

UGANDA / JUDGMENT

Talugende v Akright Projects Limited and 2 Others (Civil Suit No. 2789 of 2016) [2023] UGHCLD 24 (10 February 2023) [2023] UGHCLD 24

COURT

HC: Land Division (Uganda)

BEFORE

Kazaarwe, J

CASE / FILE NUMBER

Civil Suit No. 2789 of 2016

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA (LAND
DIVISION)

CIVIL SUIT NO. 2789 OF 2016

TALUGENDE ROBERT----- PLAINTIFF

VERSUS

1. AKRIGHT PROJECTS LIMITED

2. BARNABAS TAREMWA

10 3. IMAGE COMPANY LIMITED----- DEFENDANTS

Before: Hon. Lady Justice Olive Kazaarwe Mukwaya JUDGMENT

The Plaintiff, Mr. Talugende Robert filed this suit against the Defendants jointly and 15 severally for:

- a. A declaration that the 1st Defendant breached the agreement of sale of the suit land and developments comprised in Block 395 Plot 1412, Busiro, Sekiwunga, Mengo.
- b. A declaration that the 2nd and 3rd Defendants have no interest whatsoever in the 20 suit land.
- c. An order for the Defendants to surrender the certificate of title to the Plaintiff.
- d. General damages

- e. Special damages
- f. Interest on (d) and (e) above.
- 25 g. Costs of the suit.

Plaintiff's Claim

On the 1 st day of June 2006, the Plaintiff and the 1st Defendant through its representatives entered into an agreement for the sale of land and developments comprised in Mengo District Block 395 Plot 1412, situated at Rhine Village Musaale, Ggombolola, Sekiwunga. A copy of the sale agreement was admitted into evidence and marked Exb. P.1. The purchase price for the suit property was agreed at UGX 120,000,000/=. The Plaintiff paid UGX 36,905,000/=. upon execution of the agreement and UGX 83,095,000/= by the 9th April 2009. Copies of the receipts were attached and marked Exb. P.2, P.2A to P.2N.

- 5 Despite express terms in the agreement that the purchaser was to pay in 12 equal monthly instalments and conclude payment in June 2006, it was almost 3 years after the agreement was signed when payment of the purchase price was completed. According to the Plaintiff, the 1st Defendant waived the provision on timely payment, when it fell behind schedule on completing the construction of the property, which, under their agreement, was due for handover on the 30th 10 December 2006. Even after the Plaintiff
- belatedly completed his payments, the 1st Defendant had not finished the house as agreed, which forced him to use his own resources for completion.

Before that, on the 4 th day of January 2008, the 1st Defendant wrote to the Plaintiff stating that it had failed to perform its obligations due to the hosting of the Commonwealth Heads

- 15 of Government meeting which was held in November 2007. A copy of the letter was tendered into evidence and marked Exb. P.3. On realising that there was delay in completing the property, the Plaintiff requested the 1st Defendant's directors to hand over possession of the property, which they did. The Plaintiff is currently in physical possession.
- Another express term of the sale agreement was that the 1st 20 Defendant would deliver the suit property with the owner's copy of the certificate of title and duly executed transfer forms which it did not do. The 1st Defendant's managing director, Mr. Anatoli Kamugisha told the Plaintiff that the title would be delivered in due course, which obligation has not been met to date.
- In his efforts to get himself registered on the title, the Plaintiff discovered that the 1st 25 Defendant had executed a loan of UGX 450,000,000/= with the 2 nd and 3rd Defendants, using the suit property as part of its collateral. A copy of the loan agreement was attached and marked Exb. P.4. This action was contrary to an express term of the sale agreement at Clause 10, which stated that the 1st Defendant would not, in any manner, engage in

any transactions in relation to or affecting the suit property which were inconsistent with the purchaser's interests.

During one of his numerous visits to Uganda to follow up on the matter, the Plaintiff carried out a search and found that the 2nd Defendant had lodged a caveat on the suit property,

on behalf of the 3rd 5 Defendant. A copy of the caveat was attached and marked Exb. P.5. This discovery, coupled with the 1st Defendant's continued failure to deliver the title, compelled the Plaintiff to lodge a caveat on the suit property as well. A copy of his caveat was tendered into evidence and marked Exb. P.6.

