

UGANDA / JUDGMENT

Potters Hand Limited v Tirupati Development (U) Limited and Another (Civil Suit 469 of 2017) [2024] UGHCLD 86 (26 March 2024)

[2024] UGHCLD 86

COURT

HC: Land Division (Uganda)

BEFORE

Bernard Namanya, J

CASE / FILE NUMBER

Civil Suit 469 of 2017

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA (LAND DIVISION) CIVIL SUIT NO. HCT-00-LD-CS-0469-2017

POTTERS HAND LIMITED:..... PLAINTIFF

VERSUS

1. TIRUPATI DEVELOPMENT (U) LTD 2. KENYA COMMERCIAL BANK LTD:..... DEFENDANTS

BEFORE: HON. JUSTICE BERNARD NAMANYA

JUDGMENT

Introduction:

1. The plaintiff (Potters Hand Ltd) sued the 1st defendant (Tirupati Development (U) Ltd) and the 2nd defendant (Kenya Commercial Bank Ltd) jointly and severally for: a declaration that the suit properties belong to the plaintiff; an order of specific performance compelling the 1st defendant to hand over land titles to the plaintiff; permanent injunction; general damages; interest; costs of the suit; and alternatively, an order compelling the 1st defendant to refund to the plaintiff, a sum of USD 540,000 being money had and received by the 1st defendant as consideration for the sale of the suit properties.

Background:

2. The background to the suit is that sometime in 2011, the plaintiff purchased six warehouses from the 1st defendant at USD 617,350. The plaintiff paid the purchase price in instalments, and later took possession of the six warehouses in 2013, pending subdivision and creation of separate titles for each warehouse. As of March 2014, the plaintiff had paid a total sum of USD 540,000 to the 1st

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defendant leaving an outstanding balance of USD 77,350. The 1st defendant subsequently obtained separate titles for the six warehouses with the following particulars: LRV 4401 Folio 17 Plot 1222 Kyadondo Block 211 Land at Kikaya, Wakiso District; LRV 4401 Folio 18 Plot 1223 Kyadondo Block 211 Land at Kikaya, Wakiso District; LRV 4401 Folio 19 Plot 1224 Kyadondo Block 211 Land at Kikaya, Wakiso District; LRV 4401 Folio 20 Plot 1225 Kyadondo Block 211 Land at Kikaya, Wakiso District; LRV 4401 Folio 21 Plot 1226 Kyadondo Block 211 Land at Kikaya, Wakiso District; and LRV 4401 Folio 22 Plot 1227 Kyadondo Block 211 Land at Kikaya, Wakiso District. The title deeds were all registered in the name of the 1st defendant.

- 3. It is the plaintiff's case that the 1st defendant failed to hand over the title deeds for the warehouses despite several demands from the plaintiff, and instead fraudulently mortgaged the warehouses to the 2nd defendant who later fraudulently advertised them for sale, following default on loan repayment by the 1st defendant.
- 4. The 1st defendant, in its written statement of defence acknowledged entering into a sale agreement with the plaintiff, and giving it possession of the suit property. The 1st defendant also acknowledged receipt of USD 540,000 paid by the plaintiff as part payment. The 1st defendant denies any wrong doing, and contends that the process of handing over the titles to the plaintiff has been frustrated by the 2nd defendant. The 1st defendant further contends that the advertisement of the suit properties was illegal, and was challenged in Civil Suit No. 516 of 2017 in the Commercial Court: Tirupati Development (U) Ltd v. KCB Bank Uganda Ltd & Kenya Commercial Bank Ltd.

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5. The 2nd defendant contends that it advanced the 1st defendant a loan facility of USD 7,000,000 in respect of which a mortgage was created over the suit property. That the 1st defendant did not comply with the terms of the mortgage deed, and eventually defaulted on repayment of the facility which led the 2nd defendant to advertise the properties for sale. The 2nd defendant denied acting fraudulently, and stated that their mortgage was registered earlier on the suit property, and that the plaintiff's purported purchase is subject to the terms of the 2nd defendant's mortgage on the suit properties.

