

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO. 31 OF 2004

STEPHEN WAKIDA PLAINTIFF

VERSUS

VIOLET EDITH NKATA LUGUMBA;

HAJATI ASIINA NABATANZI DEFENDANTS

BEFORE: Hon. Lady Justice Monica K. Mugenyi

JUDGMENT

On 8th January 2001 the plaintiff and the first defendant executed a sale agreement in respect of land comprised in Mailo Register Block 9 plot 290 at Kagugube, Makerere Hill for a consideration of Ush. 13 million. It was agreed that the purchase price would be paid in three (3) instalments. Upon execution of the said agreement the plaintiff paid the first instalment of Ushs. 3 million. The latter 2 instalments were to fall due on 15th January 2001 and upon the eviction of all squatters from the suit land. On 11th January 2001 the plaintiff lodged a caveat on the suit land to protect his interest therein. He subsequently discovered that the said caveat had been removed and the suit land transferred to a one Asiina Nabatanzi. The plaintiff attributed the removal of the caveat and transfer of the suit land to Ms. Nabatanzi to fraud. Ms. Nabatanzi, who was initially the second defendant to this suit, is now deceased and has since been substituted with the Administrator General.

The parties framed the following issues:

- 1. Whether there was breach of contract on the part of the 1st defendant.**
- 2. Whether the second defendant is a bonafide purchaser of the suit premises.**
- 3. Whether the 2nd defendant obtained registration by fraud.**
- 4. Remedies available to the parties.**

Issue no. 1: Breach of contract

The issue of breach of contract was attested to by the plaintiff. It was his evidence that on 8th January 2001 he executed a sale agreement in respect of the suit land, and in consideration thereof made part payment of Ushs. 3 million. The sale agreement was admitted in evidence as Exh. P1. The plaintiff testified that on the day the second instalment fell due, the first defendant did not turn up at his advocate's office to pick it up as had allegedly been agreed. Reminders for the first defendant to pick up the said instalment were admitted in evidence as Exh. P2 and P3 respectively. Conversely, it was the first defendant's evidence that upon the execution of the sale agreement she commenced negotiations with a one Asiina Nabatanzi, a squatter on the suit land. Ms. Nabatanzi sought Ushs. 35 million from the first defendant, which the latter considered extortionist and exorbitant given that it was above the total purchase price of the land. Consequently, it was agreed between herself and the LC Chairperson who had brokered the deal between her and the plaintiff that the transaction is called off. It was the witness' testimony that she did refund the instalment that had been paid by the plaintiff through the same 'broker' and subsequently sold the land to Ms. Nabatanzi.

It was argued by Mr. Ojiambo for the plaintiff that the first defendant breached the sale agreement by declining to receive the second instalment of the purchase price from the plaintiff contrary to clause 2(ii) of the sale agreement, and by selling the land to a third party contrary to clause 6 of the same agreement. Learned counsel referred this court to the case of **Ronald Kasibante vs. Shell Uganda Ltd CS No. 542 of 2006 (2008) ULR 690**, as well as the definition of breach of contract by **Black's Law Dictionary, 8th Edition, p. 200** in support of his arguments. In **Ronald Kasibante vs. Shell Uganda Ltd** (supra) it was held:

“Breach of contract is the breaking of the obligation which a contract imposes which confers a right of action for damages on the injured party ...”

Meanwhile the cited definition in *Black's Law Dictionary* reads as follows:

“Violation of contractual obligation by failing to perform one's own promise, by repudiating it or by interfering with another party's performance.”

Learned counsel did also refer this court to the case of **Holland vs. Wiltshire (1954) 90 CLR 409 at 420**, where parties' obligations in contracts for sale of land were outlined as follows:

“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 dependable obligations in the absence of any provision in the contract to the contrary. If one party informs the other party that it cannot or will not complete the contract by 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 to require performance or accept the repudiation and bring the contract to an end.”

However, Mr. Ojiambo did not provide this court with copies of the authorities cited as required of him by court etiquette. Be that as it may, the text relied upon in **Holland vs. Wiltshire** (supra) was cited with approval in **Kagumya Godfrey vs. Ntale Deo Civil Suit 298 of 2004** (High Court).

This court has perused the sale agreement in issue presently. For ease of reference, the clauses that spell out the first defendant's obligations are reproduced below.

