

UGANDA / JUDGMENT

Tugume v Sebuwufu (Civil Suit 573 of 2013) [2023] UGHCLD 124 (11 May 2023)

[2023] UGHCLD 124

COURT

HC: Land Division (Uganda)

BEFORE

Byaruhanga Rugyema, J

CASE / FILE NUMBER

Civil Suit 573 of 2013

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

CONSOLIDATED CIVIL SUITS:

CIVIL SUIT NO. 573 OF 2013

TUGUME ADAH ::::::::::::::::::::::::::::::

VERSUS

SEBUWUFU MOHAMMED::::::::::::::::::::::::::::

AND

CIVIL SUIT NO. 239 OF 2013

SEBUWUFU MOHAMMED::::::::::::::::::::::::::::

VERSUS

TUGUME ADAH :::::::::::::::::::::::::::::: (Administrator of the Estate of Charles Tumwesigye)

Before Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

Background

In Civil Suit No. 239/2013, the Plaintiff Sebuwufu Mohammed [1] filed a summary suit against Charles Tumwesigye (Now deceased) seeking vacant possession of suit property comprised in Block 243, Plot 1289 at Luzira and the costs of the suit, contending and averring that by a Sale agreement dated 5/1/2013, the Defendants sold him the suit property at a consideration of Ugx 500, 000, 000/= which he fully paid but the defendant failed to give the Plaintiff the vacant possession of the said property. In the alternative, the Plaintiff sought for refund of the consideration.

- 12) The Plaintiff obtained a summary Judgement. On the 25th of September 2013, the summary Judgment and the Decree were set aside upon an application by the Defendant. He was granted leave to file his Written Statement of Defence (W. S. D). In his W. S. D, the said Charles Tumwesigye (Defendant Estate) denied the Plaintiff's allegations and contended that on 1st May 2013, he rescinded the Suit property Sale agreement on the ground that the Plaintiff breached or failed to complete payment of the consideration i.e, the final installment of Ugx 120,000,000/= on or before the agreed date of 30th April 2013. The Defendant Estate (the late Charles Tumwesigye) undertook to refund the amount so far paid to him.
- 13) In the meantime Ms. Tugume Adah, the Plaintiff in C. S No. 573 of 2013 sued her husband, the said Charles Tumwesigye as the 1st defendant and Mr. Sebuwufu Muhammed as the 2nd defendant seeking a declaration nullifying all transactions affecting the Suit land while averring that she was the official wife of the 1st Defendant having solemnized their marriage at Saint Stephen East Rwenzori Diocese in 2010 and that the suit property comprised of their matrimonial home which the 1st defendant

sold to the 2nd defendant without her spousal consent. It was her further averment that the defendants forged her signature on the sale agreement purporting her consent to the sale.

- 14) On 5/3/2014, by an order of Court, the two suits C. S No. 573 of 2013 and 239/2013 were consolidated. During the preliminary hearing of the suits on the 20/2/2015, the said Charles Tumwesigye (1st Defendant) was reported dead. Upon Charles Tumwesigye's death, his wife, the said Ms. Tugume Adah applied for Letters of Administration in respect of the Estate of her late husband. Upon obtaining the Grant, Ms. Tugume Adah, the Plaintiff in C. S No. 573 of 2013, withdrew the suit against the deceased Defendant (her late husband) and proceeded against only the 2nd Defendant, Mr. Sebuwufu Mohammed.
- 15) In his W. S. D, said Sebuwufu Mohammed denied the Plaintiff's allegations and contended that he purchased part of the Suit land and the commercial building thereon known as Block 243, Plot 1289 situated at Luzira and that the Plaintiff witnessed the sale agreement and consented to the same.