Representation:

6. At the hearing of the suit, the plaintiff was represented by Mr. Andrew Kahuma of M/s. Kahuma & Co. Advocates. The 1st defendant was represented by Mr. Pamba Egan of M/s. Trust Law Advocates. The 2nd defendant was represented by Mr. Terence Kavuma of M/s. Kabayiza, Kavuma, Mugerwa and Ali Advocates.

The plaintiff's witnesses and exhibits:

- 7. The plaintiff produced one witness, Andrew Sebutenga (PW1), its managing director. The plaintiff adduced evidence of the following documents that were exhibited:
- i). P1 to P6 Copies of the land titles for the 6 warehouses.
- ii). P7 to P9 Letters by the plaintiff to the 1st defendant dated 1 April 2014 12 May 2015 and 28 February 2017.
- iii). P10 Sale agreement between the plaintiff and the 1st defendant.
- iv). P11 Newspaper advert for the intended sale by the 2nd defendant dated 23 June 2017.
- v). P12 Consent Judgment between the 1st defendant and the 2nd defendant

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in Commercial Court Civil Suit No. 516 of 2017 Tirupati Development (U) Ltd v. KCB Bank Uganda Ltd dated 28 July 2017.

- vi). P13 Letter from the 2nd defendant's lawyers to the plaintiff's lawyers dated 8 August 2017.
- vii). P14 Letter by the 2nd defendant to the 1st defendant dated 7 August 2017.
- viii). P15 Title deed for Folio 19 Plot 1224.
- ix). P16 A copy of the release of mortgage.
- x). P17 Transfer deed for Folio 19 Plot 1224.

The 1st defendant's witnesses and exhibits:

- 8. The 1st defendant led evidence from two witnesses, DW2 (Kruti Barot) and DW3 (Rogers Mayanja). The 1st defendant adduced evidence of the following documents that were exhibited:
- i). D19 Work Identity Card for DW3.
- ii). D20 License to transact credit reference bureau business.
- iii). D21 Business Standard Credit Report.

- iv). D22 Credit Card Request Form.

The 2nd defendant's witnesses and exhibits:

- 9. The 2nd defendant relied on the evidence of Timothy Nabaala (DW1). The 2nd defendant adduced evidence of the following documents that were exhibited:
 - i). D1 The facility agreement.
 - ii). D2 The mortgage deed.
 - iii). D3 Lease agreement between Harshad Barot and the 1st defendant.
 - iv). D4 Notice of default.
 - v). D5 Notice of sale of mortgaged property.

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- vi). D6 Letter by the 1st defendant on release of titles dated 4 August 2017.
- vii). D7 Letter by the 1st defendant on release of titles dated 25 August 2017.
- viii). D8(a) to D8(f) Interim Certificates
- ix). D9 Acknowledgment of receipt of titles.
- x). D10 Letter by the 2nd defendant dated 26 November 2020.
- xi). D11 Letter by the 2nd defendant dated 3 July 2020.
- xii). D12 Letter by the 1st defendant dated 3 December 2020.
- xiii). D13 Letter by the 1st defendant dated 16 November 2020.
- xiv). D14 Letter by the 1st defendant dated 27 November 2020.
- xv). D15 Letter by the 1st defendant dated 13 January 2023.
- xvi). D16 Complaint in Civil Suit No.15 of 2022.
- xvii). D17 Ruling in Misc. Application No.97 of 2022.
- xviii). D18 Memorandum of Appeal against the Ruling of Justice David Wangututsi.

