

UGANDA / JUDGMENT

African Forward Christian Ministries v Kizito and Another (High Court Civil Suit 1128 of 2019) [2023] UGHCLD 186 (29 June 2023)

[2023] UGHCLD 186

COURT

HC: Land Division (Uganda)

BEFORE

Asiimwe, J

CASE / FILE NUMBER

High Court Civil Suit 1128 of 2019

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

HIGH COURT CIVIL SUIT NO. 1128 OF 2019

I. AFRICAN FORWARD

CHRISTIAN MINISTRIES PLAINTIFF

VERSUS

1. JOSEPH KIZITO MUBIRU

2. DFCU BANK:..... RESPONDENTS

BEFORE: HON: JUSTICE TADEO ASIIMWE**JUDGMENT**

The plaintiff instituted this suit against the defendants for a permanent injunction, an order of specific performance, vacant possession, declaration that the plaintiff is the lawful/rightful owner of the suit land, mesne profits, an order directing the 1st defendant to account for rent collected from the suit premises from the date of payment of the second installment till vacant possession, an order directing the 2nd defendant to avail the mortgage account of the 1st defendant for the ^p use of

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auditing/reconciliation of the plaintiffs mortgage payments and costs of the suit.

The plaintiff's case is that the plaintiff entered in to an agreement of sale/purchase of property with the 1st defendant. That the plaintiffs paid all the purchase price but the 1st defendant has unjustifiably refused to specifically perform the contract of sale of the subject property. That the 1st defendant has no right to rescind the contract or repudiate the same,

on the other hand, the 1st defendant denied the allegations of the plaintiff and raised a counterclaim. That the sale agreement executed between the parties was not authorized by the 1st defendant as the vendor, Mr. Ssebana Kizito did not have powers of attorney empowering him to sale the said land and that neither was the late Ssebana Kizito a successor in title in respect to the suit land. That the plaintiff breached the terms of the agreement by failing to timely settle the outstanding loan, including the principal and interest there on. That as a consequence the agreement should be considered rescinded and repudiated.

The defendant raised a counter claim stating that the plaintiff is in breach of the contract for wrongfully failing to pay US\$ 144,500 to the 2nd defendant. That the defendant is entitled to the cost of borrowing to fund the loss until payment, basing the cost on the compounded interest of financing the loss or alternatively on the reasonable compounded recovery of interest earned. In conclusion he sought for special damages,

exemplary damages, general damages, punitive damages and that in the alternative the defendant refunds a sum of UGX shs. 433,000,000/- and 185,815,000 being the amount paid by the plaintiff under the agreement.

At scheduling the parties agreed on the following issues to be resolved.

- 1. Whether the plaintiffs sale agreement in respect of the subject property is valid.
- 2. whether there was a contract executed between the plaintiff and the 1st defendant.
- 3. Whether there was specific performance of the contract.
- 4. Whether the parties are entitled to the remedies sought.

At trial the plaintiff was represented by counser Namaweje Sylvia Ebitu, the 1st defendant by counsel Mugenyi yese while the 2nd defendant was represented by counsel Kirabo Sharon. All counsel filled written submissions which I will consider in this judgement.

THE LAW

The general rule is that he or she who asserts must prove and the burden of proof therefore rests on the person who must fail if no evidence at all is given on either side. The standard of proof required to be met by either party seeking to discharge the legal burden of proof is on a balance of probabilities.

In *Miller V Minisrer of pensions* Itg4TlZ ALL E R372 ord Denning stated:

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"That the degree is well settled. It must carry o reasonable degree of probability but not too high as is required in a criminal case. If the evidence is such that the tribunal can say, we think it more probable than not, the burden of proof is discharged but if the probabilities are equal, it is not. "

It is also the position of the Law that the evidential burden does not shift to the defendont unless there is cogent and credible evidence produced on the issue.for determination.

In a bid to proof their case, the plaintiffs red evidence of 4 witnesses while the defendants called 2 witnesses closed their cases

PW1 testified that the plaintiff company purchased the suit property form the defendant through his father John Ssebana Kizito who signed the agreement on his behalf since the 1stdefendant was abroad. That upon purchase, the plaintiffs first instalment was 433,000,000/- and the balance of 185,000,000/- was to be paid to late Ssebana Kizito the 1str defendant's father. That the 1st defendant received Shs 136,000,000/- million through his account at DFCU Bank and the final balance of 481,000,000/- million was paid to the Ftdefendant through his bank account. That after 3 months, the 1str defendant refused to give vacant possession of the property hence this case. upon cross-examination, she confirmed full payment of the purchase price and denied having any agreement with the 2nd defendant bank.

PW2 Annet Namutebi Musooka testified that the suit property was purchased from the 1st defendant and an agreement was written which was signed on his behalf by his father ssebana Kizito and confirmed his signature on the agreement. She also confirmed that the plaintiff paid all the consideration to the 1str defendant and his father Ssebana Kizito as per the agreement. But the 1st defendant refused to hand over the properly to the plaintiff company.