Counsel Legal representation:

t61 The Plaintiff, Ms. Tugume Adah was represented by Mr. Mamawi Bill of M/s Greystone, Advocates, Kampala and Mr. Gilbert Nuwagaba of KGN Advocates, Kampala while the Defendant, Mr' Sebuwufu Mohammed was represented by Mr. Kaganzi Lester of M/s Kaganzi & Co. Advocates, Kampala. At the closure of the hearing of the suit, both Counsel were directed to file their written final submissions on the given respective dates. However, at the time of writing the Judgment, the defendant and or his Counsel,

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as indeed, counsel for the Plaintiff complained as per his letter on record dated 28/3/2023 filed on record on 29/3/2023, refused and or failed to file their respective written submissions. As ^a result, Court proceeded to resolve the suit in spite of the defendant's failure in filing his respective submissions since submissions are not evidence but just a guide; The Uganda Civil Justice Bench Book Page 163 citing George Odunga's Digest on Civil case law and Procedure.

Issues for the determination of the suit:

t81 The following issues were formulated by the parties in a Joint Memorandum of Scheduling dated 26/6/2014:

1. Whether the Plaintiff in C. S No. 2391 2013 breached the Sale Agreement.
2. Whether the Defendant in C. S No.2391 2013 breached the Sale Agreement.
3. Whether the Sale Agreement was terminated by the Defendant in C. S No. 239/2073.
4. Whether the Plaintiff in C. S No. 753/2013 gave consent to the sale of the suit property.
5. Whether the sale of the suit property is valid or not
6. What remedies are available to the parties.

t91 The foregoing issues were formulated before the Plaintiff, Tugume Adah withdrew the suit against her deceased husband, Charles Tumwesigye (1st Defendant). I however propose to deal

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with issues Nos; 1&2 together, 3 separately, 4&5 together and 6 also separately.

- Issues 1&2;(a) Whether the Plaintiff in Civil Suit Number 239 of 2013 breached the Sale Agreement.
- (b) Whether the Defendant in Civil Suit Number 239 of 2013 breached the Sale Agreement.

- [10] Counsel for the Defendant Estate submitted that the Plaintiff, Mr. Sebuwufu Mohammed breached the agreement of sale when he did not pay the balance of the outstanding money by the 30th day of April 2013 as expressly agreed in the agreement. Time being of essence, by the 2nd of May of 2013 the money had not been paid, as a result, this prompted Mr. Charles Tumwesigye (Defendant Estate) to rescind the agreement. The letter rescinding the agreement was exhibited as P. Exh.8 and that instead of Mr. Sebuwufu Mohammed acknowledging the rescission, moved to pay money on the bank account, the late Tumwesigye Charles held with Equity Bank, which he obtained from a bank manager of Equity Bank a one Mr. Jaggwe, an act contrary to the fiduciary relationship of the bank to customer but no written acknowledgement was ever made for the balance. Counsel concluded that this Court should find that Mr. Sebuwufu Mohammed breached the said agreement.
- [11] The Sale agreement dated 5th January 2013 P. Exh. 1 stated as follows:

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- „1 In the consideration of an agreed total purchase price of Ug. Shs. 500,000,000/= (Five Hundred Million shillings only) payable by the purchaser to the Vendor, the Vendor hereby agrees to sell and hereby sells the property to the Purchaser who also agrees to purchase and hereby purchase the same.
- The purchaser shall pay to the vendor and SYBA Associated Advocates a sum of Ug. Shs.74, 000,000/= (Seventy Four million shillings only) as first installment, Syba Associated Advocates shall acknowledge receipt of Ug. Shs. 50,000,000/: by issuing a receipt to that effect and Ug. Shs. 24, 000, 000/= shall be acknowledged by the vendor by signing these presents. 2
- The balance Ug. Shs. 426, 000,000/= (Four Hundred Twenty Six Million shillings only) shall be paid in two installments as hereunder;) -)
- (i) Us. Shs. 245,000,000/= (Two Million Forty Five Million shillings only) as second installment on or before the 7th day of January 2013 the receipt of which shall be acknowledged by SYBA Associated Advocates the 7" caveator's lawyers by issuing a receipt.
- (ii) llg. Shs. 181,000,000/= (One Hundred Eighty One Million Shillings only) as the last and final installment on or before the 30th day of April 2013 the receipt of which shall be acknowledged by the vendor signing an acknowledgement of receipt.

