THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DSIVISION

CIVIL SUIT NO.2122 OF 2016

FORMERLY NAKAWA HIGH COURT CIVIL SUIT NO.157 OF 2014

JAMES OJWIYA::PLAINTIFF

VERSUS

BETTY MUTISA ::DEFENDANT

This suit was brought by Plaintiff against the Defendant for:

i) breach of contract seeking an order of specific performance of an agreement dated 23rd of May 2013,

ii) vacant possession,
iii) general damages,
iv) interest, and;
v) Costs of Ugshs.500,000/- as money had and received by the Defendant with interest thereon.

The facts of the suit are that: the Defendant and her husband, a one Nicholas Mutaisa, are the registered proprietors of comprised in **Kyadondo Block 234 Plot 3161 at Kirinya, Bweyogerere** (*hereinafter the suit land*).

With the consent of her husband, the Defendant mortgaged the suit land to Housing Finance Bank Ltd. The Defendant defaulted on her loan and there were numerous threats to foreclose the suit land from the bank's agents. Because of fear to lose the

suit land, the Defendant, with the consent of her husband, decided to sale the land to the Plaintiff at Ushs.120, 000,000/- (*shillings one hundred twenty million*) only in order to use part of the sale price to service the mortgage.

In the agreement, the Plaintiff agreed and indeed paid, "the 1st instalment of shs.38,500,000/- *(thirty eight million, five hundred thousand shillings) "upon execution of the...*" Under clause 2(b),(c), and (d) of the same agreement, it was also agreed thus:

b) The buyer shall pay to the seller the second instalment of shs.41,500,000/=..... (*forty one million, five hundred thousand)* within September 2013, but not later than 30th September 2013.

c) The buyer shall pay to the seller the last instalment of Shs.40,000,000/=... in December 2013 but not later than 6th January 2014.

d) The buyer shall take possession of the land and property after completing payment of last instalment.

According to clause 3(c) of the agreement, it an understanding between the parties that the seller/Defendant would "*settle the loan money with the bank after getting the second instalment from the buyer and thereafter the seller"* "would" *collect the certificate of title from the bank and keep it with her lawyers till the buyer shall make the final payment*."

The Plaintiff failed to pay the 2nd instalment as was agreed in clause 2(b) above but, in the addendum to the original agreement, which varied the aforesaid agreement, the Plaintiff paid Ugshs.14, 000,000 (*fourteen million shillings)* to the Defendant on October 7, 2013 and promised to pay to the seller the balance of Shs.27,500,000/=.... (*twenty seven million, five hundred thousand shillings)* in paragraph 2(b) in the original agreement by the end of October 2013".

It was as well agreed in the addendum that *the payment of the last instalment of shs. 40,000,000/- ...shall not be affected by the variation in the payment of the 2nd payment in paragraph 2(b)*". On October 26th 2013, the Plaintiff made another payment of Ushs.20,000,000/- (*twenty million shillings)* through the Defendant's bank account, but this was less; Ushs. 7,5000,000/- *(seven million, five hundred thousand shillings)* as was agreed in the addendum. Besides this, the Plaintiff made no further payments to the Defendant.

On a date unknown, the Defendant re-mortgaged the suit land to Finance Trust Bank which bought off the initial bank's mortgage, implying that she did not collect and keep the suit land's certificate of title, but instead was taken in possession of Finance Trust Bank.

On March 14, 2014, the Defendant, through her lawyers, communicated to the Plaintiff that she had rescinded the contract alleging breach by the latter, and that she intended to refund the money she had so far received, less expenses arising out of the alleged breach.

It is alleged in this suit by the Plaintiff that the Defendant breached the said agreement by refusing to receive her balance of Ushs. 40,000,000/- *(forty million shillings)* which is due and outstanding despite several reminders to acknowledge receipt of the same. It is on this ground that he seeks the aforesaid reliefs.

At scheduling, both parties agreed to the following issues:

Issue No. 1:

Whether the Defendant is entitled to refund the Plaintiff's deposit of Ushs.72, 500,000/- after she terminated the sale agreement of the suit land.

Issue No.2:

If so, whether the Plaintiff is entitled to any other remedies.

At the trial, each party produced one witness to prove their respective allegations, that is; James Ojwiya (PW1) and Betty Mutaisa (DW1).

Counsel for both parties endeavoured to file written submissions as directed by Court, which I shall consider, but not reproduce. I note that Counsel raised different issues in their respective submissions that is; for Counsel for the Plaintiff:

1. Whether there is breach of land sale agreement.
2. And if so, what are the remedies.

And for Counsel for the Defendant;

1. Whether the sale agreement is valid and enforceable.
2. Whether there was breach of the sale agreement.
3. What are the remedies available to the parties.

