

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

CIVIL SUIT NO. 298 OF 2004

KAGUMYA GODFREY ::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

NTALE DEO ::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGMENT

The Plaintiff Godfrey Kagumya brought this suit against the Defendant Ntale Deo for the following declarations:

- (a) That the agreement dated 30th July 2003 entered into between the Plaintiff and the Defendant still subsists.
- (b) The subject matter of the above said agreement is the property of the Plaintiff both at law and in equity.
- (c) An order for specific performance of the agreement between the Plaintiff and the Defendant.
- (d) An order that the Defendant doth accept the balance due and owing to him on the said agreement and makes an account of all the monies received from

the property in dispute from the date the same was due to pass in reality to the Plaintiff to date.

(e) General damages:

The Plaintiff and the Defendant entered into a Sale Agreement for land and house located at Baliruno Zone Nakulabye – Rubaga Division. The Sale Agreement was made on the 30th July 2003. The total consideration for the property was Shs.11,500,000/= (eleven million five hundred thousand only). At the signing of the agreement Shs.7,000,000/= (seven million only) was paid and the Defendant acknowledged receipt of the same and it was agreed by the parties that the balance of Shs.4,500,000/= (four million five hundred thousand) was to be paid to the seller by the purchaser in a period of three months i.e. by the 30th October, 2003.

Before the date agreed upon, the Plaintiff had already secured the money and was ready to clear the said balance. However, the Defendant could not be accessed because his known addresses which he had indicated in the Sale Agreement were not known to him. The Plaintiff was forced to contact the Chairperson Baliruno Zone Local Council who wrote for him a letter inviting the Defendant to appear and be paid his balance for the sale of the land and house thereto. The Defendant failed to appear and the said Chairperson directed the Plaintiff to trace the Defendant at his residential address in Bweyogerere Central zone. The Chairperson of the area also tried to locate the Defendant in vain.

After the circus of locating the Defendant and the Plaintiff's efforts to get him had hit a dead point, the Plaintiff was surprised to be served with a notice

terminating the Sale Agreement from the Defendant's lawyers for breach of contract.

After the said notice and other forms of settlement initiated by the Plaintiff to get his house paid for had failed, the Plaintiff filed this suit seeking the declarations outlined above.

The Defendant denied the Plaintiff's claim in his Written Statement of Defence. He conceded that there was a Sale Agreement between him and the Plaintiff for sale of the suit property at Shs.11,500,000 out of which Shs.7,000,000/= was paid leaving the balance of Shs.4,500,000/= which was to be cleared within three months by or on 30th October, 2003. He denied evicting the Plaintiff and contended that it was the Plaintiff who breached the agreement by failing to pay the balance for over one year leading him to repudiate the contract.

During the scheduling conference the following facts were agreed:

By agreement dated 30th July 2003 the Defendant sold his piece of land with a house and developments thereon in Baliruno Zone 5 Nakulabye Parish, Rubaga Division to the Plaintiff for a total consideration of Shs.11,500,000/= (eleven million five hundred thousand only). The Plaintiff paid a deposit of Shs.7,000,000/= (seven million) on the date of the agreement, the balance being payable on or before the 30th October 2003.

The agreed issues were:-

(1) Whether the agreement of sale of land between the Plaintiff and the Defendant dated 30th July 2003 is binding.

(2) Whether the agreement dated 30th July 2003 was breached and if so by who?

(3) What are the remedies available to the parties?

Evidence adduced

Godfrey Kagumya Pw₁ testified that he knew the Defendant Deo Ntale through brothers who informed him that a house was being sold in Nakulabye Baliruno Zone. On 30/7/2003 they went to Nakulabye to the home of Mr. Benunga Amoti who was the Chairman of Baliruno Zone. From there the Defendant agreed to sell the suit land at Shs.11,500,000/= . He paid Shs.7,000,000/= and the balance of Shs.4,500,000 was to be paid within three month. Mr. Benunga reduced the agreement in writing (exhibit P₁). The final payment was to be by 30/10/2003.

