

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT MPIGI**  
**LAND CAUSE NO. 31 OF 2017**

**AGABA ROGERS KYALISIIMA:.....: PLAINTIFF**

**VERSUS**

**SENFUKA BAGENDA:.....: DEFENDANT**

**BEFORE: HON.JUSTICE W.MASALU MUSENE**

**JUDGMENT**

The plaintiff filed this suit against the defendant for trespass and recovery of the land comprised in Mawokota Block 268 plot 37 together with the developments thereon at Kayabwe and Lubanda in Mpigi district. The plaintiffs claim was that the defendant sold the said piece of land to him which included a school known as southern College Kayabwe for a consideration of 48,485 USD (equivalent to 160,000,000/=shillings and an agreement was executed to that effect. It is alleged that the defendant signed transfer forms and the title was generated in favor of the plaintiff, but the defendant has since refused to give vacant possession of the land to the plaintiff and refused to refund the money. The defendant's claim is that he was the registered proprietor of the said land and that in 2015, the plaintiff lent to the defendant a loan of 48,485 USD equivalent to 160,000,000/= shillings inclusive of interest to be paid within 3 months. The defendant claims to have deposited his certificate of title as security for the purported loan together with undated transfer forms in favor of the plaintiff which he transferred in his names in 2016 and which is the subject matter of this suit.

At scheduling the parties came up with the following issues;

1. Whether the transaction between the plaintiff and the defendant was a sale or loan
2. Whether the transaction was in respect of plot 37 or 39
3. Whether there was breach of the sale or loan agreement
4. What remedies are available to the parties?

The plaintiff was represented by M/S Wakabala & Co. Advocates while the defendant was represented by KOB Advocates & Solicitors. Both counsel filed their submissions on court record.

**Issue one: Whether the transaction between the plaintiff and the defendant was a sale or loan?**

Counsel for the plaintiff submitted that the plaintiff's witnesses PW1, PW2, PW3 and PW4 testified that the transaction between the defendant and the plaintiff was a sale of land and not a money lending transaction and that their testimony was never challenged in cross-examination. Counsel also stated that the agreement was tendered in court and marked PE2 whose title reads as "Agreement of Sale and purchase of land together with all developments thereon" which implied that the parties intended a sale and not loan agreement.

Counsel for the plaintiff also added that the defendant did not deny the contents of the agreement in cross examination and he appended his signature at his own free will. Counsel stated that the defendant even confessed that he read through the agreement and understood all its contents and knows the effect of signing documents including that particular agreement.

Counsel therefore stated that the sale agreement is thus primary evidence that the suit land with all its development was actually sold and he referred to S.61 of the Evidence Act which defines primary evidence to mean the document itself produced for the inspection of court. He added that the defendant produced nothing in court to show that the transaction was a loan agreement.

Counsel also referred to S.91 of the Evidence Act to the effect that where the terms of a contract, grant or any other disposition of property have been reduced to the form of a document, no evidence shall be given in proof of the terms of that contract.....but the document itself or secondary evidence of its contents. He relied on that to submit that the land sale agreement was submitted in court and no other document availed to that effect.

Counsel further stated that PW1, an attorney for the plaintiff stated that the defendant signed transfer forms in favor of the plaintiff and title was generated in favor of the plaintiff. That the defendant in para 5 of the written statement of defence admits that he signed a land sale agreement of the land and also signed the transfer forms in favor of the plaintiff. He also added that according to S. 59 of the RTA, certificate of title is conclusive evidence of ownership.

Counsel for the defendant on the other hand submitted that Courts do not look at the title of the document to determine whether it is a sale or loan but rather at the intention of the parties, contents and prevailing circumstances. He then stated that the inclusion of clause 1, 8 and 9 implied that the money received would be repaid upon defect in title or third party claims, plus interest and noncompliance with the agreement.

Counsel for the defendant also argued that the provisions of the agreement on refund and payment of interest rule out the possibility of a sale because unlike

other transactions, a sale is irreversible and once it has been signed and sealed, the vendor can only recover the land through an action for specific performance and not money.

The defendant alleges that he was introduced to the plaintiff by a one Kabogere who lent him money where he gave his land as security and was given a sales agreement to which he inquired about its validity and was informed that that's how they operated and that he signed because he was under pressure and desperate for money .

Counsel further argued that PW2 stated that the defendant sold the land for 160,000,000/= yet in cross examination asserted to not have seen the document. Further he added that PW3 who also stated the same claimed that he never went to the land. Further submissions were that PW4 the advocate stated that he did not remember the names of the neighbors and doesn't specialize in land matters and that he did not carry out proper investigations as regards the land in dispute.