Subsequently, the Plaintiff traced the 2nd Defendant who acknowledged possession of the title, but claimed he was owed a sum of UGX 50,000,000/= by the 1st 10 Defendant. He went on to demand the said sum from the Plaintiff in exchange for the release of the title

It was the Plaintiff's contention that the 2nd Defendant does not have a right to lodge a caveat on the property since it was the 3rd Defendant who lent money to the 1st Defendant 15 in its own right as per the agreement.

Owing to the Defendants' actions, the Plaintiff has failed to use and develop his land and as a result, he has suffered great loss and inconvenience. He has also incurred a lot of costs travelling to Uganda on four different occasions to follow up on this issue, for which he holds the Defendants liable. Copies of the travel documents are attached and marked 20 Exb. P.7 and P.8.

The Defendant's Claim

to him, a proposal the Plaintiff rejected.

None of the Defendants presented their evidence. They were absent for the hearing of their matter. However, in their pleadings, the 1st Defendant acknowledged receipt of the purchase price, but maintained that the payments were made over a period which exceeded the duration agreed upon in the sale agreement. The 1st 25 Defendant averred that the Plaintiff could not get occupation of the suit premises, the certificate of title and transfer forms before full payment of the purchase price which did not happen on the 1st day of June 2006 as stipulated in the agreement. The 1 st Defendant added that the author of Exb. P.3, Mr. Anatoli Kamugisha, who committed to delivery of the house by the 10th

April 2008, was unaware that the Plaintiff had not completed all his payments of the purchase price and therefore had no right to deal in the property.

In their joint defence, the 2nd and 3rd Defendants denied the Plaintiff's claim and contended that the suit property was registered in the name of the 1st Defendant, at the

material time when they entered into a loan agreement with the 1st 5 Defendant it was rightly offered as collateral. And the 2 nd Defendant subsequently placed the caveat as per the terms of the loan agreement.

According to the Defendants, the Plaintiff was not entitled to the prayers sought and his suit should be dismissed with costs.

10 Representation.

The Plaintiff was represented by Mr. Kenneth Engoru from M/S Lex Uganda Advocates & Solicitors while the Defendants were represented by Mr. Odyang Rogers from M/S Okello, Oryem & Co. Advocates.

The Defendant filed a witness statement but failed to appear in Court. Upon application 15 by Counsel for the Plaintiff, this Court proceeded with the matter under Order 17 Rule 4 of the Civil Procedure Rules.

Counsel for the Plaintiff filed written submissions on behalf the Plaintiff which I shall not reproduce but have duly considered.

The following issues were formulated for Court's resolution;

20 Issues

1. Whether the Plaintiff breached the agreement of sale?
2. Whether the 1st Defendant breached the agreement of sale?
3. Whether the 2nd and 3rd Defendants are bonafide third parties whose interest in the suit property is superior to the Plaintiff's claim.
- 25 4. What remedies are available to the parties?

RESOLUTION

Issue 1

Whether the Plaintiff breached the agreement of sale?

The undisputed facts reveal that the Plaintiff completed payment of the purchase price in 2009. He explained that the cause of the delay was because the 1st Defendant was behind

5 schedule on completing the property in preparation for hand over. Counsel for the Plaintiff pointed out that at all material times the 1st Defendant did not protest the delay, but instead acknowledged receipt of all the monies as is demonstrated by the receipts, Exb. 2A- 2N.

Counsel argued that the 1st Defendant was estopped from claiming that there was a delay in the payments, when it received them all. He relied on **section 114 of the Evidence**

10 Act, Cap 6, Yonasani Kanyomozi v Motor Mart (U) Ltd SCCA No. 15 of 1995 which cited with approval, **Nurdin Randali Vs Lombank Ltd (1963) EA 304** where Newbold, J held;

"*when one person has by his or her declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief neither*

15 *he or she shall be allowed, in any suit or proceeding between himself or herself and that person ..., to deny the truth of that thing.*"

It was Counsel's submission that the Plaintiff was not in breach of the sale agreement. By a letter, Exb. P.3, the 1st Defendant informed the Plaintiff that he was behind schedule in the construction and the parties thereafter varied the terms of payment and delivery

20 which is acceptable under **section 67 of the Contracts Act 2010**.