In his argument to issue one above, Counsel for the Defendant majorly relied on the concept of matrimonial property and spousal consent. This was neither part of the pleadings nor raised at scheduling; and as argued by the Plaintiff's Counsel in his rejoinder, the same constitutes a departure from pleadings. Additionally, I believe that the Defendant has no *locus* to raise such an issue except her husband.

For those reasons, the said issue and arguments raised thereof by the Defendant's Counsel shall be disregarded.

Basing on the above said, I observe that the proper decision of Court cannot be based on the issues raised at the scheduling, but on those raised in the submissions. I therefore do act pursuant to O.15 r1(5) of the Civil Procedure Rules and amend the scheduled issues to the following;

1. Whether the Plaintiff is entitled to any remedies.

Resolution

Issue No. 1:

Whether the Defendant breached the sale agreement with the Plaintiff.

There is no other way through which this can be resolved save for applying the terms of the agreement between the parties. Counsel for the Plaintiff ably referred to the principles for interpretation of written agreements. Among these, is the principle that a contract shall be interpreted according to the common intention of the parties as expressed in the proposition that;

> *People who freely negotiate and conclude a contract should be held to their bargain rather that the Judges, should not intervene by substituting each, according to his individual sense of fairness, terms which are contrary to those which the parties have agreed upon themselves; see* ***Stockloser versus Johnson [1954]1 ALL ER 640****.*

I also understand that *'the object sought to be achieved in construing any contract...is to ascertain what were the major intention of the parties as to their legal obligations each assumed by the contractual words in which they sought to express them'.* **Pioneer Shipping Ltd versus B.T.P Tioxide Ltd (1982) .AC724**. *It is trite that;*

> *"when one speaks of the intention of the parties to the contract, one speaks objectively, the parties cannot themselves give evidence of what is to be taken as intention which was and what must be ascertained is what is to be taken as intention which reasonable people would have had, if placed in the situation of the parties".*

It is a term of the agreement that the Plaintiff was to pay the Defendant a second instalment of Ushs.41,500,000/- "(*within September 2013, but not later than 30th September 2013"*. As I have already alluded, the Plaintiff did not pay the second instalment on time. That notwithstanding, the Defendant accepted a late payment of

Ushs.14,000,000/-, being a partial payment of the shs. 41,500,000/- in the addendum dated 7th October 2013.

In the effect, this constituted a waiver by the Defendant of her right claim payment 'within September 2013, but not later than 30th September 2013.

It can also be rightly said that in the addendum, the parties varied clause 2(b) of the original agreement in that; their intention was that the payment of all Ushs.41,500,000/- was to be made by the Plaintiff to the Defendant by the end of October 2013. I agree with the Plaintiff's Counsel that the Defendant would be *estopped* from claiming at that moment, that the Plaintiff was in breach of the contract. Counsel ably referred me to Section 114 of the Evidence Act Cap 6 and the case of ***Pan African Insurance Company (U) Ltd versus International Air Transport Association; H.C.C.S.No. 667 of 2003***.

The said, is undisputed that by the end of October 2003, the Plaintiff had only paid Ushs.34,000,000/- to the Defendant. It was admitted by the Defendant upon being referred to DEXH2 dated 22nd April 2013, that her unpaid arrears were Ushs.5,856,521/- (*shillings five million, eight hundred fifty six, five twenty one*). This implies that by the end of October, her arrears with the bank were slightly higher than that, so she could ably settle the loan money out of the money on the second instalment and retain some.

Whereas the parties' intention was that the 2nd instalment was to be used by the Defendant to '*settle the loan money with the bank and collect the certificate of title from it and keep it with her lawyers till the Plaintiff shall make the final payment",* it was not intended that all the instalments be used to settle the loan.

It was therefore up to the Defendant to determine what payment from the Defendant was to be appropriated for settlement of the loan. For the Plaintiff, the obligation

was to pay the whole Ushs.41, 500,000/- by the end of October 2013. Having not completed payment thereof, my view is that he should not allowed to complain of how the Defendant used the initial partial payments? Who knows if the Defendant intended to use the unpaid balance of Ushs.7, 500,000/- *(seven million, five hundred thousand shillings).*

Further, it was the understanding of the parties, under clause2(c) of the original agreement that the 3rd instalment would be paid by the Plaintiff "in December 2013 but not later than 6th January, 2014." This term was bolstered by the addendum to the original agreement. As I now know, there is no evidence from the Plaintiff of compliance with this term. In this testimony, the Plaintiff averred that the Defendant refused to receiver her outstanding balance but, this is doubtful. I say so because there is no evidence showing any of his attempts to pay any outstanding balances. He ably testified that he made the last payment of Ushs.20, 000, 000/- on the Plaintiffs bank account, no attempt was even made to deposit the balance on it.

