

UGANDA / JUDGMENT

Mutange v Afromix Construction Limited and Another (Civil Suit 118 of 2020) [2023] UGHCLD 250 (23 January 2023) [2023] UGHCLD 250

COURT

HC: Land Division (Uganda)

BEFORE

Kaahwa, J

CASE / FILE NUMBER

Civil Suit 118 of 2020

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MUKONO

CIVIL SUIT NO.118 OF 2020

MUTANGE CAINAN::::

VERSUS

1. AFROMIX CONSTRUCTION LTD

2. SAM MPIIMA LUBULWA::::

BEFORE HON. LADY JUSTICE KAAHWA CHRISTINE

JUDGMENT

1. Background of the suit

This suit was brought by the Plaintiff against the Defendants jointly and severally claiming for:

- A declaration that the Defendant's refusal to surrender \$i)\$ the land title for Block 149 Plot 140 (hereinafter the suit land), land situated at Kabembe is breach of contract and is unlawful.

- An order for specific performance directing the Defendants ii) to process the certificate of title in favour of the plaintiff.
- General damages of approximately UGX 15,000,000. iii)
- Costs of the suit \$iv\$
- Any other relief that the court may deem fit. \$v)\$

2. Plaintiffs' Claim

That by an agreement dated 17th day of January 2015, the plaintiff together with his wife Allen Mutange purchased land comprised on Block 149 Plot 140 measuring 34.5 decimals from the defendant at a purchase price of Ug. Shs.25,000,000 (Uganda Shillings Twenty Five Million only).

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That despite payment of the full purchase price and execution of the sale agreement, the Defendants have failed to perform their obligations despite repeated demands.

3. Defendants' Claim.

The defendants admit that the 1st defendant sold the suit land to the plaintiff. That the 2nd defendant is a mere director and therefore not liable. The 1st defendant was delayed or prevented by caveats lodged by Warid Telecom, now Airtel Uganda Ltd on the parent title and that the defendants have now obtained the withdrawal of the caveats and are ready to complete the processing.

4. Hearing of the Matter

The parties filed a joint scheduling memorandum on 27th April 2022. When this matter came up for mention on 29th November 2022 the parties were directed to explore an out of court settlement. The Defendants and their representatives did not turn up on 9th December 2022 when the parties were due to report on the status of the amicable settlement. The matter was then set down for hearing on 9th December 2022, the Defendants were not in court when the matter was called. The Court was then moved to proceed ex parte in accordance with Order 9 rule 27 of the CPR which was allowed. Evidence was led by the Plaintiff and one other witness and the Plaintiff thereafter closed his case. The Court then adjourned for judgement on 24th January 2023.

5. Issues

The following are the issues for determination by this court.

- 1. Whether or not the defendants breached the contract of sale?
- 2. Whether or not the defendants should perform their obligations as per the sale agreement?
- 3. Whether or not the defendants are jointly and severally responsible for the general damages?
- 4. Whether the plaintiff is entitled to the remedies sought?

6. **Burden and Standard of Proof**

Section 101(1) of the Evidence Act Cap 6 provides that whoever desires Court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts, must prove that those facts exist. This position was fortified in the case of **Uganda Petroleum Co. Ltd versus Kampala City Council Civil Suit No.250 of 2005**, where it was held that in civil cases the burden lies on the party who alleges to prove his or her case on the balance of probabilities.

In this case, the Plaintiff thus bears the burden of proving the proposed issues on the balance of probabilities and in doing so, the Plaintiffs called four (4) witnesses. These are PW1; (Mutange Cainan), PW2; (Francis Ewap), PW3; (Allen Mutange) and PW4; (Malinga Godfrey). During the hearing however only two witnesses testified and thus the testimony of Francis Ewap and Malinga Godfrey is accordingly struck off the court record.

The Defendants only called one witness to rebut the Plaintiffs' case and this is DWI (Sam Mpiima Lubulwa).

7. Analysis and determination of issues

Issue No.1: Whether or not the defendants breached the contract of sale?

Breach of agreement involves the failure to fulfil obligations imposed by the terms of the agreement as was stated in the case of **United Building Services Ltd versus Yafesi Muzira t/a Quickest Builders & co Ltd H. C. C. S. No.154 of 2005**.

