

UGANDA / JUDGMENT

Birungi v Kibuuka (HCCS 514 of 2020) [2023] UGHCLD 178 (30 June 2023)

[2023] UGHCLD 178

COURT

HC: Land Division (Uganda)

BEFORE

Basaza, J

CASE / FILE NUMBER

HCCS 514 of 2020

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[LAND DIVISION]

HCCS. NO. 0514 OF 2020

BIRUNGI MASESANE (FROMERLY BIRUNGI DEUS)

PLAINTIFF

$\$V\$$

ANDREW BENON KIBUUKA

DEFENDANT

BEFORE: HON. LADY JUSTICE P. BASAZA - WASSWA

JUDGMENT

Representation:

Mr. Shwekyerera Philmon for the Plaintiff.

None for the Defendant.

Introduction:

The Plaintiff; Mr. Birungi brought the present suit by ordinary plaint against Mr. [1] Kibuuka, in an action for alleged breach of contract in respect of land formerly comprised in Busiro Block 511 Plot 16 at Kamunyi Mako -Kasanje. (Hereinafter referred to as: 'the suit land').

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$\mathbf{1}$

- In his suit, Mr. Birungi contends that Mr. Kibuuka entered into a sale agreement [2] with him on April 10, 2015 (PEX. 1) to sale to him 3.5 acres out of the suit land. That Mr. Kibuuka breached the contract and failed to carry out a sub-division to demarcate off the 3.5 acres, and failed to avail to him the certificate of title and transfer forms. He seeks **inter alia**; for a Declaration that Mr. Kibuuka breached the contract, and for an order for recovery of the said 3.5 acres. In the alternative, he seeks for an order for a refund of the money that he allegedly paid to Mr. Kibuuka, and for the costs of the suit.
- [3] The Defendant; Mr. Kibuuka was served with court process more than once, but did not file a defence. Service of court process upon him was also done, with the leave of Court, by substituted service in the New Vision newspaper of April 29, 2022 at page 45. The hearing of this suit thus proceeded **ex parte** of Mr. Kibuuka.

Issues:

- The issues for determination are; [4]
- Whether the Defendant breached the contract of sale that he entered [1.] into with the Plaintiff? And if so;
- Whether the Plaintiff is entitled to the remedies he seeks? [2.]

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Determination of issues:**Issues Nos. 1 & 2 (jointly):**

Whether the Defendant breached the contract of sale that he entered into with the Plaintiff? And if so; whether the Plaintiff is entitled to the remedies he seeks?

- The sole witness in this case was the Plaintiff; Mr. Birungi (PW1). [5] The full testimony of Mr. Birungi (PW1) is on the court record, and only the relevant portions of his testimony have been referred to in this Judgment.

- [6] PW1 testified that vide a sale agreement dated April 10, 2015 (PEX. 1), he bought, and Mr. Kibuuka sold to him 3.5 acres out of the suit land. That the suit land at the time of sale was a 200 acre plain, empty piece of undeveloped land. That they agreed in the sale agreement that they would have a lawyer draft a main agreement before the end of April, 2015. That out of the purchase price of UGX. 49,000,000/=, PW1 paid a total of UGX. 22,000,000/= to Mr. Kibuuka and his agent: a one Mr. Nsubuga Christopher. That PW1 paid the said sum in cash, in installments of UGX. 6,500,000/=, UGX. 13,500,000/= and UGX. 2,000,000/= on 10/04/2015, 02/05/2015 and on 27/03/2016.
- PW1 further testified that after April 2016, Mr. Kibuuka made himself inaccessible [7] until his agent Mr. Nsubuga informed PW1 that the price of the 3.5 acre piece out of the suit land had since changed and was now at UGX. 80,000,000/= per acre.

Accompanying 30/6.

[3]

- PW1 also stated that Mr. Kibuuka has since sub-divided the suit land into several [8] plots numbering nearly 50 plots as shown in the area schedule marked PEX. 5 and that the land has since changed hands and is in other peoples' names.
- That Mr. Kibuuka failed to perform his part of the agreement, and changed the [9] purchase price, and refused to execute the main agreement before a lawyer. That Mr. Kibuuka also refused the proposals made to him by PW1 that he pays the remaining balance of UGX. 27,000,000/= upon Mr. Kibuuka availing to him a certificate of title and transfer forms, or in the alternative, that Mr. Kibuuka refunds to him, at current market value, the money he paid to him.
- He (PW1) stated that he has been denied use of the money he paid to Mr. [10] Kibuuka, and has no land.

Submissions of Counsel on issues Nos. 1 & 2:

It was only Mr. Shwekyerera; learned Counsel for the Plaintiff, who filed written [11] submissions. He submitted simply that Mr. Kibuuka breached the sale agreement (PEX 1), and prayed that issue No. 1 be answered in the affirmative. He argued that since the area schedule (PEX 5) shows that Mr. Kibuuka is still the registered proprietor of the residue by balance measuring 32. 38 Hectares (approximately 80 acres), a piece of 3.5 acres can be demarcated off that plot and transferred into the names of Mr. Birungi, upon the latter depositing in court the balance of UGX. 27,000,000/=. That in the alternative, Mr. Kibuuka be

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[4]

ordered to refund, at the current market value of the said 3.5 acres, the deposit of UGX. 22,000,000/= that Mr. Birungi paid to him. Learned Counsel suggested that the current market value of the 3.5 acres at UGX. 80,000,000/= per acre, is UGX. 125,680,000/ \$=\$

Learned Counsel also prayed that Mr. Birungi be awarded general damages of \$[12]\$ UGX. 18,000,000/=, with interest thereon at the rate of 20% per annum, plus the costs of the suit.

