

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

CIVIL APPEAL NO. 75 OF 2012

(From Mengo Chief Magistrate Court Civil Suit No. 278 – 2008)

GODFREY EVANS KITYO :::::::::::::::::::::::::::::: APPELLANT

VERSUS

ALICE KAGYEZI :::::::::::::::::::::::::::::: RESPONDENT

Before: Hon. Mr. Justice J. W. Kwesiga

JUDGMENT

The Plaintiff/Respondent sued the Defendant/Appellant seeking recovery of Shs.36,750,000/= as balance owed in a contract of sale of land. The facts gathered from the record of Appeal are that:-

On 18th August, 2006, ALICE KAGYEZI (Respondent) sold to EVANS KITYO (Appellant) land comprised in Busiro Block 364 Plot 173 at Bulenga measuring approximately 0.99 Hectares for a consideration of Shs.61,200,000/=. At signing Shs.2,000,000/= was paid leaving a balance of Shs.59,200,000/=. (See Exhibit D1).

On 8th September, 2006 the parties executed a Deed of variation of the above Agreement and inter alia, it was stated that instead of 0.99 Hectares (2.45 acres) the sale was for 1.99 Acres for Shs.49,750,000/= only out of which Shs.13,000,000/= had already been paid leaving the outstanding consideration of Shs.36,750,000/=. It is this balance of Shs.36,750,000/= that the Plaintiff sued the Defendant for in the trial Court.

His Worship Phillip Odoki, then Chief Magistrate of Mengo gave Judgment for the Plaintiff and held that the Defendant/Appellant breached the Agreement and ordered that the Defendant/Appellant pays the Plaintiff/Respondent Shs.35,400,000/= with interest at 24% per annum from 8th December, 2006 until payment in full and costs of the suit.

The Appellant was dissatisfied with the above decision and M/S Muganwa, Nanteza & Co. Advocates filed the following grounds of Appeal:-

1. That the trial Magistrate erred in Law and fact when he failed to evaluate the evidence on record.

2. That the trial Magistrate erred in Law and fact when he failed to evaluate that the suit land is a Wet Land and the Sale Agreement was frustrated.
3. That the Court erred in Law and fact when he passed a biased Judgment.

All the trial and on appeal the Plaintiff/Respondent was represented by M/S Ssendege, Senyondo & Co. Advocates while the Defendant/Appellant was represented by M/S Muganwa, Nanteza & Co. Advocates.

The Plaintiff and the Defendant opted not to call any witness at all. The Plaintiff and the Defendant did not testify in support of their pleadings. It appears in the proceedings that Mr. Mutyaaba Sempa and Mr. Muganwa for the Plaintiff and Defendant respectively told the trial Magistrate the following:-

“It is agreed that there was a sale of land at Busiro Block 364 Plot 173. There was part-payment of Uganda Shillings 14,350,000/= leaving a balance of Shs.35,400,000/= and that a Cheque had been issued by the Defendant in the sum of Shs.36,750,000/=.

Subdivision was done. It is agreed that after the subdivision Ministry of Water wrote a letter that the land falls in Wet Land.

Issues:

1. Whether the Agreement was breached and if so by who?

2. Remedies.”

After the above position, the Advocates told the Magistrate that there was no need to call witnesses and they proceeded to present their final submissions.

The learned Chief Magistrate ordered and decreed as follows:-

- (i) That the Defendant pays the Plaintiff Uganda Shs.35,400,000/= being the balance of the contract sum.
- (ii) That the Defendant pays interest on the above decretal sum at the rate of 24% per annum from 8th December, 2006.
- (iii) The Defendant shall pay the costs of the suit.

(iv) The Counter-claim is hereby dismissed with costs.

It is from the above proceedings that this appeal arises. The trial procedure adopted by the Advocates of both parties created a quite difficult task of evaluating evidence where there was no testimony recorded from either party and yet the only fundamental criticism is that the trial Magistrate erred in Law and fact when he failed to evaluate the evidence on record.

