the boundary opening of ***plot 2,*** dated 19th August, 2013 ***(PExh 7)*** which also showed an error in the plotting of the adjacent ***plot 10.***

It was the defendant's claim that when brought to the attention of the 1st plaintiff he denied the existence of any encumberances or third party claims on the suit land and requested the surveyor to halt the release of the report, until the said findings were confirmed in his presence.

On account of the disagreements between the 1st plaintiff and one of the claimants, Bonny Kiwanuka, ***Dw4,*** the parties failed to confirm the findings and reach an agreement to resolve the dispute.

Subsequently another boundary opening exercise was conducted by *M/s Tech Solutions* and per their report dated 13th April, 2015, ***PExh 8,*** in effect confirming the findings of the survey made by ***Dw3***.

Going by the contents of those reports, the conclusion was inevitable that the area on which the buildings (claimed by the 1st plaintiff) were located and the access road had not been captured under ***plot 2***. It was computed and found to be 3.22 hectares or 7.95 acres, out of which 6.19 acres or 2.50 hectares were on ***plot 10.***

The recommendation was made by the surveyor to redeem the piece of land which had the buildings, which would ultimately require the owners of ***plot 10*** to sign subdivision consent/transfer forms, and subsequent approval by the district.

The report also found that 5 acres of the suit land were claimed by Nicholas Mugisha who had a house on that land as indeed confirmed during the *locus* visit. 3 acres were claimed by Kiwanuka of Mpigi district.

The google maps as at 2010-2015 indicated that the land was bushy with no human activity taking place at the time and that cultivation on the land began

in 2016. ***(Ref. DExh 10,*** *letter dated 31st December, 2021requesting for google images;* ***DExh 11:*** *Analysis of Ground situation using Google images).*

The defendant's claim was that to date the 1st plaintiff has failed to clear the encumberances and third party claims affecting the land and in his counterclaim, prayed for the dismissal of the suit; a permanent injunction restraining the plaintiff, his agents/servants, employees from trespassing or other way dealing with the land; general damages and costs of the counterclaim.

Decision of court:

As noted earlier, not even 50% of the total consideration had been paid by the defendant in fulfilment of the contractual obligations. But secondly, the provisions under ***section 17 of the Contracts Act, 2010*** are clear.

Where as in this case both parties or where one of the parties to the contract operates under a mistake as to the matter of fact which is essential to the agreement, consent is obtained by mistake of fact and the agreement is void.

A mistake of fact is a factual error such that if the correct fact had been known, may have resulted in a different contract. (***Nilecom Ltd vs Kodjo Enterprises Ltd Civil Suit No. 18 of 2014).***

The above support the conclusion that the defendant was forced to pay only a partial deposit for the land whose boundaries and total acreage and boundaries were unknown/unclear to both the parties at the time.

In addition to the mistake in boundaries and acreage, there was no denying the fact that the 1st plaintiff did not disclose the 2nd plaintiff's purported interest in the suit land at the material time.

He did not disclose the existing *bibanja* interests or the licencee interest which were all later brought to the attention of the defendant after the agreement had been signed by the two parties.

At the time of the transaction therefore, there was neither certainty of the terms nor was there *consensus ad idem* therefore between the two parties.

Capacity and consent to transact:

Under ***section 11(1) (supra)*** a person has capacity to contract where that person is of eighteen years or above; of sound mind; and not disqualified from contracting by any law to which he or she is subject.

As also declared by the Court of Appeal in its decision of ***Joyce Nakayima & 3 others vs Nalumansi Kalule and 2 others CACA No. 111 of 2019,*** an illegal sale conducted without proper authority/capacity cannot be executed against any of the parties, let alone be enforced against a third party who was not privy to the contract.

Section 34 of the Land Act, Cap.227 allows a tenant by occupancy to assign, sublet or subdivide only after securing the consent of the land owner. Without such consent, the tenant has no capacity to make any transaction.

In *clause 7* of the sale agreement, the 1st plaintiff represented to the defendant that he had obtained the requisite consent for sale of the property and undertook to introduce the defendant to the local authorities of the area.

He presented a certificate of title ***PExh 1*** for the land comprised in ***LRV 1882 Folio 17 Mawokota block 211-2015 plot 2,*** measuring 99.59 acres, onto which he got registered as proprietor for an initial term of 5 years *w.e.f* 1st August, 1990, extendable to 49 years.

The land in dispute had been leased to him by the Uganda Land Commission on 8th October, 1990 under specific terms and conditions as spelt out in that lease. As per the lease offer form ***PExh 1*** dated 16th September, 1987 ULC gave the 1st plaintiff an initial lease of 5 years, and on completion of the building covenant an extension of 49 years was to be granted.

It was an express term under *clause 2 (d)* of the lease to use the land for *grazing purposes only.*

In *clause 2 (f)* thereof, the lessee and lessor had also agreed not to sublet or part with possession of or suffer any one an equitable interest without *prior* written consent of ULC as the lessor.