Clause 2:

“The purchase price is payable in the manner following, namely:

- i. The first instalment of Ushs. 3,000,000/= (Three million only) is payable on or immediately before the execution of this agreement. By putting her hand hereunto the vendor acknowledges receipt of the said first instalment.**
- ii. The second instalment of Ushs. 2,000,000/= (Two million only) is payable on Monday 15th January 2001.**
- iii. The third and final instalment of Ushs. 8,000,000/= (Eight million only) is payable on 15th February 2001, but in any case, not before completion of evicting squatters from the demised land.”**

Clause 3:

“It is hereby agreed by and between the parties that the cost for eviction of the squatters shall be part of the purchase price. FOR AVOIDENCE OF ANY DOUBT, the vendor shall not require from the purchaser any additional money on account of evicting squatters. The vendor permits the purchaser to take the immediate possession of the demised land and to commence developments thereon immediately after the eviction of the squatters and payment/ receipt of the final instalment.”

Clause 4:

“Upon completion of evicting the squatters from the demised land the purchaser shall discharge the balance of the purchase price whereupon the vendor shall execute the transfer instruments and surrender the same to the purchaser thereby vesting all the vendor's rights and interest in the demised land unto the purchaser absolutely free from all encumbrances and claims whatsoever. Third party claims, if any, affecting the demised land shall be borne solely by the vendor.”

Clause 6:

“The vendor hereby undertakes not to sell, assign or in any way to part with the demised land in favour of a third party or in any manner that may be prejudicial to the purchaser’s interest.”

Clause 2 of the agreement clearly spelt out the terms of payment. Clause 2(ii) provided for payment of the second instalment of the purchase price on 15th January 2001. Contrary to the plaintiff’s allegations, the agreement did not stipulate the manner in which this instalment would be paid. The plaintiff did, under cross examination, testify that he assumed that the first defendant would pick up the instalment from his advocates office as that was the manner in which the first instalment had been paid. Conversely, it was the first defendant’s alternative averment in her written statement of defence that it was the plaintiff that was in breach of clause 2(ii) by failing to pay the second instalment to her as stated in the sale agreement. From the foregoing, both parties to the sale agreement appear to be in agreement that the first defendant did not receive the second instalment as stipulated in the sale agreement. The responsibility for this omission is what is in issue.

In contracts for the sale of land the obligation to pay the purchase price lies squarely with the purchaser. See **Holland vs. Wiltshire** (supra). Therefore, the obligation to effect such payment in this case lay with the plaintiff. He admittedly assumed that depositing the said instalment at his advocate’s office was sufficient on the premise that the first instalment had been similarly deposited at the said office. However, under clause 2(i) of the agreement receipt of the first instalment was to be acknowledged by the first defendant’s endorsement of the sale agreement. Therefore, she had to be present at the venue where the execution of the agreement would take place in order to endorse the same and receive the money. This was not the case with the second instalment. It was incumbent upon the plaintiff to ensure that the first defendant received the payment he was responsible for by the date stipulated in the contract. Therefore, in so far as he failed to comply with the express provisions of clause 2(ii), the plaintiff was in breach of the sale agreement. This court would have gone ahead to find the plaintiff liable to the first defendant in damages for breach of contract. However, it is clear from the evidence that, upon failing to evict the squatters from the suit land, the first defendant went on to execute another sale agreement in respect of the same piece of land with Ms. Nabatanzi. She did so on 11th January 2001 after the failed negotiations with the squatters and did also refund the plaintiff’s first instalment. Therefore, she cannot claim recompense for the plaintiff’s breach of the contract because she had, by her conduct, discharged him of any obligation to complete payment of the purchase price.

With regard to clause 6 of the agreement, it is apparent on the face of the record that, in selling the suit land to the second defendant, the first defendant contravened the provisions of the sale agreement. It was argued for the first defendant that the contract was frustrated and all the parties were discharged from their obligations thereunder when it became apparent that the cost of eviction would be higher than the purchase price.