Analysis by this Court:

- I have very carefully looked at all the documents relied on by Mr. Birungi for his \$[13]\$ These include inter alia; the sale agreement (PEX 1), the Area stated claims. schedule (PEX 5), a mutation form (PEX 8), and the certificate of title to the suit land (PEX 7).
- While I am persuaded that Mr. Birungi paid to Mr. Kibuuka the money he claims \$[14]\$ to have paid to him totaling to UGX. 22,000,000/=, as shown by the acknowledgements in the sale agreement (PEX 1) and in the deed of acknowledgment dated 02/05/2015 (PEX 3), I am not persuaded that there was any breach of contract by Mr. Kibuuka.
- Breach of contract is defined as: \$[15]\$

'A violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or interfering with another party's performance. A breach may be one by non-performance,

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or by repudiation, or by both. Each gives rise to a claim for damages, and may give rise to other remedies'.

Per Black's Law Dictionary¹

- Contrary to the assertion by Mr. Birungi that Mr. Kibuuka did not demarcate off \$[16]\$ the alleged 3.5 acres, the evidence shows that by the time Mr. Birungi paid UGX. 22,000,000/= to Mr. Kibuuka, the latter had already mutated off, and created several plots from the suit land. See the Area schedule (PEX 5) and the mutation form (PEX 6).
- As it is, it is therefore not clear to this court what really transpired between the \$[17]\$ The picture painted to Court, by the documents laid out, suggest parties. varying scenarios. The sale agreement (PEX 1) is ambiguous and vague. It is not clear what was agreed as the time frame for the payment of the purchase price by Mr. Birungi to Mr. Kibuuka? PEX 3 shows that Mr. Birungi paid the last installment of UGX. 2, 000,000/= on March 3, 2016 almost a year after he paid the previous installment of UGX. 13,500,000/= on May 2, 2015. Could it be that the said installments were paid late? Why did Mr. Birungi pay the second installment of UGX. 13,500,000/= against a loose handwritten deed of acknowledgement (PEX 3), instead of doing so against; what the parties had described in their sale agreement as: 'the main agreement to be drafted by a lawyer at the end of April 2015'?

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\$19\$ th ed. at page 213.

- I find that Mr. Birungi has failed to prove that Mr. Kibuuka failed to perform any \$[18]\$ promise in the said sale agreement. He has failed to prove breach of the contract of sale by Mr. Kibuuka.
- Equally of concern, up until now, Mr. Birungi has not completed payment of the \$[19]\$ purchase price. He has not demonstrated to this court that his obligation to pay the outstanding balance of UGX. 27,000,000/= was contingent upon any condition to be fulfilled by Mr. Kibuuka. I do not see any such condition stipulated in any of the documents that he produced, or otherwise.
- The law requires that he who alleges or asserts, must prove his / her allegations. [20] He / she must prove the existence of an alleged fact. (Sec. \$101 - 103\$ of the Evidence Act²). In this case, Mr. Birungi has failed to prove his allegations against Mr. Kibuuka. I thus hold issue No. 1 in the negative.
- \$[21]\$ I now turn to address the second issue on remedies;
- \$[22]\$ Flowing from the outcome of Issue No. 1, it follows that Mr. Birungi is not entitled to the remedies he seeks, save for his alternative prayer that he be refunded the sums he paid to Mr. Kibuuka.

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\$\rm ^2\$ Cap. 6 of the Laws of Uganda.

- I reject the proposition by Mr. Shwekyerera that Mr. Kibuuka be ordered to \$[23]\$ refund to Mr. Birungi the said deposit at 'a market value for the 3.5 acres, that he put at \$UGX.\$ 125,680,000/='.
- The correct approach is to order that a refund is made with interest thereon. \$[24]\$ Rather than the suggested criteria that is without correct basis. As it is, this Court is unable to ascertain whether as of now, the value of an acre in the area in which the suit land is situate, is at UGX. 80,000,000/=. And even if Court were able to establish the correct value, I have taken it into account that the purchase of the said 3.5 acres had not yet been crystallized between the parties, and therefore, that proposition would still be inappropriate.

Decision of Court:

- In the final result, having concluded as I have under issues Nos. 1 & 2, it follows \$[25]\$ that the Plaintiff's suit against the Defendant largely fails. I accordingly Order and Direct as follows;

- The Defendant: Mr. Andrew Benon Kibuuka is ordered to refund to the \$1.\$ Plaintiff Mr. Birungi Masesane (Formerly Deus), the sum of UGX. 22,000,000/= (Twenty - Two Million) paid to him in respect of the suit land formerly comprised in Busiro Block 511 Plot 16 at Kamunyi Mako -Kasanje.

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Mr. Andrew Benon Kibuuka shall, within forty – five (45) days from the \$2.\$ date of this Judgment, refund to Mr. Birungi the said sum of UGX. 22,000,000/= stipulated under clause 1 above, with interest thereon at the rate of 18% per annum, calculated from March 27, 2016³, until the date payment is made in full.

(Section 26 (2) of the Civil Procedure Act⁴, applied).

\$3.\$ The Plaintiff is awarded 40% of the Costs of this suit against the Defendant

I so Order,

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P. BASAZA - WASSWA JUDGE

June 30, 2023

Judgment delivered to the parties via email and by uploading the same on the Judiciary ECCMIS system.

Sent to: MasencoinvestmentsLtd@gmail.com, andrewbennon@gmail.com

³ March 27, 2016 is the date the last of the three instalments totaling to UGX. 22M was paid to Mr. Andrew Benon Kibuuka by Mr. Birungi. ⁴ Cap 71 of the Laws of Uganda

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