In the instant case it is not in contention that a contract was entered, payment made by the Plaintiff and the Defendants have not honored their part of the contract. This position is clear in paragraph 6 of the Written Statement of Defence.

The obligation not fulfilled by the Defendants is the failure to process land title within four months from the date of payment of the last purchase price in favour of the Plaintiffs. But as Court has established, there was a caveat on the suit land which the defendants contend that it made it difficult for them to process the title in time. This maybe the overall cause as to why the Defendants could not perform their obligation under the agreement. However, court also took notice of the letter of Conditional No Objection to Vacate Caveats on Block 149, Plot 140 At Kalega

Kabembe Mukono addressed to the Registrar of Titles dated 12th April, 2021. The defendants should, therefore, not

use this as a safeguard for their non-performance, they had 8 months in the year 2021 and the whole of 2022 to have the title processed and since the caveat was vacated, the defendants have not offered any explanation as to why they have not processed the title. For that reason, therefore Court finds that there was breach of agreement by the Defendants.

This issue is thus found in the affirmative.

8. Issue No. 2: Whether or not the defendants should perform their obligations as per the sale agreement?

The effects of breach of contract vary, depending on the seriousness of the breach and also on how the innocent party decides to react towards the breach. In this case, the Plaintiff being the innocent party sought for the following remedies;

Specific performance of the agreement of sale between the Plaintiff and the Defendant dated the 17th day of January 2015. The remedy of specific performance is provided for under Section 64 of the Contract Act which states;

"Where a party to a contract, is in breach, the other party may obtain an order of Court requiring the party in breach to specifically perform his/her promise her under the contract.

A party is entitled to specific performance of a contract where;

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It is not possible for a person against whom a claim is made, to perform the contract.

The specific performance will produce hardships which would not have *resulted if there was no specific performance.*

The rights of a third party acquired in good faith would be infringed by the specific performance. Specific performance would occasion hardship to a person against who a claim is made, out of proportion to the benefit likely to be gained by the claimant; The person against whom the claim is made is at the entitled, although in breach to terminate the contract;

Or The claimant committed a fundamental breach of his or her obligations under the contract, but in cases where the breach is not fundamental, specific performance is available to him or her subject to his or her paying *compensation for the breach.*"

The evidence on record shows that the Defendants are in breach of clause 4(b) of the sale agreement. The Plaintiff contended in paragraph 5 (b) of the plaint that he paid full purchase price and that the defendant don't demand him anything. In the absence of any evidence to explain why the Defendant have failed to fulfill their part of the bargain under the contract, I find no reason why this court should not order the Defendants to specifically perform their obligations under the contract.

9. Issue No.3 Whether or not the defendants are jointly and severally responsible for the general damages on land approximately bought at 25,500,000/= (Twenty-Five Million, Five Hundred Thousand **Shillings**?

General damages are what the law presumes to be the direct, natural or probable consequence that will have resulted from the defendant's breach of contract. They are normally damages at large and can be nominal or substantial depending on the circumstances of each case.

In the case of James Sebagala Vs China Palace (U) Ltd, it was held that, when two or more Defendants are liable for a Plaintiff's injury or loss, the rule of joint and several liability makes each of them liable for the entire amount of damages regardless of their liability. This in my opinion, leads to unfair outcomes when a Defendant who minimally contributed to the Plaintiff's harm or loss may have to foot the entire award because the Defendant who is principally responsible is insolvent or not traceable. This situation at times turns the proceedings of the suit into a search for a Party with a deep pocket.

In situations where the Plaintiff does not specifically state whether the Defendants were being sued jointly or severally, one would be inclined to believe that there was proportionate liability in the mind of the Plaintiff. The solution to the puzzle lies in the intention of the parties.

The agreement that the parties entered into did not apportion liability and it could only be interpreted that it was a joint and severally based undertaking.

However, it is suffice to note that;

"A company is an entity distinct from its shareholders and its directors. Some of its powers may be according to its articles exercised by the directors and certain other powers may be reserved for shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers."