4. Immediately after payment of Ug. Shs. 245,000,000/= (Two Hundred Forty Five Million Shillings only), Luigi Gianinazzi & Jobbing Fields Properties shall proceed to remove the caveat it lodged on this property and hand over the duplicate certificate of title to the purchaser or his Advocate-"

As can be seen from Para. 3.(ii) of the Sale Agreement, it was ^a term of agreement that the last installment of the consideration be paid by or on the 30'h of April 2013. During cross examination, Mr. Sebuwufu Mohammed (DW3) did concede that he had not paid the balance at the agreed time. That he paid the balance after the deadline of 30'h April 2013, that he actually paid the last coin in Court before the Registrar High Court Land Division. Time being of essence, upon the purchaser's default on payment of the last instalment, on 2'd May 2013 the vendor rescinded the agreement.

[12] In Nakawa Trading Co. Ltd Vs. Coffee Marketing Board H. C. C. S No. 137/91, it was held that "a breach of contract occurs when one or both parties fail to fulfill the obligations imposed by the term". In the instant case, the purchaser having conceded that he defaulted in the mode of payment of the purchase price, I find that he was in breach of the Agreement and therefore, the 1" and 2'd issues are in favour of the Defendant Estate. The Plaintiff in C. S. No. 239/2013 breached the sale Agreement. There is no evidence of any breach of the agreement by the vendor, the late Tumwesigye Charles (Defendant Estate).

Issue No. 3: Whether the sale Agreement was terminated by the defendant in Civil Suit No.239/2013

- [13] It is case for the Defendant Estate that when the Plaintiff, Sebuwufu Mohammed defaulted in payment, the vendor rescinded the Agreement with an option to refund to the Purchaser Ug. Shs. 380,000,000/= that had so far been deposited on the purchase price (Ugx f 20,000,000/= was still owing). The purchaser denied receiving the Rescission Notice. However, on the 3'd and 6'n May 2013, the purchaser deposited Ugx. 44,000,000/= and Ugx. 51,000,000/= respectively on the Vendor's personal Account in Equity Bank without his knowledge and consent. This was definitely contrary to the terms of the agreement that required payments to be by cash to Syba Associated Advocates and the Vendor, the late Charles Tumwesigye who were to sign an acknowledgment of the receipt of the funds. Indeed, the vendor angrily protested to Equity Bank official's unprofessional conduct of disclosing his personal Bank Account to strangers, the purchaser.
- [14] It's the view of Counsel for the Defendant Estate that the Plaintiff's conduct of deviating from the agreed upon mode of payment of the installments of the purchase price by cash to the Vendor's Bank Account without authorization at the time when he had defaulted, is proof that he had learnt or received the Vendor's notice of rescission of the agreement.

- [15] In the absence of any evidence of authorization by the vendor that payments of the purchase price installments be made on his personal Bank Account, am inclined to believe the Defendant Estate that the purchaser Mr. Sebuwufu Mohammed, indeed received the Vendor's Notice of rescission of the sale Agreement

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but adamantly ignored it and paid the 2 deposits on the Vendor's personal Bank Account in order to defeat the Vendor's Rescission of the Agreement. Even with the deposits made on the Vendor's Bank Account, the purchaser was still in default, he did not deposit the entire sum due.

[16] In view of the foregoing, I find the 3'd issue in the affirmative. The Sale Agreement was duly terminated by the defendant in C. S. No.2 3912013.

Issues No. 4 & 5; (a) Whether the Plaintiff in C. S. No. 753 of 2013 gave consent to the sale of the Suit property. (b) Whether the sale of the Suit

property is valid or not.

- t17l It is the Plaintiff's case that the purported sale of the Suitland by her late husband, Charles Tumwesigye to the Defendant, Sebuwufu Muhammed was done fraudulently as her purported signature thereon was forged. That the signature on the Sale agreement (P. Exh. 1) attributed to her purportedly signed on 5'h January 2013 is significantly different from her signature on the caveat she lodged on 13th August 2012 (P. Exh.2) in respect of the suit property.
- IfB] The Plaintiff further averred and testified that she was not aware of any sale of the Suit land and denied ever registering any withdrawal of the caveat (P. Exh.3) she had lodged in respect of the Suit land in 2013. The Plaintiff explained that she discovered the sale of the Suit property during her eviction from the property.