After 1 ½ months he got the balance and looked for the Defendant in order to pay off and get possession of the house. He phoned the Defendant who indicated that he was far away but told the Plaintiff that he was going to contact him later. The Plaintiff testified that he did not hear from the Defendant for a whole week which prompted him to start searching for him. He called the Defendant many times but his phone was off. He went to the Defendant's shop but did not find him there. He decided to go to the home of the Chairman where they had made the agreement and told him that had failed to find the Defendant so that he could pay him the balance of the sale price. The Chairman and his General Secretary tried to call the Defendant but his phone was off. The Chairman promised to trace the Defendant and get back to him (Plaintiff) thereafter. However before the Chairman could get back to him, he tried the Defendant's phone and it went through and he promised to meet him at the

home of the Chairman at 2.00 p.m. He went to the home of the Chairman at the agreed time but the Defendant never showed up. He stayed at the Chairman's place until 7.30 p.m. The Chairman suggested that he would write to the Defendant calling him to pick his balance. The said letter was written (exhibit P₂). On 24/10/2003 he went back to the home of the Chairman and waited up to 6.30 p.m. but the Defendant never showed up again. The Chairman then advised him to go and look for the Defendant at Bweyogerere at the address he had put as his residence in the agreement. On 28/10/2003 he went to Bweyogerere Central Zone. The chairman of that zone told him to go back after three days as he was still going to trace the Defendant. After three days he went back and the Chairman gave him a letter (exhibit P₃) stating that he did not know the Defendant Deo Ntale. Sometime later he received a letter from the Defendant's lawyers stating that the Defendant has instructed them to terminate the Sale Agreement because the Plaintiff had defaulted payment of the balance. He instructed his lawyers to write to the Defendant to pick his balance but they did not heed (exhibit P₄). It was at this point that he decided to seek redress from court because all along he was ready to pay the balance of the purchase price.

During cross-examination he stated that he was taken to the Defendant by Senyonga Abdu and a one Robert who were brokers. He stated that the Defendant used to sell tyres opposite Mandela Petrol Garage. After the agreement he never saw the Defendant until after one month when he met the Defendant along Rubaga Road and later the Defendant called him and told him to meet him at Delta Protection Services Limited. That the Defendant proposed out of court settlement but gave him conditions to pay his expenses plus the balance or else he was going to refund the deposit with costs. He concluded that he did not want the refund but wanted specific performance of the ...

Baruga Amoti Pw₂ testified that he was Chairman of Baliruno Zone 5 Local Council. He testified that the Plaintiff and Defendant approached him to witness a Sale Agreement between them. The Defendant was selling his house. The two parties came with two men, one of them was called Abdu Senyonga but he forgot the name of the other gentleman. He wanted his committee members to be present but managed to get only the secretary for Finance Victoria Namusisi. The parties agreed on the sale price at 11,500,000/= of which the buyer was to pay a deposit of Shs.7,000,000/= and the balance was to be paid on or before 30/10/2003. The two parties requested him to write the Sale Agreement which he did. They read through the agreement before signing it.

On 21/10/2003 he received a call from the Plaintiff that he had met the Defendant and agreed to meet at his (witness) place the following day for the purpose of paying the balance of the purchase price. On 22/10/2003 he waited for the parties at his home but it was only the Plaintiff who came. He called his Secretary for Finance and she came. Abdu Senyonga the broker also came. They waited for the Defendant from 3.00 p.m. to 5.00 p.m. but he never turned up. He tried to call the Defendant to pick his money but his phone was off. Later he went to the Defendant's place of work on South Street where he had directed him earlier. He wrote a letter which informed the Defendant that the Plaintiff had come to pay him. He informed the Defendant to go to his home on 24/10/2003 so that the Plaintiff could pay him the balance.

He left the letter with the Defendant's colleague. However the Defendant's colleague informed him that the Defendant had gone out of the country on a business trip. In 2004 the Defendant came with a letter from his lawyers informing him that he was no longer interested in the Sale Agreement and that

he was not willing to surrender the house to somebody else. That he advised the Defendant that it was unacceptable to sell the house to another person when he (Defendant) had already sold the same to the Plaintiff.

Christopher Kimbugwe Pw₃ testified inter alia that he was Resident and Chairman of Bweyogerere Central Zone. He stated that in 2003 the Plaintiff approached him with a document tracing the Defendant. He told the Plaintiff to give him three days to allow him trace the Defendant from his registration book for his subjects. He checked the registration book but failed to locate the name of the Defendant in the registration book. He wrote back to the Plaintiff informing him that he did not know the Defendant. He wrote the letter on 1/11/2003 (exhibit P₆). In cross-examination he stated that his zone has about 3,500 residents according to his registration book.