Locus in quo visit:

10. Locus in quo visit to the suit property was conducted by this court on the 24 November 2023. The following persons attended: Mr. Andrew Kahuma – counsel for the plaintiff; Ms. Stella Nakato – counsel for the 2nd defendant; Mr. Pamba Egan – counsel for the 1st defendant; Ms. Kruti Baroti – Managing Director, 1st defendant; Mr. Nabaale Timothy – Head of Recoveries & Collections, 2nd defendant; Mr. Andrew Sebutenga – Managing Director, plaintiff; and Ms. Masitula Nakisozi – Local Council Chairman of the area. Mr. Andrew

Sebutenga and Ms. Kruti Baroti gave evidence on oath and were cross examined and re-examined by either counsel. The court observed that the suit property is in possession of the plaintiff.

Issues:

11. The following four issues were framed for determination:
 - i). Whether the plaintiff's interest in the suit property is subject to the 2nd defendant's mortgage.
 - ii). Whether the 1st defendant fraudulently mortgaged the suit property to the 2nd defendant.
 - iii). If so, whether the 2nd defendant's mortgage is vitiated by fraud.
 - iv). What remedies are available to the parties?

The plaintiff's evidence:

12. Andrew Sebutenga (PW1), managing director of the plaintiff testified and stated that sometime in 2011, he agreed to purchase six warehouses on land comprised in LRV 4183 Folio 16 Plot 1072 Block 211 at Kikaya in Wakiso District from the 1st defendant at USD 617,350. It was agreed that the 1st defendant would pay the purchase price in instalments, and as of March 2014, a total sum of USD 540,000 had been paid to the 1st defendant by the plaintiff leaving an outstanding balance of USD 77,350. That in 2013, the 1st defendant allowed the plaintiff to take possession of the six warehouses, numbered 82,83,84,85,86&87. That the 1st defendant was supposed to process separate titles for each warehouse, and hand them over to the plaintiff but the 1st defendant failed to deliver the title deeds. That initially, the parties had no formal agreement of sale for the warehouses but on the 1 July 2016, a formal sale agreement for the warehouses was executed, stating the terms already agreed upon by the parties. That sometime in 2017, the suit property was advertised for sale by the 2nd defendant following default by the 1st defendant on its loan obligations. Later on, the 1st defendant handed over one title deed

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for Folio 19 Plot 1224. That to date the plaintiff is in possession, use, and occupation of the 6 warehouses but without the title deeds for five warehouses.

The 2nd defendant's evidence:

13. DW1 (Timothy Nabaala) testified that on 17 July 2012, the defendants executed a facility agreement wherein the 2nd defendant and Kenya Commercial Bank Ltd agreed to advance the 1st defendant a sum of USD 7,000,000 payable in 36 months to finance the construction of 135 warehouses, with each of one of them having a title. That the said facility was secured by inter alia the suit property. That on 9 November 2012, 135 leasehold titles in the name of

the 1st defendant were created and on 16 November 2012, the 2nd defendant's mortgages were registered. That the 1st defendant did not comply with the terms of the mortgage deed, prompting the 2nd defendant to serve a notice of default on the 1st defendant, and eventual advertisement of the properties for sale on 23 June 2017. That following the advertisement for sale, on 3 August 2017, the 1st defendant filed Civil Suit No. 516 of 2017 against the 2nd defendant which suit was settled by consent. That the 1st defendant paid USD 342,000, and on 7 August 2017, pursuant to the consent, the 2nd defendant released the mortgage on Kyadondo Block 211 LRV 4401 Folio 19 Plot 1224, one of the properties claimed by the plaintiff.

The 1st defendant's evidence:

14. DW2 (Kruti Baroti) testified that the plaintiff took possession of the ware houses after the signing of the sale agreement, and has remained in possession to date. That the 2nd defendant has unfairly refused to release title deeds of the ware houses to the detriment of the plaintiff and the 1st defendant. She prayed for an order compelling the 2nd defendant to surrender the title deeds for the

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plaintiff. DW3 (Rogers Mayanja), an official of Metropol Uganda Ltd, testified that the credit reference bureau report adduced by the 1st defendant is authentic.

Consideration and determination of the issues by the court:

Issue No.1: Whether the plaintiff's interest in the suit property is subject to the 2nd defendant's mortgage.