At the time when the defendant signed the agreement, the total area constituting ***plot 2*** and its actual boundaries remained uncertain and third party interests in the suit land unresolved, thus calling for a fresh survey in order to settle those interests.

Court also noted that at the time when the 1st plaintiff terminated the agreement, more than 50% of the consideration was yet to be paid by the defendant. It is not unlikely that more than ten years after the initial agreement, fresh terms have to be agreed upon after determination of the actual area to be leased after clearing off pending claims by the third parties; and securing the necessary consents from the lessor.

In response therefore also to ***issue No. 4*** on account of the fact that the parties never entered into a valid agreement, the issue of breach did not even arise as the terms and conditions of the invalid contract could not be enforced by court against either side.

Issue No. 1: Whether the 2nd plaintiff has a cause of action against the defendant.

Issue No. 2: Whether the sale agreement between the 1st and 2nd plaintiffs/counter defendants dated 4th September, 2010 of land comprised in LRV 1882 Folio 17 Mawokota block 211-2015 plot 2 at Serinya is illegal and fraudulently procured;

And

Issue No. 3: Whether the 2nd plaintiff has legal and enforceable rights and interests in the suit land

A *cause of action* means every act which is material to be proved to enable the plaintiff to succeed or every fact which, if denied, the plaintiff must prove in order to obtain judgment.

In order to prove that there is a cause of action, the plaint must show that the plaintiff enjoyed a right; that the right has been violated and the defendant is liable. Thus under ***Order 7 rule 11 of the Civil Procedure Rules***, a plaint may be rejected if it does not disclose a cause of action.

The Court of Appeal in ***Kapeka Coffee Works Ltd vs NPART CACA No.3 of 2000*** held that in determining whether a plaint discloses a cause of action the court must look only at the plaint and its annextures if any, and nowhere else.

PExh 3 is an earlier sale agreement over the same land, dated 4th September, 2010, between the 2nd plaintiff and the 1st plaintiff for consideration of ***Ugx 80,000,000/=***. The balance of ***Ugx 10,000,000/=*** was to be paid by around 4th May, 2011.

In the agreement, the vendor was to hand over to the purchaser the original title and signed transfer forms after receiving the balance of the purchase price. The purchaser was under obligation to survey/open boundaries and incur all costs of the transfer. He was allowed to build servant quarters, put a care taker on the suit land and grow some food crops.

The principles governing a valid contract as highlighted earlier were equally applicable to the purported agreement between the 1st plaintiff and the 2nd plaintiff, which the defendant sought to challenge.

There is no indication whatsoever that the balance of the consideration was ever paid and transfers signed made; a prior survey conducted; third party interests settled; and title transferred to the 2nd plaintiff.

Equally important, court noted that the requirements under the lease between ULC and the 1st plaintiff (*consent and warranty)*, and all the necessary consents had not been secured prior to the sale.

There was nothing to prove that the two parties were fully aware of the boundaries, or actual acreage of the suit land; or to show this court that the buyer was aware of all the third party interests on the land in dispute or what portion of land he actually intended to buy, taking into account the unresolved disputes. This was no doubt a botched sale, which no court in its right frame of mind could enforce.

The law is clear that prior consent to assign or dispose of the land must be secured by the lessor/land owner from the tenants in occupation who wishes to do so.

Section 34 (9) of the Land Act, provides that no transaction to which this section applies shall be valid and effective to pass any interest in land, if it is undertaken without the consent as provided for in that section.

A land owner must seek prior consent of the tenant in occupation before dealing with that land. By virtue of ***section 35(1) and (2) of the Act***, the two must give each other the first option to assign or dispose of the land.

The evidence in this instance indicates that the 1st plaintiff attempted to assign/dispose of the suit property in 2010 to the 2nd plaintiff and in 2013 to the defendant, in contravention of the terms and conditions of the lease without securing prior consent from the ULC, as the leasing authority. But also as confirmed during the locus visit, suit the land was not being utilized for grazing as per the specific terms of that lease.

Furthermore, the provisions of ***section 35 (8),*** require that change of ownership of title effected by the owner by sale grant or otherwise does not in any way affect the existing interests or bonafide occupant. The new owner is under obligation to respect the existing interest.

In this case, no consent was obtained from the *bibanja* owners: Bonny Kiwanuka and Nicholas Mugisha who were next door neighbors to the 1st plaintiff; and whose presence or interest in the suit land could have, with sufficient efforts by the prospective buyers been drawn to their attention.

Based on those important provisions of the law, the two transactions in relation to this suit land therefore fail to meet the criteria of a valid agreement.

In the words of Lord Denning in the case of ***Macfory vs United Africa Co. Limited (1962) ALL ER 1169 at 1172,*** cited with approval in ***Kalokola Kaloli vs Nduga Robert, Civil Appeal No. 001 of 2013*** *if an act is void then in law it is a nullity. It not only bad, but incurably bad. There is no need for an order of court to set aside. It is automatically null and void without more to do, though it is sometimes convenient to have the court to declare it to be so. So every proceeding which is found on it is also bad. You cannot put something on nothing and expect it to stay there. It will collapse.*

In alignment with the above, a court ought not to allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the attention of court. (***May vs Brown Doering MC NAB & Co. (1882) 2QB 728*** cited with approval in ***Kyagulanyi Coffee Ltd vs Francis Senabulya CACA No. 41 of 2006.)***

The purchaser of an interest must satisfy court that he/she indeed acted in good faith in order to benefit from the defence of a *bona fide* purchaser for valuable consideration of land.