Clause 2(iii) of the sale agreement made payment of the final instalment conditional upon the eviction of all squatters from the suit land. This was re-echoed in clause 4, where the payment of the final instalment by the plaintiff and subsequent transfer of the land to him, were rendered conditional upon the eviction of the squatters by the first defendant. In that sense, the eviction appears to have been a condition precedent to the final payment of consideration and the consequential transfer of the first defendant's proprietary interest in the suit land to the plaintiff. A condition precedent would entail any act or event (not being a lapse of time) that must exist or occur before a duty to perform something promised arises. If the condition does not occur and is not excused, the promised performance need not be rendered. See **Black's Law Dictionary, 2004, 8th Edition, p.312.** A condition precedent is incidental to the fundamental terms of a contract, which go to the very essence of a contract's validity at the stage of formation. Within the context of sale of land agreements, the fundamental terms between a vendor and purchaser would be the offer of land in respect of which the vendor has good title, the acceptance of the said offer and the payment of consideration for the same. Indeed, **Holland vs. Wiltshire** (supra) outlines the delivery of good title as the primary obligation of a vendor in a sale of land contract.

In the present context, the eviction of squatters was required of the vendor as part of her obligation to deliver good title free of encumbrances; this eviction was required prior to the duty upon the purchaser to complete payment of the purchase price arising. Thus the first defendant was required to evict the said squatters as a condition precedent to the plaintiff's duty to complete payment of the purchase price. Put differently, failure by the first defendant to effect the eviction would discharge the plaintiff of his contractual obligation to complete consideration for the suit land. Indeed, in **Holland vs. Wiltshire** (supra) it was also held that where one party informed the other party that it was unable to complete the contract by the date prescribed therein s/he committed anticipatory breach amounting to a repudiation, which gave the innocent party 'a right to terminate the contract.'

In the present case, however, there is no evidence that the first defendant informed the plaintiff of her inability to evict the squatters in what would amount to anticipatory breach of contract or repudiation. She did attest, though, to having failed to so evict the squatters owing to the exorbitant sums of money they sought from her, and it was submitted on her behalf that this was tantamount to frustration of the contract. What would amount to frustration of contract was expounded in the case of **Davis Contractors Ltd vs. Fareham Urban District Council (1956)** **1 All ER 145 at 160** as follows:

“So perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognises that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it (obligation) a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni. It was not this that I promised to do.*”

In the present case, clause 3 of the sale agreement embedded the cost of eviction within the purchase price and expressly forbade the first defendant from seeking additional money from the plaintiff on account of the cost of eviction. By implication, this clause of the agreement placed the duty of eviction upon the first defendant at a cost embedded within the purchase price. The first defendant deponed a witness statement where she stated that she was asked for Ushs. 35 million to secure the eviction of the squatters on the suit land. This piece of evidence was neither contradicted nor controverted in cross examination. The money in question is well over the purchase price of Ushs. 13 million. The doctrine of frustration is premised on the principle that if a party's principal purpose is substantially frustrated by unanticipated changed circumstances, that party's duties are discharged and the contract is deemed to be terminated.

Quite obviously, without proven default either by herself or the plaintiff, the obligation upon the first defendant to evict the squatters had become impracticable to perform in so far as performance thereof would entail her sourcing for 'eviction' funds from beyond the purchase price contrary to the spirit and letter of the sale agreement. The principal purpose of evicting the squatters was not to gift her land to the plaintiff at no benefit to herself, but to do so at a profit. This was a clear case of *non haec in foedera veni*. Selling her land at a costly expense to herself was not what she had contracted with the plaintiff to do. I do therefore find that the contract between the plaintiff and the first defendant was frustrated by the exorbitant demands of the squatters on the suit land. In the result, I find that neither party breached the sale agreement of 8th January 2001; rather, the performance of the said contract was frustrated and the parties were duly discharged of their respective contractual obligations thereunder. I so hold.

With regard to the second issue herein, it was argued for the plaintiff that Asiina Nabatanzi, to whom the first defendant sold the suit land, was not a bona fide purchaser thereof since she had sufficient notice of and did participate in the fraud that allegedly underscored the registration of her interest therein. Ms. Nabatanzi, on the other hand, averred in her pleadings that she was the registered proprietor of the suit property, having lawfully acquired it vide an agreement dated 11th January 2001. This court proposes to consider issues 2 and 3 together. It is necessary to establish whether or not there was fraud in the registration of Ms. Nabatanzi's interest, prior to a consideration as to whether she had notice of or participated in the alleged fraud.