In his submissions, the Plaintiff's Counsel defined breach of contract as "*the breaking of the obligations which a contract imposes which confers a right of action for damages on the injured party". See* ***Ronald Kasibante vs Shell (U) Ltd H.C.C.S.No.542 of 2006*****.**

In view of the definition, I am constrained to find that the failure by the Plaintiff to pay Ushs.41, 500,000/- (*forty one million, five hundred thousand shillings)* by the end of October 2013, constituted a breakage of the obligation stipulated in the addendum. The same is true with clause 2(c) of the original agreement. Premised on these findings, I decline to find the Defendant in breach of a contact with the Plaintiff. In the result, the first issue is found in the negative.

Issue 2:

Whether the Plaintiff is entitled to any remedies.

Having found issue one in the negative, the Plaintiff is in principle, not entitled to any consequential reliefs arising out of breach of contract.

That notwithstanding, the Plaintiff alternatively sought for a refund of Ushs.72, 500,000/- from the Defendant as money had and received. According to Court in ***Shenoi & An versus Maximou [2005] EA.280*****,** while referring to a passage in **Halsbury's law 235 para 408:-**

The principle is that where one person has received money from another under circumstances such as in this case, he is regarded in law as having received it to the use of that other. The law implies a promise on his part or imposes an obligation upon him to make payment to the person entitled. In default the rightful owner may maintain an action for money had and received to his use.

The aforesaid proposition is based on the principle of unjust enrichment. As set out in the India case of ***Mahabir Kishore & Madhya Pradesh 1990 AIR 313*****,** the requirements are:

> "*First that the Defendant has been enriched by the receipt of a benefit, secondly that this enrichment is at the expense of the Plaintiff and thirdly that the retention of the enrichment is unjust."*

This principle has long been adopted and accepted in Uganda. In ***Dr. James Kasugyera Tumwine & Anor versus Sir. Willie Magara & Anor HCCS No.576 of 2004*****,** *Bamwine J.* (*as he then was*) observed that:

> *"Money which is paid to one person which rightfully belongs to another, as where money paid by A to B on consideration which has wholly failed, is said to be money had and received by 'B' to the use of 'A'. It is recoverable by action by 'A'. The paying of 'A' to 'B'....becomes a quasi-contract, an obligation not created by, but similar to that created by a contract and is independent of the consent of the person bound..."*

In this case, it is undisputed that the Defendant received Ushs.72, 500,000/- from the Plaintiff. It is clear that this is at the Plaintiff's expense since no consideration was furnished by the Defendant in return. As such, it would be unjust for the Defendant to receive the said amount. Consequently, I hereby find that the Plaintiff is entitled to a refund of Ushs.72,500,000/- (*seventy two million, five hundred thousand shillings)* from the Defendant, as money had and received.

Similarly, the Plaintiff sought for interest on the refund. It is trite that a Plaintiff who has been wrongfully deprived of his or her money is entitled to interest. The basis of award of interest is that the Defendant has taken and used the Plaintiff's money and benefited. Consequently, they ought to compensate the Plaintiff for the money. See ***Sietco versus Noble Builders (U) Ltd S.C.C.A No.31 of 1995***.

It is now about six years since the Defendant detained the Plaintiff's money. Despite communicating her rescission of the agreement to the Plaintiff on the 14th of March, 2014, the Defendant have never attempted to refund the Plaintiffs money. It is natural to believe that she had benefited from the use of the said money and as such, she ought to compensate the Plaintiff.

Under S.26(2) of the Civil Procedure Act, Court has powers to award interest if not agreed upon." The principle has been confirmed by decided cases where it is stated that;

> "*Where no interest rate is provided, the rate is fixed at the discretion of the trial judge."*

See ***Crescent Transportation Co. Ltd versus Bin Technical Services Ltd C.A.C.A No.25 of 2000*.**

In the present case, Court will exercise it discretion to award interest on the refund, taking into account that this was a commercial transaction and that the defendant has held the Plaintiff's money since 2014 when the agreement was rescinded.

Accordingly, interest is awarded at the Court rate of 18% per annum from the date of filing the suit till payment in full.

Costs:

Under S.27(2) of the Civil Procedure Act, a successful party is entitled to costs unless for good cause, Court orders otherwise.
See also the case of ***James Mbabazi & anor versus Matco Stores Ltd & Anor; CA Civil Reference No.15 of 2004***.

In this case, the Plaintiff, having succeeded only at his alternative action, I order that the defendant shall cater for50% of the costs of this suit.

I so order.

.....

Henry I. Kawesa

JUDGE

1/02/2021

1/02/2021

Namuddu Florence for the Plaintiff present.

Defendant absent.

Plaintiff present.

Namuddu: The matter is for Judgment.

Court:

Judgment read in the presence of the above mentioned parties.

Sgd:

Elias Kakooza

Ag. Deputy Registrar

01/02/2021