Such purchaser derives protection under ***section 181 of the RTA***. The term is defined in ***Black's Law Dictionary 8th Edition at page 1271*** to mean:

> ***"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has good faith paid valuable consideration without notice of prior adverse claims."***

Whether or not there was fraud and whether or not a party was a *bonafide* purchaser for value without notice the question that a court would poise is whether the defendant honestly intended to purchase the suit property and did not intend to acquire it wrongfully. ***(David Sejjaka Nalima vs Rebecca Musoke SCCA No. 12 of 1985)***.

A person who purchases an estate which he knows to be in occupation of another person other than the vendor is not a *bona fide* purchaser for value without notice of the fraud if he/she fails to make inquiries before such purchase is made.

Some of the key tenets for a *bona fide* buyer include conducting a prior survey to establish with certainty the acreage and the boundaries of the land that he/she sets out to buy; conducting inquiries from the neighbours of the suit land and consulting the Lcs in order to verify the truthfulness of the information relating to the land.

It is not enough for a prospective buyer to stop at inspecting the land or the title and later purport to conduct the survey after signing the agreement. In the circumstances as highlighted, neither the 2nd plaintiff nor the defendant for that matter, could claim to have acquired interest as bona fide purchasers.

Had the buyers taken trouble to inquire from Lcs and neighbours, they would have noted that there were other subsisting interests on the land.

A prior survey would have brought out to the prospective purchaser's attention all the errors and disputes relating to acreage; location of the access road and plotting, prior to any of the transaction.

Indeed, if the purchasers had conducted prior careful search and inspection of the title as due diligence would demand, they would have each noted that the 1st plaintiff's right to assign or transfer the suit land under the lease was premised on his fulfilment of certain requirements under the lease, including securing prior consent of the lessor.

In the case of ***Jennifer Nsubuga versus Micheal Mukundane, Civil Appeal No. 208 of 2018,*** it was held that:

> ***"In my view, a due diligence investigation would seek to cross check or confirm the vendor's claim by inquiring, seeking to cross-check or confirming the vendor's claim to title by inquiring of independent persons knowledgeable about the land or that which could otherwise shed light on the bonafides of the intended land purchase.***
>
> ***It ought to be directed at persons that are independent of the beneficiaries of the land transaction in question, with a view to ascertaining the authenticity of the title sought to be conveyed. Of necessity that would exempt routine, contractual inquiries made of the seller to establish his/her title to property".***

Halsbury and Martin Modern Equity (Sweet and Maxwell) Ltd 1977, at ***page 27*** provides:

> ***"Prior equitable interest in land can only be defeated by a bonafide purchaser for value without prior notice. Then the equities are equal and his estate prevails. If he took with notice, the position is otherwise, as the equities are not equal. If he does acquire a legal estate, then the first in time that is the prior equitable interest prevails as equitable interests rank in the order of creation."***

Based on the above principles the purchasers of the suit property were therefore not *bonafide* purchasers for value. There was no valid contract therefore for this court to enforce.

Section 98 of the CPA confers to this court inherent powers, to make orders necessary to meet the ends of justice.

The 1st plaintiff in his amended plaintiff prayed for the payment of the outstanding balance from the defendant.

However as recommended by the surveyor, the 1st plaintiff needed to first ascertain what he intended to sell to him; redeem the piece of land which had

the buildings; determine issues relating to the access road; and resolve any other disputes on the suit land.

Any deduction from ***plot 2*** of the portions of land belonging to the acknowledged *bibanja* holders or additions from land comprised in ***plot 10*** would all result in altering the size of ***plot 2,*** subject to the approvals/consent as envisaged under the lease agreement.

In the final result, the parties would have to enter into a fresh agreement.

Accordingly, the following are the orders/declarations issued by court:

Decision of court:

1. ***The 2nd plaintiff had no cause of action against the defendant; and other than a refund of the money paid as consideration to which he was entitled, he has no other enforceable right over the suit land.***

2. ***The 1st plaintiff did not enter into a valid contract with the defendant, accordingly the agreement is unenforceable against both parties.***

3. ***The defendant is entitled to a refund of monies paid as consideration to the 1st plaintiff in respect of the suit land within a period of sixty days from the date of delivery of this judgment, upon which the defendant shall immediately return to him the certificate of title for plot 2.***

4. ***The defendant is entitled to the first option to purchase the land on fresh terms and conditions as may be agreed upon, taking into account the existing bibanja and any other interests validly existing on the land; and after securing the required consent from the lessor.***

Each party to meet their own costs.

Alexandra Nkonge Rugadya

Judge

12th January, 2024

Delivered by email

12/1/2024.