PW3 Richard Kawesa testifred and corroborated the evidence of pwl and PW2 to the effect that the property was bought from both Kizito Ssebana and the 1st defendant and payment was to be made in instalments although the lawyer included ramp-sum payment in the agreement. That accordingly, all the amount was paid in full.

upon cross-examination, he confirmed that the 1st defendant disagreed on the outstanding balance for the mortgage clearance and stopped the plaintiff from making any further payments when there was a small outstanding amount of 5,000 dollars. That however the plaintiff paid the last instalment in November 2019. Upon cross-examination by the 1st defendant, he confirmed that the 1st defendant bank was not a party to the sale agreement and the plaintiff merely made payments to the bank on behalf of the 1st defendant. /r

PW4, Kakembo Livingstone testified that and added that the sale agreement was signed through a lawyer and Ssebana Kizito signed on behalf of the 1st defendant.

on the other hand, DW1 testified that he holds two accounts with DFCU Bank a shilling account and a dollar account and that only a dollar account received a payment from the plaintiff. That 136,965,000/= was payment for 2nd instalment which had delayed. That the agreement was signed by his late father which were brought to his attention and consented to it and went ahead to receive money. That he came to Uganda to meet the buyers, (the plaintiff). He denied having refused the plaintiff from effecting monthly payments since they were supposed to pay the outstanding balance at once in a lump-sum. That however, the plaintiff paid monthly payments below the agreed mortgage payment of US 2,900 dollars with effect from 2013. That the plaintiffs made late payment and caused the loan repayment to be in arrears as they had stopped payment in 2019 and he continued to pay the loan obligation personally from that time. He stated the outstanding loan obligation to be 14,927 US Dollars. Upon cross-examination, he confirmed that the suit property is commercial and he receives rent of shs 4,000,000/= per month which he uses to renovate the property.

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Upon court questions, he confirmed that consideration for the suit property was shs 1,100,000,000/- one billion, one hundred million but the plaintiff had so far paid shs 922,000,000/- million.

DW2 testified that originally the suit land was in the names of John Ssebana Kizito but it is the 2nd defendant who effected transfer of title to the 1st defendant in a preparation of a loan facility and that the mortgage is still running.

Upon further cross-examination he confirmed that there is a loan reschedule for the loan to run from 2020 to 2024. That the outstanding balance is 14647 dollars as principle only.

RESSOLUTION.

Whereas 4 issues were framed by the parties, the defendant conceded to the first two issues which are resolved in the affirmative. I shall proceed to resolve the last 2 issues starting with issue 3.

3. Whether there was specific performance of the contract.

It was the Plaintiff's undisputed evidence that on the 1st of August 2016 he entered into an agreement for the purchase of the suit property with the Defendant. A copy of this sale agreement was adduced in evidence as exhibit PE4.

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

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6. PURCHASE PRICE the purchase price is UGX 1,100,000,000/ (Uganda shillings one Billion one hundred Million only).

7. TERMS OF PAYMENT; the above purchase price shall be paid as follows:-

A) UGX 433,000,000/ has been paid in cash in one lump sum upon signing of his agreement receipt of which the vendor hereby acknowledges by appending his signature hereto and no other receipt will be necessary.

b) UGX 185,815,000/ shall be paid in one month directly to the seller either in cash or any other mode that shall be agreed upon.

c) That the purchaser shall pay UGX 481,185,000/ directly in to the seller's account held in DFCU Bank, Jinja road bank until all the mortgages are fully paid off

B the seller shall hand over vacant possession of the property to the purchaser within a period of 3 months immediately following the completion of the 2nd installment as per clause 7(b)

9 the original owners/duplicate certificate of title to the property together with documents of release of the mortgage shall be secured from the bank as soon as the purchaser completes the payment of the 3rd installment and the same shall be handed over to the purchaser as soon as practicable.

From the evidence on record it is not in dispute that the 1st and 2nd installments of the purchase price were paid. In my opinion it is immaterial whether or not the 2nd installments were paid out of time as the payments were never rejected by the seller which would ideally amount to ratification.

It is also clear that the 1st defendant at the completion of the 2nd installment by plaintiff did not honor clause 8 of PE4 by handing over vacant possession claiming unpaid balance on the mortgage.

secondly, as per clause 9, the original owners/duplicate certificate of title to the property together with documents of release of the mortgage were

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to be secured from the bank as soon as the purchaser completes the payment of the 3rd installment and the same shall be handed over to the purchaser as soon as practicable.

