

millions only). Plaintiff also paid another Ushs.3,000,000/- in 2014 for processing of the title to the Defendants. To date, the Defendant has failed or neglected to fulfill the said obligation.

Due to the Defendant's failure to fulfill her part of the contract, the Plaintiff alleges that she has suffered financial loss because she had commercial prospects for the property. She alleged breach of contract on the part of the Defendant and that she had suffered a lot of inconvenience and suffering.

The Defendant never appeared to defend the case against her despite proof of personal service of Court summons. The matter was heard *ex parte* under Order 9 rule 10 of the Civil Procedure Rules.

PW1, the lawful Attorney of the Plaintiff; Mugume Onesmus was the only witness who led evidence to prove the Plaintiff's case. He testified that the Defendant was a long time friend of his and the Plaintiff was his mother. He admitted in evidence a copy of the sale agreement between the Plaintiff and the Defendant for the sale of the suit property. It was *marked P1* (sale agreement). He also tendered a search certificate in Court which proved that the Defendant was the registered owner of the suit property and this was *marked P2*. He went on to testify that the Plaintiff was given a duplicate of title to the property which was also tendered in *evidence and marked P3*.

That the Defendant only gave them the title but never signed the transfer forms and she has never processed the title for the 2nd unregistered plot. Further that in 2013 and 2014 respectively, she was sent an extra US\$ 10,000 and US\$ 1000 through Western Union in order to process the title. *A copy of the cash remittance was tendered in evidence and marked P4*.

Further that they waited for the Defendant to transfer and process the other title but she could not do any of the two. They served her with notices which she failed to comprehend with. PW1 also testified that the Plaintiff had not taken possession because the Defendant had tenants on the land. He stated that the Plaintiff had not yet paid the balance because the Defendant did not fulfill her part of the bargain.

In the Plaintiff's scheduling memorandum, the following issues were raised for Court's determination;

1. *Whether or not the Defendant is in breach of the sale agreement entered into with the Plaintiff for the suit property comprised in freehold Register Volume 890 Folio 14 plot 449 Busiro Block 425 measuring approximately 0.171 hectares with an additional area of 0.12 acres with no certificate dated 19th April 2013.*
2. *Remedies available to the parties.*

Written submissions were filed for the Plaintiff.

Resolutions of issues.

Issue 1

1. **Whether or not the Defendant is in breach of the sale agreement entered into with the Plaintiff for the suit property comprised in freehold Register Volume 890 Folio 449 Busiro Block 425 measuring approximately 0.171 hectares with an additional area of 0.12 acres with no certificate dated 19th April 2013.**

In all Civil matters, the *onus* rests on the Plaintiff who must adduce evidence to prove his or her case on the balance of probabilities if she is to obtain the relief sought. **Ref: Sections 101-103 of the Evidence Act, Cap.43. See: Lord Denning in Miller versus Minister of Pensions (1947)2 ALL ER 372 at page 373.**

It was the Plaintiff's undisputed evidence that on the 19th day of April 2013, she entered into an agreement for the sale of the suit property with the Defendant. *A copy of this sale agreement was adduced in evidence as exhibit P1.*

Section 10(1) of the Contracts Acts 2010 defines a contract as;

'an agreement made with a free consent of parties with the capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound'.

William Kasozi versus DFCU Bank Ltd High Court Civil Suit No.1326 of 2000; Lady Justice C. K. Byamugisha, while considering the prerequisites' that must exist in order for a contract to be valid and enforceable went stated that;

“once a contract is valid; it creates reciprocal rights and obligations between the parties to it. I think it is the law that when a document containing contractual terms is signed, then in the absence of fraud, or misrepresentation the party signing it is bound by its terms”

Hence, when one party to a contract fails to perform his or her obligations or performs them in a way that does not correspond with the agreement, the guilty party is said to be in breach of the contract and the innocent party is entitled to a remedy.

In the case of **Ronald Kasibante vs. Shell Uganda Ltd HCCS No.542 of 2006**, breach of contract was defined as;

‘the breaking of the obligation which a contract imposes which confers a right of action for damages on the injured party.’

In the instant case, the Plaintiff alleges breach of contract on the part of the Defendant. It was her undisputed evidence that the Defendant undertook to register and process title for the additional unregistered 0.12 acres of land and also seek consent to change the user rights of the land from residential to commercial purposes but she had failed to fulfill her obligation under the contract. Exhibit P1, the sale agreement, was signed by both parties. It contained 5 clauses which the parties agreed to. These were the clauses;

1. *In consideration of a sum of Ugshs.240,000,000/- (two hundred and forty million shillings only) out of which Ugshs.100.000.000 one hundred million shillings only) has been paid by the purchaser to the vendor, (the receipt of which the vendor agrees do thereby acknowledge on the execution of this agreement), the vendor agrees to sell and the purchaser agrees to purchase all that land contained freehold Register Volume 890 Folio 14 Plot 449 Busiro Block 425 measuring 0.171 hectares together with an additional area next thereto measuring 0.12 acre currently without a certificate of title.*