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That when she confronted her late husband, Charles Tumwesigye about the forgery of her signature, he confessed to her that he knew she would resist the sale yet he was in dire need of money to pay off a company, Jobbing Fields Ltd which was in possession of the Certificate of title, he had given out as security without her consent, and that the said Jobbing Fields had obtained judgment against him.

- [19] Lastly, that on the day the Plaintiff is alleged to had signed the agreement (5/1/2013), it is her contention that she was not at home (in Kitintale), she had gone to Kazo (of Kampala) to visit ^acousin who had just given birth. She categorically denied ever giving her consent in whatever form to sell the Suit land or any part of it.

- t20l The defendant, Mr. Sebuwufu Mohammed on the other hand insisted that the Plaintiff did sign the agreement and there were several witnesses who included an advocate Birungi Sheila (DW1), a one Mutebi Robert (DW2), the broker who brokered the Suitland deal and another advocate Bautu Robert (DW4) who knew her and saw her sign the agreement.
- [21] Counsel for the Plaintiff submitted that the crux of this case is whether indeed the Plaintiff signed the agreement dated 5th January 2013 and the Caveat withdrawal dated 6th January 2013 and, whether the Plaintiff is literate in the English language to have signed and written the documents she's alleged to have executed.
- [22] Citing a plethora of the various provisions of the Illiterates Protection Act and authorities, Counsel concluded imploring this

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Court to invoke Section 72 of the Evidence Act and examine the Plaintiff's signatures, including that which she provided in Court during cross examination, the one on her Caveat and the accompanying affidavit and compare them with those attributed to her on the Sale agreement and the Caveat withdrawal. It is his contention that Court will find that they are not in any way similar. That the Plaintiff being illiterate in the English language, she was incapable of writing the withdrawal of a caveat (written in English), which interestingly was not even attested to. It was therefore his further conclusion that the Plaintiff's purported signatures on the sale agreement and the purported Caveat withdrawal attributed to her were forged with the sole purpose of fraudulently portraying to all sundry that her consent for the sale of the suit property had been procured legitimately whereas not but it is instead an illegality.

Requirement of Spousal Consent

- [23] In the determination of these two issues, this Court has to first make a finding on whether the Suit land,/Property was family land and therefore subject to the provisions of Section 39 of the Land Act.
- 124l Section 39 of the Land Act provides thus:

"39 Restrictions on the transfer of family land

1) No Person shall'

(a) sell, exchange, transfer pledge, mortqaqe or lease any land;

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- (b) enter into any contract for sale, exchange, transfer, pledging mortgage or lease of any land; or

- (c) give away any family land inter vivos, or enter into any transaction in respect for family Land;

except with the prior consent or his or her spouse".

"Family land" include land on which the person ordinarily resides with his or her spouse and from which they derive sustenance from, S. 38 A (4) of the Land Act.

[25] The burden is on the Plaintiff to prove that the Suit subject matter was family land and therefore protected under Section 39 of the Land Act (see Ss. f01-f03 of the Evidence Act). As was observed in Inid Tumwebaze Versus Mpweire Stephen & Anor, H. C. C. A Number O39/2OLO,

> "..... this is so because the allegations of irregularities in the transactions leading to the sale as put across by Counsel for the Appellant if proved to have existed would supersede any other issues."

[26] The Plaintiff Tugume Adah (PW1) testified that she was customarily married to Charles Tumwesigye in 1993 and later contracted a Church marriage on the 15th of May 2010 at Saint. Stephen's Cathedral Diocese East Rwenzori (P. Exh1O). That her late husband entered into a transaction of sale of land comprised in Kyadondo Block 243 plot 1289 land at Luzira that comprised of a storied building with shops and offices on the ground and 1" floor while the 2'd floor was used as their matrimonial home but that he later disagreed with the defendant, Sebuwufu Mohammed

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as to the manner of payment leading to her late husband rescinding the agreement of sale of the suit property. That prior to the transaction they were renting in Nsambya until 1997 when they shifted to the suit property as their new home where they now derive their livelihood from the property in form of rent from tenants and the market across the road.