The Defendant conceded knowing the Plaintiff. He stated that he came to know the Plaintiff on 30/7/2003 through Senyonga Robert and Joseph who were land brokers. The Plaintiff was interested in buying the suit land. They agreed on the purchase price at 11,500,000/=. The Plaintiff paid 7,000,000/= on that day and the balance of 4,500,000/= was to be paid within three months time. Their agreement was reduced in writing (exhibit P₁). The matter was adjourned to allow the Defendant to continue with his defence but he disappeared promoting the court to close his defence. Both parties were ordered to file written submissions but it was Counsel for the Plaintiff who complied.

Resolution of issues:

(1) Whether the Sale Agreement between the Plaintiff and Defendant still subsists.

According to **Black's Law Dictionary, Sixth Edition**, a sale is defined as a contract between two parties called the seller and the buyer by which the former in consideration of the payment or promise of payment of a certain price in money, transfer's the latter the title and possession of property. Transfer of property as providing of services for consideration. A transfer of property for a fixed price in money or its equivalent the same Dictionary defines an agreement of sale as that not merely implies an obligation to sell but an obligation on the part of the other party to purchase while an agreement to sell is an obligation on the part of the vendor or promisor to complete his promise to sale.

In **Osuman v Hajji Haruna Mulangira SCCA No. 58 of 1995** the doctrine of sale was referred to as where the vendor becomes in equity a trustee for the purchaser of the estate sold and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money a charge or lien on the estate of the security of that purchase money and a right to retain possession of the estate until the purchase money is paid.

In the same case 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 the setting it aside between the vendor and the purchaser, a contract binding on both parties.

In the same case it was further stated that in referred to real estate, another level of validity was required, where the vendor must be in position to make title, according to the contract and the contract will not be valid contract unless he

has made out his title according to the contract or the purchaser has accepted the title, the contract is fully binding upon the vendor. Consequently if the title is accepted in the lifetime of the vendor and there is no reason of setting aside, the contract then although the purchase money is unpaid, the contract is valid and binding and being a valid contract it has a remarkable effect that it convert the estate so to say in equity it makes the purchase money part of the personal estate of the vendor and it makes the land part of the real estate of the vendee.

In the instant case from the evidence on record, the two parties came together for a purpose/common goal where one had land/house for sale and the Plaintiff had the desire to purchase the land. Both parties carried out discussions in the presence of the Local Council Authorities where the land was located and agreed on the terms and conditions which they reduced in writing. The Defendant had good title in the suit land which he passed on to the Plaintiff thereby having only one claim being the unpaid balance of Shs.4,500,000/=. The agreement thus cannot be terminated by the Defendant upon the claim that the Plaintiff/purchaser had failed to make good the terms and conditions of the same. The Defendant failed to prove to court during the hearing how far he had tried to contract the Plaintiff/purchaser for the balance due and owed him. Instead the Plaintiff did prove how he tried to contact the Defendant in order to pay the balance of the purchase price. Infact it would have been different if the Defendant had done what the Plaintiff did in moving all corners tracing for the Defendant for his payment. As it is evident, it is apparent that the Defendant was playing monkey tricks to ensure that the deadline for payment of the balance was over to enable him reclaim the property on the basis of breach of terms and conditions of sale.

From the above analysis I do find that the sale agreement between the Plaintiff and the Defendant of 30/7/2003 was a binding agreement and the only claim the Defendant has against the Plaintiff is the balance of Shs.4,500,000/=. The allegation that the Defendant had sold the same to a third party does not hold any water since that would tantamount to unjust encroachment because he could not pass title which he did not have since after the sale agreement the vendor seized to have any claim in the land but in the balance owed to him by the purchaser: See **Osman v Hajji Haruna Mulangira (Supra)**.

The Defendant cannot therefore claim to have sold the same property to another party since he did not have title to pass on to another person.

Issue No.2: Whether the agreement was breached.

Black's Law Dictionary again defines breach of contract as failure without legal excuse to perform any promise which forms the whole or part of a contract.

Prevention or hindrance by a party to a conduct of any occurrence or performance requisite under the conduct for the creation or continuation of a right in favour of the other party or the discharge of a duty by him.

