

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
CIVIL APPEAL NO. 063 OF 2012
(ARISING OUT OF NAK-CV-005 OF 2012)**

NSAMBA RICHARD ::::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

NANDAWULA CHRISTINE ::::::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HONOURABLE LADY JUSTICE EVA K. LUSWATA

JUDGEMENT

This is an appeal from the decision of Her Worship Nakitende Juliet Grade I Magistrate Kiwoko, in the Chief Magistrate’s Court of Luwero at Nakaseke delivered on 3rd July, 2014.

The appellant instituted Civil Suit No. 005 of 2012 against the respondent, seeking inter alia, an order of specific performance to execute a land sale agreement, and in the alternative, a refund of Shs. 500,000/= (shillings five hundred thousand only) deposited, with interest, damages and costs of the suit.

It was the appellant’s case that he is a kibanja holder on 12 acres of land situate at Nakyesawa village Kamuli Parish, Kikamulo sub-county, Nakaseke District (hereinafter called the suit land) while the respondent is a beneficiary of her late father’s estate, the late Zephaniah Kalibbala (the landlord). That the appellant and respondent entered into a land sale agreement whereby the appellant as a kibanja holder, was permitted to purchase the reversion equivalent to his kibanja interest and be given a land title at a consideration of Shs.3,000,000/= (shillings three million only). That the appellant paid Shs.500,000/= as a first deposit, which would facilitate the respondent begin the process of registration of the suit land into her names and leaving a balance of Shs. 2,500,000/= (shillings two million five hundred thousand only).

That despite the appellant's willingness to complete the payment the respondent ignored or refused to accept the same which was a total breach of the contract.

It was the respondent's case that the appellant deposited Shs. 500,000/= and remained with a balance of Shs. 2,500,000/= as per the agreement. That in spite of several requests by the respondent, the appellant declined to pay the balance which prompted the respondent to sale part of her interest (which consisted of a portion of the appellant's kibanja) to a one Ssenoga. The respondent indicated readiness to transfer to the appellant land equivalent to Shs. 500,000/=.

The trial Magistrate found that although the intention of the agreement was for the appellant to purchase his kibanja interest, he breached the agreement when he failed to add more money to the respondent upon demand, to enable the latter process the transfer into her name as an administrator.

The appellant being dissatisfied with the judgment appealed against it on the following two grounds: -

- 1. The Learned Trial Magistrate erred in law in holding that the respondent herein was not in breach of the agreement for sale of land.***
- 2. The Learned Trial Magistrate failed to make a proper evaluation of the evidence on record and thus coming to a wrong decision.***

The written submissions made for both parties were well researched and articulate but shall not be reproduced here, but fully considered in my Judgment. The grounds of appeal shall be resolved concurrently.

My duty as the first Appellate Court is to evaluate the evidence as a whole and make my own findings and draw my own conclusions on the facts and evidence as presented. See: ***Kifamunte Henry vs. Uganda SCCA No. 010 of 1997.***

Before dwelling into the merits of the appeal, I will first consider the aspect of fraud which was raised by counsel for the appellant in his submissions. A scrutiny of the pleadings in the trial Court shows that none of the parties pleaded or proved fraud. The appellant's claim in the lower Court was for breach of contract. There may have been some evidence alluding to fraud, but since no facts of fraud were pleaded, there was no basis of advancing evidence of fraud as this would offend the provisions of **Order 6, Rule 3 of the Civil Procedure Rules**, which is mandatory provision which require the particulars of fraud to be clear in the pleadings. Also see the authority of **Kampala Bottlers Ltd. Vs. Damanico (U) Ltd. CA.22 of 1992.** In any case, as rightly pointed out by counsel for the respondents, the persons against whom constructive fraud was levied, were not party to the suit and had no opportunity to challenge those allegations. Therefore, it would be asking too much of this court, to consider the allegations of fraud; which was in fact not even a ground of appeal. Thus the submissions for the appellant in relation to fraud are misplaced, and no finding shall be made by this court on that aspect.

The main contention on appeal is that the trial Magistrate wrongly evaluated the evidence in concluding that the respondent was not in breach of the contract. Counsel for the appellant argued that the contract was concluded between the parties and his being was in occupation, the duty of the respondent as vendor, was restricted to receiving the purchase money, which according to the appellant, was payable in full only after a transfer into his name was made. He argued further that the non compliance with the clause to make an additional payment by the respondent was never meant to render the contract void or voidable but only to facilitate the transfer. Counsel argued further that no proof had been presented to show that the respondent had ever requested for, and the appellant refused to pay more money towards the purchase price.