It can be discerned from the Plaintiff's plaint, that the Defendant company's director had the authority to resolve the issue of processing a certificate of title in favor of the plaintiff. However, I tend to differ from this line of argument and make reference to The Organic Theory of Companies where the courts have elected to treat the acts of certain officers as those of the company itself. This theory can be traced to the case of Lennard's Carrying Co. vs. Asiatic Petroleum Co. Ltd (1950) A. C 705 where a ship and her cargo were lost owing to

unseaworthiness. The owners of the ship were a limited company. The managers of the company were another limited company whose managing director a one Mr. Lennard managed the ship on behalf of the owners. He knew or ought to have known of the ship's unseaworthiness but took no steps to prevent the ship from going to sea. Under the relevant shipping Act the owner of a sea going to ship was not liable to make good any loss or damage happening without

his fault. The issue was whether Lennard's knowledge was also the company's knowledge that the ship was unseaworthy. The court held that Lennard was the directing mind and will of the company his knowledge was the knowledge of the company, his fault was the fault of the company and since he knew that the ship was unseaworthy, his fault was also the company's fault and therefore the company was liable. **Viscount Haldane held:**

"From the above, it therefore goes without saying that a company has no mind of its own any more than it has a body of its own. Its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation."

The rule in **Turquand's case** also known as the indoor management rule is premised not on logic but on business convenience because; a 3rd party dealing with a company has no access to the company's indoor activities.

It would be very difficult to run a business if everyone who had dealings with the company's internal operations before engaging in any business with the company. In the circumstances therefore, I find that the acts of Mr. Sam Mpiima, the director were acts of the company and therefore binding on the company, hence the company is liable for any breaches.

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10. Issue No.4: Whether the plaintiff is entitled to the remedies sought?

Oxford Law Dictionary 5th Edition at page 423 defines a remedy as any of the methods available at law for the enforcement, protection or recovery of rights or for obtaining redress for their infringement. Such remedy can be a civil one which court may grant in form of damages. The Plaintiff on filing this suit prayed for an order of specific performance, general damages and costs of the suit. The authority in *Hoskins vs. Black*, 190 Ky. 98, 226 S. W 384, 385, is to the effect that, the Defendant's failure/refusal to fulfil their contractual obligation to repay the loan facility entitled the Plaintiff to demand the performance of the same to the letter.

Section 61 (1) of the Contracts Act No. 7 of 2010 is to the effect that a party who suffers the breach is entitled to receive from the party who breaches the contract, compensation for any loss or damage caused to him. The Plaintiff seeks an order of Specific performance, general damages and costs of the suit.

Section 33 (1) of the Contracts Act No. 7 of 2010 requires parties to a contract to perform or offer to perform their respective promises unless dispensed with under any law. According to *Hoskins vs. Black*, 190 Ky. 98, 226 S. W 384, 385, the Plaintiff is entitled to demand for the certificate of title from the defendants

The effects of breach of contract vary, depending on the seriousness of the breach and also on how the innocent party decides to react towards

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the breach. In this case, the Plaintiff being the innocent party sought for the following remedies;

1. Specific performance of the agreement of sale between the Plaintiff and the Defendant dated the 17th day of January 2015. The remedy of specific performance is provided for under Section 64 of the **Contract Act** which states;

"Where a party to a contract, is in breach, the other party may obtain an order of Court requiring the party in breach to specifically *perform his/her promise her under the contract"

A party is entitled to specific performance of a contract where;

- 1. It is not possible for a person against whom a claim is made, to perform the contract.
- 2. The specific performance will produce hardships which would not have resulted if there was no specific performance.
- 3. The rights of a third party acquired in good faith would be infringed by the specific performance.
- 4. Specific performance would occasion hardship to a person against who a claim is made, out of proportion to the benefit likely to be gained by the claimant;
- 5. The person against whom the claim is made is at the time entitled, although in breach to terminate the contract; or
- 6. The claimant committed a fundamental breach of his or her obligations under the contract, but in cases where the breach is

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not fundamental, specific performance is available to him or her subject to his or her paying compensation for the breach.

