

(h) Any further and other relief this Hon. Court may deem fit.

1.2 Facts of the case

1.2.1 The facts underlying the plaintiff's case are that:-

- (i) In response to an advert by the 2nd defendant in the New Vision newspaper of Thursday February 19, 2009 the plaintiff bided for the purchase of land and developments comprised in Kibuga Block 15 plot 1809.
- (ii) On the 11th day of May, 2009, the 2nd defendant acting for and on instruction of the 1st defendant as receiver/manager, offered for sale to the plaintiff land and developments comprised in Kibuga Block 15 plot 1809 at Kibuli.
- (iii) in response to the offer, the plaintiff on 12th May, 2009 paid shs 55,000,000/= as full and final payment of the purchase price for the suit land unto a DFCU Bank Ltd Account appointed by the 2nd defendant in consultation with the 1st defendant.
- (iv) in accordance with the terms of the offer, the plaintiff and 2nd defendant acting in the course of his duty executed a sale agreement for the suit land in favour of the plaintiff.
- (v) Under the aforesaid agreement, the 2nd defendant acting as an agent of the 1st defendant undertook to avail the duplicate certificate of title together with vacant possession upon payment of the full purchase price.

(vi) The defendant s have until now neither rendered vacant possession nor delivered the certificate of title or signed transfer forms in favour of the plaintiff despite receipt of the full purchase price and numerous pleas of the plaintiff thereby subjecting the plaintiff to loss, damage and inconvenience.

1.3 The defendants through their lawyers M/s Kigozi, Sempala, Mukasa Obonyo Advocates filed the joint written statement defence against the plaintiff's claims in the plaint. The defendants totally deny the plaintiff's claims in the suit. The defendants averred that:-

- (a) The suit property was sold to the plaintiff upon the default of the Mortgagor through the second defendant under foreclosure.
- (b) The plaintiff bought the suit land on terms and conditions contained in the sale agreement dated 26th October, 2009 and some of them are in Clauses 3.1, 3.2 and 3.3.
- (c) The plaintiff knew fully well that there were illegal occupants at the time of purchase that had to be removed or evicted.
- (d) The defendants on several occasions evicted the illegal occupants and called the plaintiff to take possession but the plaintiff ignored and /or refused to do so citing flimsy excuses.
- (e) The defendants shall contend that the plaintiff's alleged loss and deprivation of use of property is self-inflicted and should not be visited on the Defendants as claimed or at all.

2. Admitted facts by the parties

During the scheduling conference, the parties agreed to the following facts:

- (a) The suit property herein is known as plot 1809 kibuga Block 15 at Kibuli comprising of 2 semi-detached houses.
- (b) The suit property was advertised for sale by the 2nd defendant in the New Vision Newspaper of Thursday February, 19, 2009.

- (c) The plaintiff bided for the purchase of the suit property and was successful and paid Ugx 55,000,000/= as full consideration to the 1st defendant.
- (d) The 2nd defendant was the agent of the 1st defendant for purposes of auctioning, selling and disposing of the suit property.
- (e) The suit property is a subject of pending Civil Suit HCCS No. 303 of 2010 between Musoke Stella vs Lubogo Alfred Charles, DFCU Bank Ltd & others.
- (f) The plaintiff has never been handed vacant possession of the complete suit property.
- (g) The plaintiff has never been handed over the certificate of title.
- (h) The 1st defendant cannot immediately hand over vacant possession of the suit property nor can the plaintiff transfer the certificate of the tile into his names as registered proprietor.

3. Admission of liability by the 1st defendant:

- (a) The 1st defendant admitted liability to the extent that the plaintiff and 2nd defendant executed the sale agreement and received consideration stipulated therein and failed to deliver vacant possession of the suit property and the certificate of title ready for transfer.
- (b) The 1st defendant also admitted that they are supposed to compensate the plaintiff as a consequence of the failed performance.

4. Issue framed by the parties

From the above admitted facts by the parties and admission of liability of certain facts of the plaintiff's case by the 1st defendant, the parties agreed to only one issue for the determination of the Court; that is:-

What reliefs are available to the plaintiff?

5. Witnesses for the parties

5.1 The plaintiff's witnesses.

5.1.1 The plaintiff called two (2) witnesses, himself inclusive:

1. Francis Atoke, the solicitor General of Uganda, the plaintiff, hereinafter referred to as PW1 gave evidence that the defendants breached the sale agreement and that as such he is entitled to the reliefs sought in the plaint. He also led evidence on specific and general damages. He prayed to Court that Court enters judgment in his favour in the reliefs being sought in the plaintiff. He was cross-examined at length on his evidence in examination-in-chief by counsel for the defendant.
2. Patrick Ogwang, hereinafter referred to as PW2 gave evidence in support of the plaintiff's case. He was cross-examined by Counsel for the defendant.

