

UGANDA / JUDGMENT

George Mwa Larum v Zaituna Kawuma

[1991] UGSC 1 (9 September 1991)

[1991] UGSC 1

COURT

Supreme Court of Uganda

BEFORE

Wambuzi, CJ

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OF
UGANDA OF UGANDA 9/9/91. IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: WAMBUZI, C. J, MANYINDO, D. C. J, SEATON, J. S. C.

CIVIL APPEAL NO. 3 OF 1991

BETWEEN

GEORGE MWA LARUM ::::::::::: APPELLANT

AND

ZAITUNA KAWUMA

EXAMPLE 11: :::::::::::

The Am Sealon JSC

(Appeal from the decision of the High Court of Uganda at Kampala (Mr. Justice Kasule Kalanda)
dated the 17th December, 1990)

JUDGEMENT OF WAMBUZI, C. J

I have read in draft the judgment of Seaton, J. S. C. In my view the appeal must fail. I agree that the issue of an inchoate contract, subject the substance of complaint in ground of appeal 1(b), was raised in the pleadings of the plaintiff, but it is not possible to say if the plaintiff relied on this particular pleading at the trial. There were no issues drawn at the hearing. No evidence was led on the issue and the issue does not appear to have been prosecuted by Counsel for the plaintiff in his submissions at the close of the hearing. Counsel is recorded as saying on the three months;

> "If one looks at Exh. Pl, the agreement, where is stated that if the sale could not take place within 3 months it would fail, thus Kakaire's going to Gulu again.

The plaintiff and his wife gave similar account - without exaggerations i.e the use of pistol plaintiff said it was someone else not Kakaire who pulled out the pistol."

Counsel did not say that the contract was avoided for non-compliance with Clause 8(B) of the Sale Agreement. The matter was raised merely to explain Kakaire's going to Gulu to ensure that the deal was concluded within 3 months. Counsel for the defendant did not allude to the matter at all. In these circumstances it is not surprising that the learned trial Judge in framing his issues did not include the matter of an inchoate contract as an issue as it was not even referred to by either Counsel.

Be that as it may, the plaintiff was the seller and covenant 2(f) in the Leasehold was against the plaintiff. He was the person to get the consent. His Counsel, Obol Ochola, made the initial application for consent to the transfer dated 5th July, 1976 which was rejected. This application was made within the 3 months as stipulated in the Sale Agreement. Another application for consent was made by the same firm of Advocates on a date I cannot ascertain but consent was given on 23rd October, 1976 nearly $\frac{1}{2}$ months after the expiration of the initial 3 months period. On the 19th April, 1977 the plaintiff signed the Instrument of Transfer. Although there is no direct evidence that the 3 months period was formally extended, a court directing its mind to the law and evidence could have come to the conclusion that by signing the transfer document the plaintiff was giving effect to the sale agreement and therefore, he waived strict observance of Clause 8(B) of the Sale Agreement or acquiesced in the extension of the period to the

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23rd October, 1976 when consent was granted. In any case absence of consent does not render the contract null and void ab initio as the plaintiff claims but such agreement is inchoate till consent is obtained particularly as any extension of the initial period would depend on the mutual consent of both parties. I would view the absence of consent in this case in the same way as in the cases of *Reginald Ernest Vere Danning vs. David Geoffrey and Another* 1960 EA 755 and *Patterson and Another vs. Kanji* (1956) 23 EACA 106. In my view ground of appeal 1(b) should fail unless it can be established that the signing of the transfer document was under duress.

Grounds of appeal 5, 6 and 7 deal with the issue of whether or not the sale was voluntary. Learned Counsel for the plaintiff submitted in effect that considering the role played by Governor Fadhul of the Northern Province and upon proper assessment of the evidence, the trial court should have found that the property was not freely sold nor a proper price paid there for.

I agree that the learned trial Judge did not deal with or in some ways misdirected himself on some facts but there is apparently independent evidence showing the role of Governor Fadhul of Gulu as well as the Governor of Busoga in Jinja regarding the necessity to establish who owned the suit property. *Isreal Wabwire* (D. W.3), the Executive Secretary Busoga, *Joseph Kyalimpa* (D. W.4), the Executive Secretary Gulu, *Ssesanga* (D. W.6), Town Clerk, Jinja all in one form or

another testified to the necessity to contact the plaintiff to establish ownership of the suit property at the material time.

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Whether or not there was duress must therefore, be resolved on the evidence of the plaintiff and the defendant. The learned trial Judge did not believe the plaintiff's version. The defendant's version is in some measure supported by senior Government Officials whose evidence has not been discredited in anyway. In these circumstances, I cannot say that the learned trial Judge erred in rejecting the plaintiff's version.

In respect of ground of appeal §1(d) regarding the use by the defendant of her maiden names, it is alleged that it was a deliberate attempt to secure and protect the defendant's fraudulent procurement of the suit property. Here again I must point out that although fraud was alleged in the plaint, no particulars of the fraud were given - see paragraphs 11 and 15 of the plaint. From the evidence, however, it would appear that the alleged fraud was the representation by Kakaire to the plaintiff that the house was required by Governor Fadhul.

The defendant gave evidence on this issue. There is evidence that Kakaire was buying various properties in Jinja and was interested in properties belonging to exiles. Kakaire was questioned on this matter and he admitted registering the suit property in the maiden names of the defendant, his wife. I would not regard this per se as evidence of fraud although it is pretty obvious that it could in other circumstances be deceit i.e if he did not intend to part with the property and was putting his wife forward merely as ostensible owner.

One limb of this complaint is in ground of appeal §1(a) which complains of contradictions between the defendant's pleadings, her case as put to the plaintiff and the evidence for the defence. Here again the matter was not canvassed in the lower court and was not made an issue. I can see, however, that some contradictions can be explained

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on/evidence. For example, the defendant denied in her pleadings that Kakaire was her agent in the deal. On the evidence, it appears that Kakaire negotiated the purchase and actually paid the purchase price but had the defendant, his wife, registered as the purchaser. In these circumstances, what was Kakaire an agent or a donor? The defendant's pleadings could certainly have been improved but in the circumstances I cannot say that the other contradictions would not have been explained if the defendant had been cross examined on them.

The learned trial Judge found that there was no duress, coercion or fraud before the sale agreement was signed. He appears to have misdirected himself on those issues after the sale agreement. He did not see the sense of any duress, fraud or coercion after the deal had been concluded. That, however, was not the sole point as according to the sale agreement consent of the head lessor was required either within the initial 3 months or within such extended period as

was mutually agreed between the parties. The learned trial Judge had to decide on the evidence whether the consent was obtained by fraud or duress, force, threats and under influence. I must confess I am unable to see a single thread of evidence to the effect that any fraud, duress, force, threats or under influence were exercised on the head lessor, Jinja Town Council, to give its consent to the transfer.

Be that as it may, the learned trial Judge favoured the defence's version. There is evidence that the defendant had to establish before the authority in Jinja that she purchased the property. I accept that there are unsatisfactory features in this case and some misdirections on the part of the learned trial Judge but I am satisfied that there is evidence on which a court properly directing its mind to the law would find for the defendant.

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In these circumstances I would not interfere with the conclusion reached by the trial court, I would dismiss this appeal.

Given under my hand and Seal of the Court this day of

S. W. W. WAMBUZI
CHIEF JUSTICE

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Prepared on 14 October 2026 · Esheria