From the evidence on record, the Defendant is in breach of clause 4(b) of the sale agreement. The Plaintiff contended in paragraph 5 (b), (c), and (d) of the plaint that he paid the defendants full purchase price and accordingly it was agreed under clause 4(b) that the defendant shall process the certificate of title upon completion of the purchase price within 4 months, something which the defendants have not done since June 2015. It's the plaintiff's contention that the defendants have failed to perform their obligation and that this amounts to breach of contract in

so far as the defendants have not availed the plaintiff with the certificate of title within the agreed period. PW1 testified that he tried to reach out to the defendants but they are not reachable and there is no communication from them. He further told court that much as he is in occupation of the land, he has got encroachers and he is not sure when his matter will be finalized.

In the absence of any additional evidence to explain why the Defendants have failed to fulfill her part of the bargain under the contract since the notice of unconditional objection to vacate caveats was give by Airtel Uganda on the 12th day of April 2021, I find no reason why this court should not order the Defendants to specifically perform their obligations under the contract.

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2. General damages for breach of contract.

Black's Law Dictionary 9th edition at page 445 defines damages as the sum of money which a person wronged is entitled to receive from the wrong doer as compensation for the wrong. It is trite law that damages are the direct probable consequence of the act complained of. The same was reiterated in the case of Storms versus Hutchison (1905) AC 515.

Furthermore, In the case of Assist (U) Ltd. versus Italian Asphalt and Haulage & Anor, HCCS No. 1291 of 1999 at 35 it was held that; 'The consequences could be loss of profit, physical, inconvenience, mental distress, pain and suffering'.

In Haji Asuman Mutekanga versus Equator Growers (U) Ltd. SCCA NO. 7 of 1995, Oder JSC (RIP), held that;

'With regard to proof, general damages in a breach of contract are what a Court (or jury) may award when the Court cannot point out any measure by which they are not to be assessed, except in the opinion and judgment of a reasonable man'.

It was submitted by Counsel for the Plaintiff that taking into account the economic value of the property and the time it has taken the Plaintiff to successfully pursue his rights from January 2015 to date.

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The general inconvenience occasioned to the Plaintiff, a figure of Ug. Shs.15,000,000/-[Uganda Shillings Fifteen Million only] as prayed for would not be excessive given the fact that the plaintiff has been in occupation of the suit property.

It is notable that the Plaintiff entered into the agreement for the sale of the suit property with the Defendant on the 17th day of January 2015. It is now Seven years later, and the Defendants have not honoured their part of the contract.

In the circumstances, the sum of Ug. Shs. 15,000,000/= [Uganda Shillings Fifteen Million only] would be fair compensation in damages.

Costs of the suit

Section 27 of the Civil Procedure Act provides that;

'Costs are discretion of the Court or Judge. Subsection (2) of the Act provides that the costs of any action, cause or other matter or issue shall follow the event unless the Court or Judge shall for good reasons otherwise order.

In the instant case, the Plaintiff being the successful party is awarded the costs of the suit.

4. Interest

The Plaintiff in paragraph 12(4) of his Complaint asked the court to award any other remedy that the Court think fit. During the oral

testimony the Plaintiff stated that he would also like interest as his monies had been tied up for a long time. The remedy of interest is available to a party as provided in 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 <u>Crescent Transportation Co. Ltd versus Bin Technical Services</u> Ltd C. A. C. A No.25 of 2000.

In the present case, Court will exercise its 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 23rd February 2015 or soon thereafter, when the agreement was breached.

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

Judgment is accordingly entered for the Plaintiff in the following terms;

1. The Defendants are hereby ordered to specifically perform their obligations under the contract in the alternative, if the contract is not performed within 45 days from the day of judgement, the

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Plaintiff shall be entitled to recover his Ug. Shs. 25,000,000/= [Uganda Shillings Twenty Five Million].

- 2. The Plaintiff is granted Ug. Shs. 20,000,000/- (Uganda Shillings Twenty Million only) as general damages for breach of the contract.

- 3. The Plaintiff is entitled to interest of 18% on the Ug. Shs.25,000,000/= [Uganda Shillings Twenty Five Million] from breach of the agreement till payment in full.
- 4. The Plaintiff is entitled to taxed costs of the suit.

I so order.

Dated at Mukono this 23rd day of January, 2023.

Hon. Lady Justice Christine Kaahwa **JUDGE**

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