In reply, Counsel for the respondent argued that the evidence of breach by the appellant was never controverted and also that the alternative prayer for a refund of the purchase price, was a manifest acknowledgement of breach by the appellant.

There is no doubt and it was indeed an agreed fact that the parties entered into a contract by which the appellant who was a kibanja owner on the suit land, was allowed to purchase the reversion equivalent to 12 acres from the respondent and the trial Magistrate did find as much in his judgment. It was also an agreed fact that Shs.500,000/- was deposited on the sale. The agreement was admitted in evidence as exhibit P1 but unfortunately, without a translation. I took the liberty to obtain a translation by a person fluent both in the English and luganda languages and it is reproduced for even reference as follows: -

EXH. P1

Nakyesaawa LCI

20/3/2012

Kamuli Parish

Kikamulo

S/Ct

25th-08- 2009

AGREEMENT FOR PURCHASE OF AN INTEREST IN LAND

I Nandawula Christine Kalibbala Zefania, I have sold part of my land 12 acres to Mr. Nsamba R. land at Nakyesaawa LCI, Ug.Shs.3,000,000/= (shillings three million only). He has paid Shs.500,000/= (shillings five hundred thousand only) as I proceed to process a transfer from the

names of Kalibbala Zefania to Ms. Christine Nandawula. Balance of Ugx. Shs.2,500,000/= (shillings two million five hundred thousand only) shall be paid on completion of the transfer process.

N.B: If the money paid is not enough, she will be paid an additional sum on that aspect.

Nandawula Kulisitina
Kalibbala Zefaniya
VENDOR

On behalf of the vendor

Kasule G.
STAMP (dated 25th-08-2009)

Nabaggala A.
VICE PERSON
NAKYESAAWA LCI

CERTIFICATION OF TRANSLATION

I Kaddu S. Joseph of High Court Land Division do hereby certify that I am fluent in both the Luganda and English languages and the attached is the accurate translation of the original Luganda document dated 21/1/1992.

.....

Kaddu S. Joseph

9/3/15

A simple and uncorrupted interpretation of exhibit 1 would be that it contained a term that the balance was payable after the respondent had completed a transfer from the names of Kalibbala Zephaniah to her names. It was argued for the respondent that the appellant's breach arose when he failed to complete payment. I believe, here he was referring to an addendum to the agreement which loosely translated would read; "*NB: If the money paid is not enough she will be paid an additional sum on that aspect.*" Conversely, counsel for the appellant argued that that provision was never intended to render the agreement void or voidable and there was no evidence to show that the respondent asked for more money towards the purchase price.

According to the appellant, about four months following the agreement and in the company of PW1, he visited the appellant to inquire on the progress of the transfer process. She advised him to return only after she contacted him, and thereafter he noticed surveyors demarcating his kibanja. He drew the attention of the respondent to that fact but she denied any knowledge of that activity. After two days, the appellant noted mark stones being placed in the suit land (including his kibanja) and later confirmed the sale to third parties.

PW1 substantially supported that evidence, more significantly, her presence when the appellant visited the respondent. Also the fact that the suit land was surveyed and demarcated was not rebutted because the respondent admitted selling off part of the suit land to a third party.

On the other hand, the respondent stated that when the initial payment run out, in November 2009, she notified the appellant and after explaining to him the situation, requested for an additional payment which he refused to pay. She claims to have made the request for additional payment in the presence of DW1. According to her, the appellant only re-surfaced on 1st January, 2010 to offer more money and to demand proof from her that she owned the suit land. She stated that she was constrained to sell part of the suit land to a third party which proceeds assisted her in processing the land title.

I am conscious of the fact that contracts are not made in a vacuum and in construing what the intentions of the parties were, I should consider the commercial purpose and factual background of the contract. (See for example **Godfrey Magezi & Anor Vs Sudir Ruparelia SCCA 16/01 reported in (2005) Kalr 154**. In my view, the purpose of the agreement was for the appellant to purchase an interest in land which could only be fully realized upon the respondent procuring registration herself. For this, she needed some financial assistance which was offered through the first deposit. Therefore, with due respect to arguments for the respondent, my understanding of the sale agreement is that it had only one term requiring the respondent to make additional payment of the balance after a transfer into the names of the respondent was achieved. The proviso for an additional payment before the transfer would become effectual only if, the respondent run out of money. Naturally, the appellant could only know of that need, after notification from the respondent. The respondent claims to have made a request for additional payment which was refused in November 2009.