2. *On the execution of this agreement the vendor shall surrender the certificate of title to the purchaser, however the execution of the final transfer of the said land into the purchase's name, shall be done after the purchaser has paid the full purchase sum to the vendor.*
3. *The vendor undertakes to process a certificate of title in the purchaser's names of the additional 0.12 acres at her expense and the final payment of the balance aforesaid shall be done after the procurement of the additional 0.12 acres on the certificate of title.*
4. *The vendor also undertakes to seek the consent to change the land herein sold from residential to commercial purposes.*
5. *The parties hereto have agreed that should the purchaser fail to pay the said balance in the manner aforesaid, the property shall be sold to any purchaser, and the purchaser shall be refunded the amount which she would have paid.*

In regard to clause 1 of the agreement, the Plaintiff admitted in her Plaint that she paid the sum of Ushs.100,000,000/- (*one hundred million only*) at the execution of the agreement. PW1 at the trial, also acknowledged this fact.

The Plaintiff further contended that she paid extra US\$ 10,000 and US\$1,000 on the purchase price to the Defendant in a bid to process the title but the Defendant failed despite reminders. This same fact was stated by PW1 at trial. I however note that PW1 provided evidence to prove only the US\$1,000 paid to the Defendant, but no evidence was adduced to prove the payment of the US\$10,000 alleged to have sent to the Defendant. Nevertheless, in accordance with the terms of the sale agreement, clause 1 was fulfilled by the parties.

I regard to clause 2, the Plaintiff in paragraph 4(b) of her plaint acknowledged the fact that she was handed the certificate of title for the land comprised in Free holder register volume 890 Folio 449, Busiro Block 425. PW1 equally admitted to this fact at trial hence this clause of the agreement was fulfilled.

In regard to clause 3 and 4 of the agreement, the Plaintiff contended in paragraph 4(i) of her plaint that to date, the Defendant had neither processed the title in her name for the additional 0.12 acres or sought consent to change the user land rights from the residential to commercial purpose and also failed to hand over the transfer instruments. She went on to contend in paragraph 4(j) that upon realizing that the Defendant had failed to fulfill her obligations under the agreement, the Plaintiff sent out several reminders to the Defendant to fulfill her obligation but she had deliberately refused, failed or neglected to effect the same.

PW1 testified that they waited for the Defendant to transfer and process the other title but she could not do any of the two. They served her with notices which she failed to comprehend with.

The Plaintiff's evidence stood undisputed by the Defendant. In the absence of any other evidence, to the contrary, I am in no doubt that the Defendant is in breach of her obligation under clause 3 and 4 of the Contract for the sale of the suit property.

Issue 1 I held in favour of the Plaintiff.

ISSUE 2

Remedies available to the parties

The effects of breach of contract vary, depending on the seriousness of the breach and also on how the innocent party decides to react towards the breach. In this case, the Plaintiff being the innocent party sought for the following remedies;

- 1) Specific performance of the agreement of sale between the Plaintiff and the Defendant dated the 19th day of April 2013. The remedy of specific performance is provided for under Section 64 of the Contract Act which states;

'64. Right to specific performance;

- i) *Where a party to a contract, is in breach, the other party may obtain an order of Court requiring the party in breach to specifically perform his/her promise her under the contract.*

- ii) *A party is entitled to specific performance of a contract where ;*
 - a) *It is not possible for a person against whom a claim is made, to perform the contract.*

 - b) *The specific performance will produce hardships which would not have resulted if there was no specific performance.*

 - c) *The rights of a third party acquired in good faith would be infringed by the specific performance.*

 - d) *Specific performance would occasion hardship to a person against who a claim is made, out of proportion to the benefit likely to be gained by the claimant;*

 - e) *The person against whom the claim is made is at the entitled, although in breach to terminate the contract; or*

 - f) *The claimant committed a fundamental breach of his or her obligations under the contract, but in cases where the breach is not fundamental, specific performance is available to him or her subject to his or her paying compensation for the breach.*

From the evidence on record, the Defendant is in breach of clauses 3 and 4 of the sale agreement. The Plaintiff contended in paragraph 4 (h) of the plaint that she has at all times been ready to pay the balance due to the Defendant or have it deposited in Court for the Defendant to be able to perform her obligations under the agreement. PW1 testified that they were willing to pay if the Defendant fulfilled her part of the bargain.

In the absence of any evidence to explain why the Defendant has failed to fulfill her part of the bargain under the contract, I find no reason why this court should not order the Defendant to specifically perform her obligations under the contract.

2 An order for eviction of any occupants on the suit property

It was the evidence of PW1 that they had not taken possession of the land and that the Defendant had no tenants on it. In the circumstances of this case, there is a valid contract for the sale of land. The fact that there is a legally enforceable contract intended to convey or create a legal interest, gives the Plaintiff an equitable interest in the suit property.