5.2 The defendants' witnesses.

5.2.1 The defendants called only one witness

Pius Olaki, legal advisor to the defendant Bank, hereinafter referred to as DW1, gave lengthy evidence in favour of the defendant. His evidence was never challenged in cross-examination by Counsel for the plaintiff.

6. Resolution of the only issue framed by the parties by Court

6.1 What reliefs are available to the plaintiff:

From the agreed facts by the parties and the admission of liability by the 1st defendant as shown hereinabove in this judgment, the only dispute was on reliefs available to the plaintiff.

During scheduling of the case the defendant offered the plaintiff shs 65,000,000/= (sixty five million shillings) as full and final settlement of the plaintiff's claims. The plaintiff refused the offer and demanded compensation of shillings 300,000,000/= (three hundred million shillings) only as full and final settlement of the suit. The settlement of the suit out of Court hit a snag. Hence, the trial of the suit on only one issue related to reliefs available to the plaintiff. Both parties adduced evidence for and against each party's case.

From the evidence on record and the submissions by both counsel for the parties the plaintiff dropped the claim of specific performance of the sale agreement between the plaintiff and the 1st defendant. Both parties in essence agreed that the said sale agreement between the parties owing to the prevailing circumstances cannot be performed. The plaintiff and his counsel instead opted to pursue the settlement of the case with a view of monetary compensation. In the premises, I hold that the order of specific performance is not available to the plaintiff.

Consequent to the above, to resolve the above framed issue, the plaintiff has to prove on a balance of probabilities whether the 1st defendant is in breach of the sale agreement of the suit property. Once the aforesaid is determined in favour of the plaintiff then the plaintiff has a burden of proof to prove what reliefs he is entitled to in this suit. It should also be noted that the burden of proof in civil matters keep on shifting. He/she who asserts a fact has a burden to prove that fact. Wherefore, in the same vein the 1st defendant has the burden of proof as soon as the burden of proof shifts to it to prove that the plaintiff is not entitled to

reliefs being claimed in the plaint. In this endeavour, both parties called witnesses as shown hereinabove in this judgment to prove each party's case.

PW1, in his evidence said that he got into the property in one side of the suit property. That he put in his guards. That some time in September, 2010, Counsel for the defendants, Mulema Mukasa told him that they have thrown out the occupants of the suit property who were staying in the other wing. That then sent in security guards; two (2) guard for day and two (2) guards for night to guard the suit premises. **That they got the occupation of the suit property for there (3) months, that is up to December, 2010.** On this evidence by PW1, in essence the plaintiff was put in possession of the suit property by the 1st defendant and he took charge of the same. The "muhindi" who was occupying the other side of the suit property automatically became the tenant of PW1. It is my finding, that PW1 got possession of the suit property.

It was therefore, in my view, incumbent on him (plaintiff) to remain in possession of the suit property. The 1st defendant from the evidence on record did its best to ensure that the plaintiff employs the suit property he bought from them.

Further, I agree with the plaintiff as is agreed by the defendants that the suit property was never transferred into the names of the plaintiff. The 1st defendant through DW1 adduced convincing evidence, giving circumstances that prohibited them from transferring the suit property into the names of the plaintiff (PW1). The circumstances are:

- (a) There were a lot of interferences from people claiming that they were coming from President' office and Police in Kabalagala Police Station.

(b) That there is another case in this Land Division of the High Court pending and filed by one Nasaka Stella challenging the mortgaging of the suit property on account of spousal consent requirement.

These are the facts that were admitted by the parties. The plaintiff was aware of the problems that surrounded his purchase of the suit property. The transaction because of the said circumstances, in my view the plaintiff ought to have joined the defendants and fight for his rights in the suit property in the suit pending in another Court filed by Nasaka Stella.

I have looked at the case filed in court by Nasaka Stella against her husband, Lubogo Alfred Charles and DFCU Bank Ltd. The said case is seeking for an order to nullify the sale of the suit property by her husband to the customer of the 1st defendant, Emoru Grace and consequent the mortgage and all the dealings with the property. In my view, therefore, the sale of the suit property to the plaintiff by the defendants is still in place. The plaintiff and the defendants should have defended the transaction regarding the suit property in the said cited suit.

(c) That Lubogo was evicted from the other wing by the court bailiff and his things were put in the compound. That unfortunately, with the help of the Military personnel Lubogo made it back into one of the wings of the suit property. There is no evidence that was adduced by the plaintiff to show that the plaintiff was ever evicted from the suit property. The plaintiff left the suit property on his own.

(d) That the handover of the property partly failed because the plaintiff was not willing to physically takeover the suit property that which gave Lubogo an opportunity to be brought in the suit premises.

In my considered opinion, the three (3) months period the plaintiff's guards were guarding the suit premises was the opportune time, the time the plaintiff would have gained full occupation of the suit property. Maybe, one can pose a question: in such a scenario, who is to blame?