A contract is defined under **section 10 the Contracts Act 2010** as follows;

10. Agreement that amounts to a contract

A contract is an agreement made with the free consent of parties with capacity to contract,

25 *for a lawful consideration and with a lawful object, with the intention to be legally bound.*

Section 33 of the Contracts Act 2010 provides for the obligation of the parties as follows;

33. Obligation of parties

The parties to a contract shall perform or offer to perform, their respective promises, unless the performance is dispensed with or excused under this Act or any other law.

- 5 I reiterate that the Plaintiff did not make his payments on time, he thereby failed to fulfil his promise. However, it is also a fact that the 1st Defendant accepted all his late payments, without objection. I agree with Counsel for the Plaintiff that, the promise for timely payment was excused under **section 114 of the Evidence Act**, which provides;
- 10 "When one person has, by his or declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or she nor his or her representative shall be allowed, in any suit or proceeding between himself or herself and that person or his representative, to deny the truth of that thing."*
- The truth is that the 1st 15 Defendant accepted all the Plaintiff's late/delayed payments. To augment that acceptance, the 1st Defendant wrote to the Plaintiff, on the 4th January 2008, on its headed paper. The address assigned to the Plaintiff in that letter, was 'Rhine 63, Kakungulu', the suit property. And yet, by the contents of the letter, the property had not been handed over to the Plaintiff. In fact, the letter constituted an apology for the delay in
- 20 delivery of; 'your house'. Therein was a commitment which I shall reproduce below;

'...we are committing ourselves to have due concentration on your site such that we can be able to deliver your house by the 10th April 2008 at turnkey. Note that the specifications of the previous agreement still stand.'

In my view, the letter was a loud and resounding endorsement of the existence of the agreement, albeit under altered circumstances. Counsel for the Plaintiff submitted that **section 67 of the Contracts Act** allows for these variations, I agree. It provides;

30 *67. Variation of contracts*

Where any right, duty, or liability would rise under agreement or contract, it may be varied by the express agreement or by the course of dealing between the parties or by usage or custom if the usage or custom would bind both parties to the contract.

5 The agreement between the parties before me was varied in the manner of payment, by the letter, Exb. P.3. Therefore, in my view, it was not open to the 1st Defendant to back track on his commitment under the agreement. All the monies were duly paid by the Plaintiff and receipted by the 1st Defendant. And the property, as of 4th January 2008, was duly acknowledged as belonging to the Plaintiff, pending its completion and formal delivery, as per the specifications of the agreement dated 1st 10 June 2006. The property was eventually handed over to the Plaintiff. He is currently in possession, just as the parties intended when they executed the agreement. I find that the Plaintiff was not in breach of the agreement of sale.

Issue 1 is resolved in the negative.

15 Issue 2

Whether the 1st Defendant breached the agreement of sale?

The Plaintiff's complaint, is that he has never received the certificate of title to the suit property. The 1st Defendant made it the subject of his loan agreement with the 3rd Defendant, whose Director, the 2nd Defendant, placed a caveat on it, hampering the 20 Plaintiff's efforts to get himself duly registered on the property. The loan agreement, Exb. P.4 is dated 24th February 2009 and was executed between the 1st Defendant and the 3rd Defendant company with the 2nd Defendant signing as its Director. The caveat, Exb. P.5 is dated 15th September 2009.

Clause 10 of Exb. P.1, the sale agreement, expressly prohibits the transaction that the 1st Defendant entered into with the 3rd 25 Defendant under Exb. P.4. Its effect was to clothe the 3 rd Defendant with the right to retain the certificate of title as collateral and later lodge a caveat on the title, which had been promised to the Plaintiff by the 1st Defendant.

This court's findings on Issue 1 indicate that there was a valid and existing agreement between the Plaintiff and the 1st Defendant which was only pending the release of the certificate of title and the duly signed transfer forms. I find that it was unlawful for the 1st Defendant to place the certificate of title as collateral under Exb. P.4, as this action 5 amounted to breach of the contract.