In **Holland v Wiltshire (1954) 90 CLR 409, 420** Lord Kitto stated:

“In the context of contracts for sale of land the vendor’s obligation is to deliver a good title and the purchaser’s obligation is to pay the price. Those are concurrent and mutually dependent obligations in the absence of any provision in the contract to the contrary. If one party informs the other that it cannot or will not complete the contract by the settlement date he or she commits an anticipatory breach amounting to a repudiation which gives the innocent party a right to terminate the contract. Presented with the repudiatory conduct of the guilty party the innocent party has an election to either refuse to accept the repudiation and continue with to require performance or accept the repudiation and bring the contract to an end.”

In the instant case the two parties entered into a contract of sale of land and a house at a consideration of Shs.11,500,000/= payable twice. At the signing of the same Shs.7,000,000/= was paid and another Shs.4,500,000/= was to be paid in a period of three months. The Plaintiff was therefore obliged to make good the contract in a period of three months. That was not possible since the other party the Defendant could not be traced at all his known addresses. The Defendant was playing hide and seek tactics to avoid being paid the balance of Shs.4,500,000/=. The Plaintiff was willing and able to fulfil his obligation to pay but the Defendant frustrated his efforts to do the same. The Plaintiff was accordingly presented with repudiatory conduct of the Defendant. There is no way the Plaintiff could be in breach when it was the Defendant who made it impossible for the Plaintiff to make good his part of the bargain. There is no evidence to show that the Defendant made any efforts to reach the Plaintiff for the balance of the purchase price apart from the termination letter. The

Defendant was indeed to say the least guilty of foul play and therefore could not escape from his responsibility on the contract.

Issue No.3: Remedies available to the parties.

It is trite law that where land is bought and any substantial amount is paid on the sale price whether possession has passed on the purchaser or not, the vendor is always entitled to the balance on the sale price and not repossession of the land even if the balances are not fully paid. See: **Osuman v Hajji Haruna Mulangira SCCA No. 38 of 1995.**

It is also trite law that in a contract of sale and purchase of real estate the time fixed by the parties for completion is regarded as essential in law. Thus where the vendor cannot make title by the date fixed for completion, the purchaser can treat the contract as at an end and recover his deposit with interest and the costs of investigating title. However equity which has concurrent jurisdiction does not look upon the stipulation as to time in precisely the same light where it could do so without justice to the contracting parties it decrees specific performance notwithstanding failure to observe the time fixed by the contract for completion: See **Stickney v Keeble & Another [1915] A.C. 387.**

In that instant case the contract was to be completed within three months on 30/10/2003. The Plaintiff tried his best to complete the contract but there was repudiating conduct from the Defendant. As was held in *Holland v Wiltshire* (Supra) a party presented with the repudiating conduct of the guilty party the

innocent party has an election to either refuse to accept the repudiation and continue to require performance or accept the repudiation and bring the contract to an end.

In the instant case, the Plaintiff was the innocent party. He has the choice to accept the repudiation or reject it and continue with the contract. In his pleadings the Plaintiff prayed for specific performance indicating that he had rejected the purported repudiation by the Defendant. The Plaintiff is entitled to that remedy of specific performance.

In his defence the Defendant intimated that the property had been resold to a third party. However according to Pw₂ that could not be true since it was the Defendant who was still collecting rent and that the Defendant had never approached him with another purchaser as Local Council authority of the area. That argument holds water since land transactions in this country are rarely done in the absence of the area local authorities witnessing them.

In any case sale to a third party would not stand because that would create conflicting equities and it is trite law that where there are conflicting interests the first in time is first in right as was held in **Rice v Rice (1854) 6 1 ER 646**.

For the above reasons I find that the Plaintiff has proved his case on the preponderance of evidence and therefore is entitled to the reliefs claimed - i.e. an order for specific performance of the agreement, a declaration that the subject matter of the agreement belongs to the Plaintiff both at law and equity, an order

that the agreement still subsists and that its termination by the Defendant was improper and an order that the Defendant accepts the balance on the sale agreement. I decline to make an order that the Defendant makes account for the use of the property in dispute to balance the inflation between the parties on the balance to be paid. I also find that this is not a matter where I would award general damages. Costs of the suit is ordered against the Defendant.

HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGE

7/11/2011

7/11/2011

Mr. Hillary Luzige present for Plaintiff.

Plaintiff present.

Defendant absent.

Judgment read in Chambers.

HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGE

7/11/2011