Issues 2 & 3: Fraud; Bonafide purchaser with no notice of fraud

The plaintiff did plead fraud and state the particulars thereof in paragraph 5 of the plaint. The particulars of fraud pleaded therein are as follows:

- a. Intentionally transferring the land to a second purchaser without cancelling or invoking the initial transaction.
- b. Selling the same portion of land to 2 people; the plaintiff and the second defendant.
- c. Colluding with the land registry to register a transfer of the land to the second defendant without notice to the plaintiff, as registered caveator.

- d. Registering a transfer with an existing caveat on the land.
- e. Forgery of removal of caveat bearing a signature purported to be that of the plaintiff.

This court has, under the preceding issue, held that the plaintiff and first defendant were discharged from their contractual obligations on account of frustration of the contract. It does follow, therefore, that the allegations of fraud averred in paragraph 5(a) and (b) of the plaint and attributable to the first defendant are not tenable and do fail. Therefore it is with paragraphs 5(c), (d) and (e) of the plaint that this court is preoccupied.

The plaintiff relied on his evidence, as well as that of PW2, to prove the above allegations of fraud. It was his evidence that on 11th January 2001 he lodged a caveat in respect of the suit land, but subsequently discovered that the said caveat had been removed without notice to him on the basis of a forged instrument of withdrawal. The forged instrument was admitted in evidence as Exh. P9. PW2, a handwriting expert, tendered in evidence a report that confirmed that the plaintiff's signature on Exhibit P9 was indeed a forgery. PW2's report was admitted on the record as Exh. P12. Conversely, the first defendant and Ms. Nabatanzi both denied participation in or notice of fraud. Ms. Nabatanzi specifically pleaded that if there was any such fraud, then she had no notice of the same.

It is now well settled law that the courts may look beyond the fact of registration and impeach the indefeasibility of a registered proprietor's interest on account of fraud by the transferee in the registration of land. This is the import of sections 64 and 176 of the RTA, as well as the *ratio decidendi* in the cases of **David Sajjaka Nalima vs. Rebecca Musoke Civil Appeal No. 12 of 1985 (CA)** and **Robert Lusweswe vs. Kasule & Another Civil Suit No. 1010 of 1983** (unreported). Fraud has been legally defined to include actual fraud, being dishonesty of some sort, as well as constructive fraud that denotes transactions in equity similar to those which flow from fraud; dishonest dealing in land, sharp practice intended to deprive a person of an interest in land; or procuring the registration of a title in order to defeat an unregistered interest. See **Kampala Bottlers Ltd vs Damanico Ltd Civil Appeal No. 22 of 1992 (SC)**, **Kampala District Land Board & Another vs National Housing & Construction Corporation Civil Appeal No. 2 of 2004 (SC)** and **Kampala Land Board & Another vs. Venansio Babweyaka & Others Civil Appeal No. 2 of 2007 (SC)**. Proof of fraud that may invalidate the title of a registered purchaser for value, as is the case presently, must be brought home to the person whose registered title is impeached or to his agents. Fraud by his predecessors in title would not affect such a registered proprietor unless knowledge of it or notice thereof is brought home to him or his agents. See **Robert Lusweswe vs. Kasule & Another** (supra) and **Assets Co. Ltd vs. Mere Roihi & Others (1905) AC 176 at 210**. For present purposes, therefore, the proof of fraud required of the plaintiff is two-pronged. First, he must prove fraud by Asiina Nabatanzi or her agents in the registration of her interest in the suit land; in the alternative, he must prove fraud by the first defendant and also prove that Ms. Nabatanzi or her agents had knowledge of the said fraud.

This court has already held that the particulars of fraud attributed to the first defendant in paragraph 5(a) and (b) of the plaint are not sustainable. The authenticity of her proprietary interest in the suit land was never in issue in this case. Therefore, the plaintiff has not proven any fraud by the first defendant as would warrant a consideration of whether or not her successor in title had knowledge of the same.