It was held in the case of *Lysaght versus Edwards (1876) 2 Ch. D 499 at pg. 506* that;

‘the moment you have a valid contract for sale, 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 of lien on the estate for the security of the purchase money and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivery of possession’.

The fact that the contract has only been part performed and the Plaintiff has not paid the full purchase price, this gives the Defendant to retain possession of the suit property until the full purchase price is paid. At this point, the Plaintiff cannot seek to evict any occupant on the suit property. In my view, this remedy would be inappropriate to award.

3. An order for *mesne profit*

The Plaintiff contends in paragraph (k) of her plaint that she had commercial prospects for the suit property as per clause 4 of the agreement and that she had suffered loss for which she sought compensation by way of *mesne profits*.

Section 2(m) of the Civil Procedure Act (Cap.71) defines *mesne profits* as;

‘..... those profits which the person in wrongful possession of the property actually received or might, with ordinary diligence have received from it, together with the interest on those profits, but shall not include profits due to improvements made by the person in wrongful possession’.

In the case of; **George Kasedde Mukasa versus Emmanuel Wambedde & 4 Ors, High Court Civil Suit No. 459 of 1998**, Mukiibi J. stated,

‘and correctly so in my view, as follows; it is settled law that wrongful possession of the Defendant is the very essence of a claim for mesne profits’.

In **Elliott versus Boynton [1924] 1 Ch. 236 [CA] Warrington, L.J, at page 250** said;

‘now damages by way of mesne profits are awarded in cases where the Defendant has wrongfully withheld possession of the land from the Plaintiff.

In **Busiro Coffee Farmers & Dealers Ltd versus Tom Kayongo & 2 Others HCCS NO. 532/92**, it was held by this Court that;

‘where a Defendant remains in wrongful possession, he is liable to pay mesne profits to the person entitled to possession., hence for a claim of mesne profits accrue, a Defendant must be in wrongful possession of the suit property as against the Plaintiff and deriving profits from the property’

Applying these principles to the instant case, it was not a finding of this Court that the Defendant is in wrongful possession of the suit property. The issue before this Court was a breach of contract. In the circumstances of this case, it would not be appropriate to grant this remedy to the Plaintiff.

4. The Plaintiff sought for General damages for breach of contract.

Black’s Law Dictionary 9th Edn at page 445 defines damages as the sum of money which a person wronged is entitled to receive from the wrong doer as compensation for the wrong. It is

trite law that damages are the direct probable consequence off the act complained of. Ref: **Storms versus Hutchison (1905) AC 515.**

In the case of **Assist (U) Ltd. versus Italian Asphalt and Haulage & Anor, HCCS No. 1291 of 1999 at 35** it was held that;

‘the consequences could be loss of profit, physical, inconvenience, mental distress, pain and suffering’.

In **Haji Asuman Mutekanga versus Equator Growers (U) Ltd. SCCA NO. 7 of 1995, Oder JSC (RIP), held that;**

‘With regard to proof, general damages in a breach of contract are what a Court (or jury) may award when the Curt cannot point out any measure by which they are no to be assessed, except in the opinion and judgment of a reasonable man’.

It was submitted by Counsel for the Plaintiff that taking into account the economic value of the property and the time it has taken the Plaintiff to successfully pursue her rights from April 2013 when the parties entered the understanding together with her.

The general inconvenience occasioned to the Plaintiff, a figure of shs.50,000,000/- million (*fifty million only*)would be fair and adequate.

The Plaintiff entered into the agreement for the sale of the suit property with the Defendant in April 2013. It is now four years later, and the Defendant has not honoured the part of the contract.

In the circumstances, the sum of Ugshs. 50 million (*fifty million*) **as proposed by Counsel would be fair compensation in damages.**

5. The Plaintiff sought for the costs of the suit.

Section 27 of the Civil Procedure Act provides that;

'costs are discretion of the Court of Judge. Subsection (2) of the Act provides that the costs of any action, cause or other matter or issue shall follow the event unless the Court or Judge shall for good reasons otherwise order.

In the instant case, the Plaintiff being the successful party is awarded the costs of the suit and Judgment is accordingly entered for the Plaintiff in the following terms;

1. The Defendant is in breach of the terms of the contract for the sale of the suit property comprised in **Freehold Register Volume 890 Folio 14 Plot 449 Busiro Block 425** measuring approximately 0.171 hectares and an additional area of 0.12 acres of unregistered land.
2. The Defendant is hereby ordered to specifically perform her obligations under the contract.
3. The Plaintiff is granted to Ugshs. 50,000,000/- (*fifty million only*) as general damages for breach of the contract.
4. The Plaintiff is entitled to costs of the suit.

I so order.

.....

Henry I Kawesa

JUDGE

27/11/2017

Right of Appeal explained to the parties.

.....
Henry I Kawesa

JUDGE
27/11/2017

27/11/2017:

Nabukenya Rachael on brief for John Mary for the Plaintiff.

Defendant absent.

Plaintiff present.

Court: judgment read out to the parties above.

.....
Henry I. Kawesa

JUDGE
27/11/2017