Issue 2 is resolved in the affirmative.

Issue 3

Whether the 2nd and 3rd Defendants are bonafide third parties whose interest in the suit property is superior to the Plaintiff's claim?

A reading of the 2nd and 3rd 10 Defendants' defence indicates that they did not plead that they were bona fide third parties with a superior claim to the Plaintiff's. Their defence is that they took possession of the certificate of title since the 1st Defendant, the borrower, was duly registered thereon.

The real question, in my view, is *whether the 2nd Defendant lawfully lodged the caveat on*

15 *the suit title?* **Section 139 of the Registration of Titles Act** provides for lodgement of caveats and **section 142** for their removal. Counsel for the Plaintiff submitted that the 2nd Defendant, who lodged the caveat, had no claim to the suit property, since he was only a director in the 3rd Defendant company which entered into the loan agreement with the Plaintiff. Counsel argued that the company was distinct from the 2nd Defendant and 20 therefore it should have lodged the caveat. However, Counsel quickly added that even the 3rd Defendant company had no interest whatsoever to the suit property.

The loan agreement, Exb. P.4 is dated 2nd February 2009. The caveat, Exb. P.5 is dated 15th September 2009. The Statutory declaration supporting the caveat indicates in paragraph 1 that the 2nd Defendant lodged it on behalf of the 3rd Defendant which advanced the loan to the Plaintiff. I am of the view that this aptly explained the 2nd 25 Defendant's name on the caveat; a director of the 3rd Defendant. I therefore do not agree with Counsel for the Plaintiff that it was erroneous for the 2nd Defendant to be named on the caveat.

There was, however, an unexplained gap between the loan agreement and the caveat. Where was the evidence of default prior to the caveat? In my view, the existence of the loan agreement by itself was not sufficient to establish default and the accompanying right to lodge a caveat.

- 5 Secondly and more importantly, the sale agreement, Exb. P.1 was evidence that the suit property was not available for lodgement of any incumbrances. The letter, Exb. P.3, wherein the 1st Defendant acknowledged the Plaintiff's ownership of the suit property preceded the loan agreement. The caveat lodged by the 2nd Defendant therefore was thus illegal.
- 10 **Issue 3 as reframed is resolved in the negative.**

Issue 4**What remedies are available to the parties?**

The Plaintiff's primary prayer is an order that the Certificate of Title and requisite transfer forms to the suit property be duly executed by the Plaintiff in his favour as owner of the 15 suit property under the agreement of sale. This prayer is granted.

Additionally, the caveat lodged by the 2nd Defendant should be removed.

With regard to the prayer for special damages, these were specifically pleaded under paragraph 7(a) and (b). The Plaintiff adduced Exb P.8, travel information pointing to his trips to and from the United Kingdom and expenses incurred. They were unchallenged

20 and are accordingly allowed at GBP 1,920. I decline to award the sum for lodging the caveat since no receipt was provided by the Plaintiff.

Finally, I agree with Counsel for the Plaintiff that General damages are in order. The Plaintiff has demonstrated that the delay in meeting his end of the agreement has caused the Plaintiff considerable inconvenience over the last several years. I award a sum of 25 UGX 30,000,000/=.

In conclusion, I enter judgment for the Plaintiff and order as follows;

- a. A declaration that the 1st Defendant breached the agreement of sale of the suit land and developments comprised in Block 395 Plot 1412, Busiro, Sekiwunga, Mengo.
- b. A declaration that the 2nd and 3rd Defendants have no interest whatsoever in 5 the suit land. For avoidance of doubt, their caveat on the suit land is hereby vacated.
- c. An order for the Defendants to surrender the certificate of title to the Plaintiff.
- d. Special damages of GBP 1,920
- e. General damages of UGX 30,000,000/=
- 10 f. Interest at 8% (d) and (e) above.
- g. Costs of the suit.

15 Olive Kazaarwe Mukwaya

JUDGE

10 th February 2023

Delivered by email to Counsel for the parties.

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Prepared on 13 October 2026 · Esheria