With regard to the second component of proof required, this court does find sufficient proof of fraud in the registration of Ms. Nabatanzi's purported interest. This finding is premised on 2 counts – first, the forgery of the plaintiff's signature and, secondly, the irregular sequence of the registration process. First and foremost, as quite conclusively proved by PW2 the signature on the purported withdrawal of caveat instrument dated 25th September 2002 differed significantly from the plaintiff's known signature on the sale agreement. The disparity in the 2 signatures was quite apparent even to the naked, untrained eye. It would appear that it was on the premise of the forged withdrawal of caveat by the plaintiff that Ms. Nabatanzi's purported interest in the suit land was registered. Secondly, but by no means less pertinent, the certificate of title that was admitted in evidence under Exhibit P9 clearly indicates that the plaintiff lodged a caveat in respect of the suit premises on 11th January 2001 vide instrument no. KLA.221568 and the same was withdrawn and/or deleted on 28th November 2002. However, before its deletion, Ms. Nabatanzi's interest in the suit land had been registered on the title on 11th October 2002. As quite rightly argued by learned counsel for the plaintiff, the change in the land's proprietorship while a valid caveat was in place did violate the provisions of section 141 of the RTA. The forgery of the withdrawal instrument constitutes actual fraud, while the illegalities in the registration process denote a dishonest dealing in land intended to defeat an unregistered interest in the same land. I do therefore find that the registration of Ms. Nabatanzi's land was tainted with fraud.

The question, then, is whether this fraud is attributable to Ms. Nabatanzi or her agents. It is well established law that the standard of proof in fraud is a higher balance of probability but falls short of proof beyond reasonable doubt. From the sequence of events described above, it appears most probable to me that the forgery of the caveat withdrawal instrument was intended to facilitate dealings in respect of the land in issue. The only dealing in respect thereof that was subsequently entered was the registration of Ms. Nabatanzi's proprietary interest and the withdrawal of the caveat lodged by the plaintiff. In my judgment, it is most reasonable to conclude that the perpetrators of these illegalities were permitted to undertake the fraudulent actions they did for the benefit of Ms. Nabatanzi. In **Black's Law Dictionary, 2004, 8th Edition, p.69** an apparent agent is defined as 'a person who reasonably has authority to act for another, regardless of whether actual authority has been conferred'. In so far as the perpetrators of the established fraud sought to promote the interests of Ms. Nabatanzi, they can be reasonably deemed to have had authority to act for her. To that extent, they were her agents. I do therefore find that Ms. Nabatanzi and her agents were party to the fraud in the registration of her purported interest in the suit premises. I so hold.

Issue no. 4: Remedies

The remedies sought by the plaintiff were set out in paragraph 9(a) to (e) of the plaint as follows:

- a. Declaration that the plaintiff is the bonafide purchaser of the suit premises and entitled to registration as owner thereof.
- b. Declaration that Asiina Nabatanzi's title was fraudulently registered and an order for the cancellation thereof.
- c. General damages.
- d. Costs of the suit.
- e. Exemplary damages.

This court has pronounced itself on the absence of breach of contract, but rather the termination of the contract of 8th January 2001 on account of frustration thereof. Therefore, the remedy sought in paragraph 9(a) is untenable, as is a prayer for general damages on account of breach of contract. However, given that this court has made a finding of fraud on account of forgery and flagrant illegalities, I am inclined to grant an award of exemplary or punitive damages in respect thereof.

In the result, judgment is entered for the plaintiff against the second defendant with the following orders:

1. A declaration is hereby granted that the registration of the land comprised in Mailo Register Block 9 plot 290 at Kagugube, Makerere Hill in the names of Asiina Nabatanzi (deceased) was procured by fraud and is therefore null and void.
2. The Commissioner, Land Registration is hereby ordered to cancel the names of the said Asiina Nabatanzi from the certificate of title in respect of the land comprised in Mailo Register Block 9 plot 290 at Kagugube, Makerere Hill, and revert the proprietorship of the said premises back to the first defendant.
3. The first defendant is ordered to refund the purchase price in the sum of Ushs. 13,000,000/= to the second defendant, the legal representative of the Estate of Asiina Nabatanzi.
4. Exemplary damages are awarded against the second defendant to the plaintiff in the sum of Ushs. 50,000,000/= only, payable at 8% per annum from the date hereof until payment in full.
5. 60% costs of the suit are awarded to the plaintiff, and 40% costs to the first defendant.

I so order.

Monica K. Mugenyi
JUDGE

6th December, 2013