- 15. The plaintiff submitted that its interest in the suit property is not subject to the 2nd defendant's mortgage. The 2nd defendant submitted that the plaintiff's purported interest in the suit property is subject to its mortgage interest.
- 16. I have perused the certificates of title for the suit property (Exh. P1 to P6), and they reveal the following particulars of ownership and incumbrances:

| Property details | Ownership | Incumbrances |

|-----|-----|-----| | LRV 4401 Folio 17 Plot | Tirupati

Development | Mortgage to KCB | | 1222 Kyadondo Block 211 | (U) Ltd entered as owner | Bank

Uganda Ltd | | Land at Kikaya, Wakiso | on the 9/11/2012 | entered on the | | District | | 16/11/2012 |

| LRV 4401 Folio 18 Plot | Tirupati Development | Mortgage to KCB | | 1223 Kyadondo Block 211 |

(U) Ltd entered as owner | Bank Uganda Ltd | | Land at Kikaya, Wakiso | on the 9/11/2012 | entered

on the | | District | | 16/11/2012 | | LRV 4401 Folio 19 Plot | Tirupati Development | Mortgage to KCB

| | 1224 Kyadondo Block 211 | (U) Ltd entered as owner | Bank Uganda Ltd | | Land at Kikaya,

Wakiso | on the -/11/2012 | entered on the | | District | | 16/11/2012 | | LRV 4401 Folio 20 Plot |

Tirupati Development | Mortgage to KCB | | 1225 Kyadondo Block 211 | (U) Ltd entered as owner |

Bank Uganda Ltd | | Land at Kikaya, Wakiso | on the 9/11/2012 | entered on the | | District | | 16/11/2012 | | LRV 4401 Folio 21 Plot | Tirupati Development | Mortgage to KCB | | 1226 Kyadondo Block 211 | (U) Ltd entered as owner | Bank Uganda Ltd | | on the 9/11/2012 | |

Page 8 of 15 | Land at Kikaya, Wakiso
District | | entered on the
16/11/2012 | |-----
-----|-----
-|-----| | LRV 4401 Folio 22 Plot
1227 Kyadondo Block 211
Land at Kikaya, Wakiso
District | Tirupati Development
(U) Ltd entered as owner
on the -/11/2012 | Mortgage to KCB
Bank Uganda Ltd
entered on the
16/11/2012 |

17. Having regard to evidence before this court, mortgages on the suit property in favour of the 2nd defendant were created on the 16 November 2012 with the 1st defendant having been entered as registered owner of the suit property on the 9 November 2012. Upon perusal of the certificates of title of the suit property, there is nothing to indicate the interest of the plaintiff. If it is true that the plaintiff had acquired an equitable interest in the suit property way back in the year 2011, why didn't the plaintiff lodge a caveat on the title deeds to protect its interest? Accordingly, it is my decision that any purported equitable interest of the plaintiff in the suit property is subject to the 2nd defendant's mortgage over the suit property.

Issues No.2 & 3: Whether the 1st defendant fraudulently mortgaged the suit property to the 2nd defendant; If so, whether the 2nd defendant's mortgage is vitiated by fraud.

18. Issues No.1 and 2 shall be handled concurrently. In paragraph 10 of the plaint, the plaintiff averred that the mortgage of the suit property by the 1st defendant to the 2nd defendant was fraudulent. The plaintiff alleged several particulars of fraud against the two defendants. The plaintiff bears the burden to prove fraudulent conduct against the two defendants. The standard of proof in fraud cases is heavier than a mere balance of probabilities. See the case of Kampala

Bottlers Ltd v. Damanico (U) Ltd, Supreme Court Civil Appeal No.22 of 1992 (coram: S. W. W. Wambuzi, C. J., A. Oder, J. S. C., H. Platt, J. S. C).