What was the evidence on record then? The evidence on record is the above reproduced Agreed facts and the Agreed documents namely the Agreements and a Letter that declared the suit land a Wet Land which must be evaluated in light of the Law applicable. This Court being the first appellate Court has the duty to evaluate the evidence as a whole and arrive at its own conclusion. (See this Court's earlier decision).

Samwiri Karekyezi & 2 Others Vs The Registered Trustees of Church of Uganda. HCC Appeal 017 of 2011 (Kabale) which relied on: Uganda Breweries Ltd. Vs Uganda Railways Corporation [2002] EA and Panda Vs Republic [1957] EA 336.

I have read the trial Magistrate's Judgment and after stating the facts of the case he states:-

“The documents were agreed upon. The Sale Agreement dated 18/8/2006 (ED1), the Variation Agreement (EP1) the area scheduling (EP2) and the letter from NEMA (ED2). Both parties agreed that there was no need of calling oral evidence and both Counsel filed written submissions.”

The option that was left to the Magistrate in absence of oral evidence was to evaluate the agreed documents together to determine whether there was a breach of the Agreement and by who. The trial Magistrate held that despite the fact that the land was declared a Wet Land did not vitiate the Agreement of sale of land and that the Defendant breached the Agreement by not selling the land and paying the Plaintiff as agreed. This holding is the basis for the decree and orders made at the conclusion of the whole Judgment.

The Variation Deed dated 8th September, 2006 under Clause 2 (ii). It was specifically agreed that the Defendant would subdivide the suit land into small Plots and sell them after which he would pay the Plaintiff the balance by 8th December, 2006. Clause 7 provided among the many things that if this sale is successfully challenged at the instance of any third party in the circumstances set out in the Clause, affecting the

Defendant's/Buyer's proprietary interests acquired as a result of this sale, then the Seller shall wholly refund the purchase price paid.

It is important to note what the parties agreed that would be fundamental condition precedent to the payment of the consideration of the sale:-

- (i) The Purchaser would subdivide the land.
- (ii) The Purchaser would sell the small Plots created through subdivision.
- (iii) The Title shall be free from being challenged for illegality or any other defect that would handicap the Purchaser from subdividing and selling to raise the money to pay off the balance.

According to exhibit D2 from Ministry of Water and Environment, Wet Land Land Inspection, an Inspection Report dated 19th December, 2006. It states, in conclusion:

“That the land in question lies in a Wet Land area, therefore its ownership is illegal, not recognized and contravenes the Law.”

The Report states among other things that it is illegal for anyone to sell, buy or lease Wet Land.

The trial Magistrate evaluated the contents of this Report and made the following conclusion:-

“Nowhere in the Constitution, in the Land Act, the Environment Act or the Rules is it stated that it is illegal to own land on a Wet Land. Nowhere it is also stated that it is illegal for anyone to sell such land. The Inspection Report was obviously wrong in so far as it attempts to interpret the Law.”

The fundamental Law of this country, The Constitution of The Republic of Uganda under Article 237 (2) (b) states:-

“The Government or Local Government as determined by Parliament by Law shall hold in trust for the people and protect natural Lakes, Wet Lands, Forest reserves,

Game reserves, National Parks and any land to be reserved for ecological and touristic purposes for the common good of all citizens.”

My understanding of this Constitutional provision is that it prohibits alienation, degrading, reclaiming the protected land meant of the good of all Ugandans which protected land include Wet Lands. The learned trial Magistrate failed to appreciate that this is Law that makes it illegal for individuals to subdivide and deal commercially in such category of land that was vested in the Government by the Constitution for all citizens of Uganda.

Article 245 provides for Protection and Preservation of the Environment.