Furthermore, from the evidence on Court record, the 1st defendant did what was possible in the circumstances of this case to make good the sale of the suit property, but for the reasons advanced hereinabove in this judgment it failed. Though the whole provision of Exh. P6 (sale agreement) were not performed, in my considered opinion the defendants are not to blame. I can only state that the said **sale agreement was frustrated** for the reasons I have outlined hereinabove in this judgment. The 1st defendant, according to the evidence of DW1 which was not challenged in cross –examination by the plaintiff's counsel, passed over the certificated of title and the release of mortgage to the 2nd defendant who was conducting the sale for the purpose of facilitating the transfer. To that extent, the 1st defendant cannot be guilty of breach of the said sale agreement.

Pursuant to the reasons and analysis hereinabove in this agreement reliefs expressed in (a), (d), (e), (f) and (h) in the plaint cannot be available to the plaintiff.

Counsel for the plaintiff made spirited arguments and cited authorities in support of this plaintiff's case, however, my finding is that those cases would have been of good help to the plaintiff and Court if and when the defendants were in breach of the said sale agreement. Therefore, I am unable to apply the said authorities (Case law) to the instant case. The only remedy available would be the refund of the purchase price plus some modest compensation.

On the question of modest compensation, I shall be guided by the following facts:-

- (1) The suit was filed in Court on 1st October, 2010. And the defence was filed in Court on 26th October, 2010.
- (2) The scheduling of the case began on 3rd May, 2011.
- (3) From the word go during the scheduling conference, the 1st defendant was willing to refund shs 55,000,000/= (fifty five million shillings) the purchase price of the suit property as compensation to the plaintiff.
- (4) The plaintiff insisted on compensation based on the current market value of the suit property and rejected the offer of Shs 65,000,000/= (sixty five million shillings) only by the 1st defendant during the time of scheduling conference.
- (5) The 1st defendant accepted liability to the extent that the sale agreement for the obvious reasons was not performed by the parties. The facts which were within the knowledge of the plaintiff.
- (6) And that the 1st defendant agreed that the issue of compensation be determined by Court.

Hence, what is obvious is that the defendants are in agreement that the plaintiff is entitled to compensation on ground of non-performance of the said sale agreement. I recommend that conduct of the 1st defendant in the handling of this suit whereby all along it was their wish to settle the suit out of Court. However, I wish to emphasize that on the other hand, the any party is free to litigate up to the last hour. Thus it was in order for the plaintiff to have maintained the fight up to the end of the trial.

In its evidence, the 1st defendant is willing to pay a refund Shs 55,000,000/= to the plaintiff and give the plaintiff some compensation by way of interest, considering that the Bank kept his money, at an interest rate of 19% per annum. The Bank (1st defendant) is also willing to pay costs of the suit to the plaintiff.

The plaintiff in his submissions insists that he wants compensation based on the current market price of the suit property. The plaintiff never brought an expert witness to give evidence on the current market value of the suit property. Hence the plaintiff never in his evidence settled the question of the current market value of the suit property. However, as I have already held in this judgment, that the sale agreement between the parties was frustrated, the issue of compensation based on the current market value of the suit property cannot arise or/ and is unattainable. I, thus, agree with the submissions by Counsel for the defendants on the question on how the compensation of the plaintiff is to be handled.

7. Conclusion

7.1 In conclusion, the plaintiff has proved that he is entitled to reliefs claimed under **items (b) and (c) in the plaint**. The plaintiff is entitled to compensation, though not based on the current market value price of the suit property. The plaintiff never called the evidence of the surveyor and valuer who would have ascertained the current market value of the suit property. However, the aforesaid notwithstanding, I have already stated hereinabove in this judgment that the sale agreement was frustrated; and that as such the 1st defendant never breached the said sale agreement. Wherefore, the issue of compensation of the plaintiff based on the current market price of the suit property does not arise. I, therefore, hold that the plaintiff is entitled to a refund of the purchase price and compensation in terms of interest rate of 22% per annum from the date of receipt of the said purchaser price till payment in full.

7.2 In the result and for the reasons given in this judgment, judgment is given in favour of the plaintiff in the following orders:-

(a) the 1st defendant shall make a refund of the shs 55,000,000/= (fifty five million shillings) to the plaintiff as monies had and received from the plaintiff as the purchase price of the suit property, within seven (7) days from the date of this judgment.

(b) In addition to the above, the 1st defendant shall pay compensation over and above Shs 55,000,000/= at the interest rate of 22% per annum, from the date of receipt of the said purchase price till payment in full but not later than seven (7) days from the date of this judgment.

(c) Costs of the suit are awarded to the plaintiff.

Dated at Kampala this 20th day of February, 2013.

sgd

Murangira Joseph

Judge