- 19. It is evidence of the plaintiff that the 1st defendant mortgaged the suit property to the 2nd defendant without disclosing that the plaintiff had an equitable interest in it; and that the 2nd defendant accepted a mortgage on the suit property without ascertaining its status, and the fact that the suit property was occupied by the plaintiff at the time of creation of the mortgages.

- 20. I have carefully considered the evidence adduced by the plaintiff in relation to the allegations of fraudulent creation of the mortgage but I am not satisfied with it. I have found nothing to indicate fraudulent conduct on the part of the defendants in the way that the mortgages were created. Notably, the plaintiff failed to lodge a caveat to protect its purported equitable interest in the suit property. Accordingly, it is my decision that the mortgages over the suit property in favour of the 2nd defendant were not fraudulent.

Issue No.4: What remedies are available to the parties?

- 21. The plaintiff prayed for several remedies including, an order of specific performance compelling the 1st defendant to hand over to the plaintiff the land titles for the suit property; a declaration that the said properties belong to the plaintiff; a permanent injunction against the defendants; general damages for inconvenience; interest on general damages; and costs of the suit.
- 22. It is my decision that the plaintiff has failed to prove a case for an order compelling the 2nd defendant to hand over title deeds of the suit property to the plaintiff. This is because the suit property is encumbered with mortgages in

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favour of the 2nd defendant. The 1st defendant already admitted to its indebtedness to the 2nd defendant in the consent judgment dated 28 July 2017 in Civil Suit No. 516 of 2017. It is not necessary for me to delve into the status of compliance by the parties to this consent judgment. Suffice to note, that as of 28 July 2017, the 1st defendant was indebted to the 2nd defendant to the tune of USD 5,972,237.

- 23. Given the failure of the 1st defendant to deliver title deeds of the suit property to the plaintiff due to mortgage incumbrances in the 2nd defendant's favour, it is necessary for this court to consider the alternative prayer for refund of the purchase price to the plaintiff by the 1st defendant for partial failure of consideration.
- 24. It is the law that in a contract for sale of land, the vendor has a primary obligation to convey the land to the purchaser free from any encumbrances. The vendor will be in breach of the obligation to convey the land free from encumbrances, where there remain on the land, persons who are lawfully in possession such as tenants or licensees; or where there are trespassers on the land; or where there are legal impediments to the enjoyment of the property. The only exception to this general rule is where there is an express stipulation in the contract for sale of land to the contrary or if the land was subject to some incumbrance or other impediment to vacant possession which was known to the purchaser. See Megarry & Wade: The Law of Real Property, 9th Edition, Stuart Bridge, Elizabeth Cooke and Martin Dixon, Sweet & Maxwell, London, 2019 at paragraphs 14-088; and 14-089.

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- 25. In the case of *Cook v. Taylor* [1942] 2 ALL ER 85, the brief facts of the case were that a vendor sold freehold property, and undertook to deliver vacant possession to the purchaser. The vendor subsequently failed to deliver vacant possession of the property to the purchaser. The vendor sued for specific performance, and the purchaser counterclaimed against the vendor seeking to be discharged from the contract, and for refund of the purchase price paid. Simonds, J dismissed the vendor's action, and held that the purchaser was entitled to a declaration that he is discharged from the obligation to perform the contract for sale of land, because of the failure by the vendor to give him vacant possession. He ordered the vendor to refund the purchase price.
- 26. In the case of *Nsubuga v. Rwomushoro* (Court of Appeal of Uganda Civil Appeal No. 102 of 2012) [2019] UGCA 3, the court considered the issue as to whether there had been a total failure of consideration entitling the respondent to a refund of the entire purchase price. The court agreed with the trial Judge that there had been a total failure of consideration because the respondent never received the land that she paid for, and that she was thus entitled to a refund of the purchase price.
- 27. The plaintiff has proved to my satisfaction that there is a valid sale agreement dated 1 July 2016 between the plaintiff and the 1st defendant. It concerned the sale of the suit property at a consideration of USD 617,350. Unknown to the plaintiff, by this time, the suit property was already mortgaged to the 2nd defendant. There is evidence that the plaintiff paid a sum of USD 540,000 leaving a balance of USD 77,350. There is also evidence that out of the six warehouses that were sold to the plaintiff, one title deed was handed over to the

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plaintiff (LRV 4401 Folio 19 Plot 1224). The plaintiff was entered as the registered owner of Plot 1224 on the 21 September 2020.