The Judiciary in resolving conflicts involving land that constitutes land protected for environmental benefit of the people who are not party to the suits some of whom may be unborn must delicately balance the conflict. The Judiciary has a crucial duty to foster sustainable development as the arbiter, balancing the immediate individual interests of development and protection and conservation of the environment and natural resources. This is the purpose of Article 237 (2) (b) and Article 245 of the Constitution of The Republic of Uganda.

The trial Magistrate failed the duty to act on behalf of those many Ugandans who were not party to the suit, who were unable to be heard because they are not yet born or because they are constrained for reasons of inhibitions of procedural and substantive Law.

Article 126 (1) of The Constitution of The Republic of Uganda states:-

“(1) Judicial power is derived from the people and shall be exercised by the Courts established under this Constitution in the name of the people and in conformity with the Law and with the values, norms and aspiration of the people.” (Underlines are mine)

Article 39 of the Constitution states:-

“Every Ugandan has a right to clean and healthy environment.”

and Article 245 imposes a duty on the State to protect the important natural resources that include Wet Lands on behalf of the people of Uganda.

The State having done its duty by passing National Environmental Management Laws, Magistrates and Judges as custodians of Justice have a duty to carefully analyse the situation of each case applying the Law and preserve the environment to foster the people's right to clean environment.

I have gone to this lengthy extent to show that the trial Magistrate's conclusion above reproduced shows that he erred in fact and in Law to rubbish the Report that prohibited the land transaction affected the Wet Land when the Report was issued by the Government Agency in-charge of protection of Wet Land as prescribed by the various Articles of the Constitution. For these reasons this Appeal ought to succeed.

Wet Lands are protected by Law from private exploitation through sales and degradation because they are the property of all the citizens of Uganda and this being the case when the Plaintiff and the Defendant transactions and Agreements were challenged by the Government's Agency the Agreement became void of Clause 7 of the Deed of Variation dated 8th September, 2006. Apart from these provisions, I do hereby declare that the Agreement to sell land that is a Wet Land is a violation of the provisions of the Constitution above set out and it is illegal and nullified.

The Appellant's Advocates have referred me to the principles of Law settled in the case of Makula International Ltd. Vs Cardinal Nsubuga & Another [1982] HCB II which states that a Court of Law cannot sanction what is illegal and once illegality is brought to the attention of Court, it cannot be ignored and overrides all questions. I agree that this is applicable to the case under consideration. This is a clear contract that is not enforceable due to intervention of Government Agencies.

HODGIN in LAW OF CONTRACT IN AFRICA pages 183 – 184 adopted the position settled in HOWARD & CO. (AFRICA) LTD. Vs BURTON 23 EACA 366 in the following words:-

“After the formation of a contract, certain sets of circumstances arise which, owing to the fault of neither party, render fulfillment of the contract by one or both of the parties impossible in any sense or mode contemplated by them. ... The question which the Judge has to solve is this, Would any reasonable third party consider the effect of such circumstances as altering the obligation of one or both of the parties to such an extent as to make the contract no longer capable of being enforced? The ‘reasonable third party’ is the Court itself.”

The parties never testified in the case and therefore there is no evidence adduced to show that the parties or any of the parties to the contract knew that the land, subject of the contract formed part of the Wet Land which is part of a major tributary to Lubiri Wet Land. Therefore apart from the contract being illegal, even if any of the parties wanted to enforce it, it was not possible. It was legally frustrated and none of the parties is guilty for the frustration and the parties are hereby discharged from the obligation under the frustrated and nullified contract.

Therefore this Appeal is hereby allowed with the following orders:-

- (a) The trial Court's Judgment orders and decree are hereby set aside.
- (b) Pursuant to Clause 7 of the Deed of Variation the Seller shall refund the sums of money paid under the impeached transaction.
- (c) Each party shall be responsible for his/her costs both in the Lower Court and in this Appeal.
- (d) Any party dissatisfied with this Judgment is granted Leave to Appeal within 30 days from date of this Judgment.

Dated at Kampala this day of July, 2015.

J. W. KWESIGA

JUDGE