On the issue of the plaintiff not being a money lender, counsel submitted that there are unlicensed money lenders who always do business by drafting agreements.

Counsel for the plaintiff stated in rejoinder that when the defendant was asked in cross examination whether he was actually coerced into signing the agreement, he stated that he wrongly used the word but wanted to mean that he was eager for money.

I have carefully considered the evidence on record and the submissions of the parties on this issue. The finding of this court is that the plaintiff tendered in evidence of an agreement which shows that it was a sale agreement with all developments on it. I will also refer to the agreement on court record PE2 which

states that “agreement of sale and purchase of land together with all developments thereon”

In clause (a) it reads **the vendor is the registered owner of the above described land...where he is operating a school known as southern college school and is in possession of the title”**

In clause (b) it is stated that for good cause and consideration given, the vendor is desirous of selling the above described land together with the developments thereon”

From the above clauses, it is clear that the agreement was a land sale agreement and I find the clauses specify the intentions of the agreement which to my interpretation was a sale of land containing the school mentioned therein. There is nothing confusing about those clauses.

I shall rely on the case of **Bank of Credit & Commercial International S.A (In Liquidation) V Ali [2001] 1 ALLER 96** cited by the defendant where it was stated that;

***“In construing contractual provisions, the object of court is to give effect to what the contracting parties intended. To ascertain the intention of the parties, court reads the terms of the contract as a whole giving the words the natural and ordinary meaning....”***

In the premises and as earlier stated, the terms of the contract were for a sale of land with all the developments in this case which included the school. I therefore agree with the plaintiff and his counsel that what was intended was a land sale as opposed to a loan agreement claimed by the defendant.

On the other hand, I disagree with the defendant's contention that clause 1, 8 and 9 implied that money received would be repaid upon a defect in title and that such provisions of refund rule out the possibility of a sale since sale agreements are irreversible. I find that what the parties intended was that in case there was a defect in the said title, the defendant would refund the money, which is always the case because even in ordinary suits of land sales, if any problem arises, the complaining party sues for the contract price which was the intention of that clause in the agreement.

In the case of **Fina Bank Ltd V Spares and Industries Ltd (2000) 1 EA 52**, quoted by Counsel for the Plaintiff, it was held that:-

***“The function of court is to enforce what is agreed between the parties and not what the court thinks alright to have been fairly agreed between the parties.”***

This means that everything that the parties wrote in the agreement was what was intended thus I cannot hold otherwise. Even in the case of **Interfreight Forwarders vs (U) LTD vs African Development Bank (1990-1994) E.A 117** it was stated that a party is bound by his pleadings, thus the defendant is bound by what he admits to have been a sale agreement and not a loan agreement.

In addition to that, the defendant has not availed any loan agreement to court to show that what was intended was a loan agreement as required by the rules of evidence. The defendant even appended his signature on the agreement and now alleges that it was by force and he did not know what he was signing. He however claimed to have read through the agreement thus cannot then turn around and allege that he did so with duress yet he read through the terms of the agreement. I am therefore inclined to reject his submissions on this issue as they have no evidence supporting them.

I also find the evidence of PW4 very instrumental. PW4, Mubiru Amir Bakidde the advocate who drafted the agreement confirmed in court that what the parties signed was a sale agreement not a loan agreement. He stated that he personally carried out a search at the land registry and confirmed the land belonged to the defendant. He further stated that he moved around the entire land in the company of the Plaintiff and the Defendant together with other members to wit a one Mwesigye, Badru, Brian and Kabogyere. That while on the land the Defendant showed them the school called Southern college School that it was part of the land and he stated that all the six acres were the ones comprising the school that he was intending to sell to the Plaintiff. PW4 stated that the defendant opened one of the offices of the school himself and confirmed that he was the sole proprietor of the school. He further stated that he moved around the whole land and it stretches from Mwanda, to the swamp, then to the passion fruit plantation and that the defendant showed them a mark stone and thus there was no need for opening boundaries and surveying.

I therefore find and hold that the agreement was a land sale agreement and not a loan agreement. All necessary diligence was conducted to verify ownership of the land with its developments. The Defendant is therefore stopped from denying the same.

**Issue two:**

**Whether the transaction was in respect of Plot 37 or 39?**

Whereas the Plaintiff and his counsel's case was that they were taken around the land to inspect and it had a school on it, the contention of the Defendant was that it was lot 37 which was sold and not 39 which had the school. It was submitted on behalf of the Defendant that the school was on Plot 39 and not 37.

Counsel for the Plaintiff submitted that if the Defendant alleges that the school is on Plot 39, then he acted with fraud. He reiterated that the evidence of the Plaintiff and that of PW4 was clear and elaborate that the Defendant took them around the school and showed them the boundary marks. Counsel for the Plaintiff concluded that at the time of purchase, the Defendant did not talk about Plot 39 and that Plot 39 was brought in to defeat the ends of Justice.