- 28. Owing to the failure by the 1st defendant to hand over certificates of title for the suit property; it is my decision that there is sound basis in law to order the 1st defendant to refund the purchase price to the plaintiff.
- 29. The plaintiff did not adduce any evidence to justify payment of general damages. The evidence presented shows that the plaintiff has been in possession of the suit property since the year 2013. When this court conducted a locus in quo visit to the suit property, it was observed that the plaintiff has rented out some of the warehouses to tenants who are paying rent. For example; Warehouse No.82 is rented to Eurostar who pays rent of USD 750 per month to the plaintiff; Warehouse No.83 is rented to JWH Enterprises Ltd who pays rent of Shs 2,400,000 per month to the plaintiff; Warehouse No.85 is rented to Li Meng who pays rent of Shs 2,000,000 per month to the plaintiff; and Warehouse No.86 is rented to MED Equip Ltd who pays rent of Shs 2,400,000 per month to the plaintiff. Considering the fact that the plaintiff has been in occupation of the suit property since 2013, and to some extent has earned rental income from the suit property, the plaintiff's claim for general damages is not justified.

Final order of the court:

30. Therefore, I enter judgment in favour of the plaintiff with the following orders: i). That the 1st defendant (Tirupati Development (U) Ltd) shall refund to the plaintiff (Potters Hand Ltd) the sum of USD 437,108 (United States

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Dollars four hundred thirty-seven thousand one hundred and eight) for partial failure of consideration.

- ii). That the 1st defendant shall pay interest on the above sum at the rate of 20% per annum from the date of this judgment until payment in full.
- iii). That upon 1st defendant's refund of the purchase price and payment of interest (if any) as set out herein, the plaintiff shall vacate property comprised in property comprised in LRV 4401 Folio 17 Plot 1222 Kyadondo Block 211 Land at Kikaya, Wakiso District; LRV 4401 Folio 18 Plot 1223 Kyadondo Block 211 Land at Kikaya, Wakiso District; LRV 4401 Folio 20 Plot 1225 Kyadondo Block 211 Land at Kikaya, Wakiso District; LRV 4401 Folio 21 Plot 1226 Kyadondo Block 211 Land at Kikaya, Wakiso District; and LRV 4401 Folio 22 Plot 1227 Kyadondo Block 211 Land at Kikaya, Wakiso District; and hand over possession of the property to the 1st defendant.
- iv). That the 1st defendant shall pay costs of the suit only to the plaintiff. The 2 nd defendant is not entitled to payment of costs owing to the fact that the dispute between 1st defendant and 2nd defendant was settled in accordance with the consent judgment dated 28 July 2017 in Civil Suit No.516 of 2017.

IT IS SO ORDERED.

BERNARD NAMANYA JUDGE 26 March 2024

| Attendance: | | | |-----|-----|-----| | 26 March
2024 at 2:43pm. | | | Pamba Egan (holding brief for Andrew | Counsel for the plaintiff | |
Kahuma) | | | Pamba Egan | Counsel for the 1st defendant | | Michael Abili (holding brief) |
Counsel for the 2nd defendant | | Twagiramungu Joshua (on behalf of the | | | plaintiff) | | |
Namubiru Josephine, legal officer of the 2nd | | | defendant | | | Allena Kanyakire | Court Clerk |
| | Pamba Egan/Michael Abili: | | | We are ready receive the judgment. | | | Court: | | | Judgment
delivered in open chambers. | | | | | BERNARD NAMANYA
JUDGE
26 March 2024 | |

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