What is clear is that although PE4 seemed not to have stipulated the time line for the 3'd installment, it was very clear that it had to be paid as an instalment and not installments. Ideally the 3'd installment should have been paid in one single installment subject to the timelines of the mortgage agreement. However, PE4 was not tied to the timelines of the mortgage deed and the I't defendant endorsed small installments and therefore cannot turn around to claim otherwise. In addition, an acknowledgement of receipt PE6 of money cannot be interpreted as an addendum to vary the timelines and terms of the PE4. From the evidence on record, it is clear that by I 9th of October 2019 as per DEX2 I the outstanding loan obligation was Usd 55,445.18. The defendant indicated in DEX15 that the outstanding loan was usD 53,445 .l8by 2311012023. There is no evidence on record that the plaintiffs paid any money after October 2019. What is on record as per evidence of Dw2 and DEX21, there was a loan reschedule with the l sst defendant where in the I't defendant has paid the balance of the loan and the outstanding balance as per O4lO4/2023, was usd 14,647.03.

I also wish to note that by the plaintiff choosing to pay in installments the plaintiff assumed an obligation to pay any interest that accrued therein. This would make it immaterial if the interest would surpass the contract sum.

However, since there was no time limit as to when the money was to be paid and avoid foreclosure, the plaintiff must first clear the outstanding amount and interest thereon to claim their rights under the agreement.

From the evidence on record, it is clear that the I't defendant frustrated the payment of the outstanding balance by asking the plaintiff not to pay any further monies and wait for a refund from the 1.t defendant. The stoppage arouse out of the disagreement about the outstanding balance between the parties. The totality of the above evidence shows that the plaintiff substantially performed part of the obligation under the agreement PE4 thal the l,t defendant failed to perform his obligation.

My understanding is that the first defendant has no interest in the suit property whatever. His actions of taking over the loan payment, rescheduling it without the knowledge of the plaintiffs was /is in bad faith. Instead he perpetrated the alleged breach.

on the balance of probabilities, the plaintiff has proved its case and as such the counterclaim of the I't defendant based on breach by the plaintiff has not been proved and the same hereby fails.

I therefore find that there was no specific performance by the l,tdefendant therefore this issue is answered in the negative.

ISSUE 4' WHETHER THERE ARE AVAILABLE TO THE PARTIES. ANY REMEDIES**A declaration that the plaintiff is the rawfur/rightful owner of the suit land.**

The plaintiff having proved their case against the I'r defendant, they are therefore declared the rightful owner of the suit land on condition that the entire outstanding loan obligation is cleared.

An order of specific performance.

The plaintiff having proved to rhe substantially complied with the cond satisfaction of court that thev have itions set in the sale agreement, they specific performance which is hereb are entitled to an order of I

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Vacant possession.

From the evidence on record, the 1st defendant is still in possession and in use of the suit property. For the plaintiff to benefit from what they have purchased, they are entitled to an order of vacant possession which is hereby granted to be effected in 30 days from the date of this judgement.

A permanent injunction.

The plaintiff having succeeded in their case, they are entitled to a prayer of permanent injunction which is hereby granted.

Order of payment of mesne profits.

Mesne profits are normally granted where there have been specifically pleaded and proved. In this case the plaintiff claimed for mensne profits. The defendant admitted in his evidence that he has been collecting shs \$4,000,000/\$ = million per month from the suit property. The plaintiff's evidence is that they were entitled to vacant possession in 2019 when they paid the last instalment. However, evidence on record indicates that the loan obligation with the 2nd defendant still subsists and as such the property could not be handed over to the plaintiff in 2019 when the parties disagreed on the loan balance.

Therefore, the plaintiff is not entitled to mesne profits.

An order directing the 2nd defendant to avail the mortgage account of the 1st defendant for the purpose of auditing/reconciliation of the plaintiff's mortgage payments.

The evidence on record shows that the 2nd defendant provided the loan account number with the outstanding loan amount of USD 14,647.03 as of 04/04/2023 as indicated in DEX21. What remains is payment of the outstanding balance.

Accordingly, the plaintiff is directed to pay the entire outstanding balance to enable them get the land title from the 2nd defendant bank. In the same spirit, the 2^d defendant bank is hereby directed to handover the said land title in the suit land to the plaintiff upon completion of the loan payment above.

Costs of the suit.

Its trite law that costs follow the event and the successful party is entitled to costs.

Section 27 of the Civil Procedure Act states;

„Provided that the costs of any action, cause or other matter shall follow the event unless the Court or the judge shall for good reason otherwise order".

The Plaintiff being a successful party is entitled to the costs of the suit which is granted.

In conclusion, the counterclaim fails and is hereby dismissed, the plaintiff's case succeeds with the following orders;

- 1. A declaration that the plaintiff is the lawful/rightful owner of the suit land.
- 2. An order of specific performance is granted.
- 3. Vacant possession is granted.
- 4. A permanent injunction is granted.
- 5. Mesne profits not granted.

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- 6. An order directing the plaintiff to pay all the outstanding loan balance to the 2^d defendant.
- 7. An order directing the 2nd defendant to hand over the title in the suit property to the plaintiff on completion of payment.
- 8. Costs of the suit are in the 1st defendant.

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