Counsel for the defendant on the other hand reiterated that there was no reference to Plot 39 in their dealing and that all evidence points to Plot 37.

As far as this issue is concerned reference is hereby made to the sale Agreement, exhibited in Court as PE2. It is stated under clause (a) that:-

**Whereas:**

- a) The vendor is the registered owner of the above described land (herein after referred to as “the property”) where he is operating a school also known as southern college school and is in possession of the Certificate of title.”**

So even if counsel for the Defendant’s submissions were that no evidence was adduced in connection to Plot 39, like it was done to 37, like; a search letter for Plot 39, a Certificate of title for Plot 39 and photographs of the alleged buildings, all the same clause (a) of the sale Agreement talks of property where the vendor (Defendant) is operating a school also known as southern college School.



Indeed in the case of **L' Estrange vs Gracoub Ltd (1934) 2 KB 394** , it was held that a party who is a signatory to a document is bound by his/her signature.

Furthermore in the case of **Parker vs South Eastern Ry Co. C.P.D 416, Mellish L.J. stated that**, *“In an ordinary case, where an action is brought on a written agreement which is signed by the Defendant, the agreement is proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and doesn't know its contents. Further , that if an agreement has been reduced into writing and it is proved that the Defendant has assented to the writing constituting the agreement between he parties, it is in the absence of fraud, immaterial that the defendant had not read the agreement and did not know its contents.*

In the present case, DW1, the defendant himself admitted in his testimony that he read through the agreement of sale and understood it properly but he did not care about the consequences since he was eager to get the money. The Defendant (DW1) also admitted that he appended his signature thereon at his own free will.

**In such circumstances, this Court, being not only a Court of Law, but a Court of Justice, cannot allow the Defendant to turn round and deny selling the school whether it is on Plot 37 or 39.** It would indeed be a mockery of Justice if court does not go by what the Defendant himself admitted in evidence and in writing that the property sold included the school. And moreover during cross-examination by counsel for the Plaintiff, the Defendant confirmed that he holds a Bachelor's degree in History and Economics from Makerere University, 2000. This Court finds that such a

highly educated defendant from the highest institution of learning in Uganda who is also flamboyant and stylishly dressed person with all ambience of modernity cannot be allowed to make a U turn in respect of what he sold. So if it actually turns out that southern college school is on plot 39, then the Defendant sold both Plot 37 and 39 to the Plaintiff and is hereby estopped from denying the same in light of Section 114 of the Evidence Act.

It provides:

*“When one person has, by his or her declaration act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or she nor his or her representative shall be allowed in any suit or proceeding between himself or herself and that person or his or her representative, to deny the truth of that thing.”*

### **Issue three.**

#### **Whether there was breach of the sale or loan agreement.**

Counsel for the Plaintiff submitted that breach arises when there is a violation of the contractual obligations by failing to perform one's promise. He thus averred that the defendant failed and/or refused to give vacant possession of the suit land to the Plaintiff or to refund the purchase money as agreed in the agreement.

Counsel for the Defendant on the other hand maintained that the defendant did not enter into a sale but obtained a loan despite the title documents and contents and that as such he could not have breached the sale agreement.

This issue has been more or less resolved under issues No 1 and 2 . So I shall not waste time repeating what I have already outlined for the sake of semantics as counsel for the defendant would like this court to indulge.

In view of the over whelming evidence on record, both oral and documentary, I find and hold that the Defendant by refusing to give vacant possession of the land and properties sold (school) or refund of the purchase price plus interest as agreed, breached the terms of sale agreement.

The alleged breach of loan agreement is accordingly rejected as there was no evidence to that effect to the satisfaction of this court or on a balance of probabilities as required under the law.

#### **Issue No. 4**

##### **Remedies available.**

Having found the three issues above in the affirmative, I do hereby enter judgment against the Defendant and in favour of the plaintiff.

I also proceed to make the following orders:

1. That the plaintiff is the rightful owner of the suit land comprised in **Mawokota Block 268 plot 37 at Kayabwe and Lubanda Mpigi** district together with all the developments including the Southern College School.
2. An eviction order be issued against the defendant from the suit land.

3. A permanent injunction restraining the defendants and his agents from trespassing on the said land.
4. General damages of **UGx 20.000.000/=** be awarded to the plaintiff for the loss he has suffered in trying to reclaim his land that he had already paid for.
5. Costs be awarded to the plaintiff.

.....

**W.MASALU MUSENE**

**JUDGE**

**07/02/2018**