However, that fact was not supported by DW1 who the respondent claims was the only witness when she made that request. Beyond that, no other evidence was adduced to show that the appellant ever asked for more payment and if she did, what sum was expected of the appellant?

Conversely, the respondent did agree in cross-examination that the appellant did visit her home in January 2010 to offer some additional payment. DW1 supported that fact in his testimony in-chief that the appellant came to his home on 1/1/2010 in the company of PW1.

I would, therefore, believe the appellant when he stated that his first encounter with the respondent (after signing the agreement) was on 1/1/2010 to inquire about the progress of the transfer and to offer further payment towards the purchase price. I would also believe him that he observed the survey exercise and the laying of mark stones on the suit land because it was an agreed fact that the respondent eventually sold a portion of the suit land to one Ssenoga.

In view of all the evidence above, I would agree with counsel for the appellant that the trial magistrate should have juxtaposed the evidence of both sides. Had he done so, the most logical

conclusion would have been to believe the appellant and not vice versa. Therefore, the trial Magistrate evaluated the evidence wrongly and erred by holding that the appellant was in breach when he failed to add more money to the respondent. It was in fact the respondent, who was in breach when she opted to sell the reversion, part of which included the appellant's interest to a third party. Even if I was to believe the respondent's testimony which I do not, it was never a term of the sale agreement that the respondent could sell to a third party in the event that the appellant refused or failed to make any further payments towards the purchase price.

Even where the agreement was silent on that controversy, there was never any argument that the respondent as an owner of a kibanja interest enjoyed and still enjoys security of occupancy on the suit land under Section 31 Land Act. In that event, the agreement of sale would still be subject to the provisions of Section 35 Land Act, so that where disagreements arose as to payment of the balance; the respondent would not have had the option to sell to a third party but instead, should have had recourse to a mediator before considering a new sale to a third party.

In conclusion, the two grounds of this appeal succeed.

In the lower court, the appellant sought for an order for specific performance and in the alternative, a refund of Shs. 500,000/=. An order for specific performance is an equitable relief at the discretion of court to enforce against the defendant the duty to do what she agreed by contract to do. (See for example **Kaijuka Mutabaazi Vs Min SCCA.23/3007 reported in (2009) Kalr 14**)

It was an agreed fact that part of the appellant's kibanja was sold off by the respondent. Evidence confirmed that 8 out of 12 acres were sold to Frank Ssenoga who in turn sold his portion of 43 acres to Sserubiri Charles. In fact, the lawyers of Sserubiri had already challenged the appellant's presence on that portion. Neither Ssenoga nor Sserubiri were made parties to the suit and neither the orders of the lower Court nor this appellate Court would bind them on that account in particular to force Sserubiri to surrender part of the reversion to the appellant. The remedy of specific performance would in that respect not apply because the respondent is no longer able to enforce the contract. The only remedy would be for a refund of what was paid as

part of the purchase price of the reversion, on account of failure of consideration flowing from the respondent.

I hasten to add, however, that the appellant would still be entitled to his kibanja interest of 8 acres and thereby would remain a tenant by occupancy on both the portion now stated to be held by Sserubiri and the portion (i.e. 22 acres) retained by the respondent. He would thereby continue to enjoy the same protection and privileges under Sections 31 & 35 Land Act similar to those he enjoyed prior to 25/8/2009, the date the agreement of sale was made.

In addition, I have held that it was the respondent and not the appellant who was in breach of the sale agreement, which would make the prayer for general damages legitimate. In summary, this appeal succeeds; the Judgment of the lower Court is set aside and in place it is ordered and decreed as follows: -

- (i) The respondent shall refund to the appellant the sum of Shs. 500,000/= (Shillings five hundred thousand only) and that sum shall attach an interest of 12% per annum from the date of Judgment of the lower Court until payment in full.
- (ii) General damages for breach of contract in the sum of Shs.2,000,000/= (Shillings one million five hundred thousand only).
- (iii) Costs of this appeal and of the Court below.

EVA LUSWATA
JUDGE
2ND JUNE, 2015