1271 The defendant, Sebuwufu Mohammed who testified as (DW3) admitted that indeed the family of the vendor were collecting rent from the tenants and the suit property which he described as ^a commercial building. However, Mutebi Robert (DW2), the land broker of the deal for the sale of the suit property during cross examination by Mr. Nuwagaba revealed thus:

> "... we proceeded to the home of the vendor at Kitintale where we found the wife, Adah who after talking to the husband, endorsed on the agreement-"

During cross examination by Court, he further stated;

"The sale of the land was discussed in Mr. Bautu's office... We left him in his office and proceeded to Kitintale at Tumwesigye's home where the Agreement was signed by the parties."

[28] The above pieces of evidence are corroborated by the evidence of the defendant, Sebuwufu Mohammad himself who during cross examination my Mr. Mamawi stated that the endorsements on the agreement were done at Kitintale at the premises he was purchasing, which premises, witnesses refer to as the "home" of the vendor and not a "commercial place" of the vendor.

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- [29] Clearly the above excerpts of the evidence by the defence witnesses support the Plaintiff's contention that the suit property located at Kitintale comprised the home of the family of the Plaintiff and her late husband, the late Charles Tumwesigye. As a result of the foregoing, I am inclined to believe the Plaintiff's version of the story that the Suit property formed the matrimonial home of the Plaintiff as the lawful wife of the deceased Vendor which evidence was not rebutted by the defendant.
- [30] For the above reasons, I find that the suit property was a family land and therefore it was subject to the provisions of Section 39 of the Land Act and as a result, the transaction of the Suitland required the Spousal consent of the plaintiff as the lawful wife of the vendor.

Attestation of the Sale Agreement and the Withdrawal of the Caveat

(a) Alleged presence of the Plaintiff during the execution of the Suit property Sale Agreement

[31] The Plaintiff blatantly testified that she neither witnessed nor signed on the sale agreement of the suit property as a form of providing her spousal consent. It is her contention that the signature thereon attributed to her was forged. It is her evidence that on the execution of the impugned Agreement she was not at home where it was executed. The defendant on the other hand insisted that the Plaintiff witnessed the agreement and followed it by withdrawing the caveat that she had placed on the suit property.

- [32] In their Witness statements, all the Defense witnesses save DW4 claim that they witnessed the plaintiff sign on the impugned Sale Agreement (P. Exh.f) and DW1 in particular claimed that upon her advice, the Plaintiff in her own handwriting drafted the Withdrawal of the caveat (P. Exh.3). However, it is apparent that P. Exh.3 was drafted in English language. It is the Plaintiff's case that she is illiterate in English having stopped in the Primary 4 at Rwamucucu Primary School in Kabale and that therefore, she was incapable of drafting such a document in English language.
- [33] Ms. Birungi Sheila (DWf), an Advocate who prepared the Sale Agreement, Mutebi Robert (DW2), the broker and the Defendant

(DW3) himself testified that the Sale agreement of the Suit property was executed at the Suit premises (at Kitintale) while Robert Bautu (DW4) who is also an Advocate, on his part clearly stated in his Witness statement that the Sale Agreement was executed in his office at Syba Chambers. In paras. 18 and 19 of his Witness statement he stated thus:

" 18. That the Agreement was concluded on Saturday 5th January, 2013 and the parties appended their signatures on the Sale agreement at Syba Associated Advocates Plot 11A, Park Lane Ilesketh Bell Road.

L9. That the Plaintiff consented to the sale transaction and appended her signature to (the) agreement".

Later, during cross examination, he conceded that nobody signed that agreement from his office. He never went to the suit property in Kitintale and therefore, he was not among those who

purportedly witnessed the Plaintiff endorse on the agreement as the DW2 and the Defendant himself (DW3) claimed during cross examination.

- [34] As regards whether the Plaintiff in her own handwriting drafted the document withdrawing the Caveat (P. Exh.3), whereas DW1 claim that the Plaintiff did it on her advice, neither DW2 nor DW4 witnessed the drafting of this Withdrawal of the caveat. DW1 herself an Advocate, who conceded during cross examination that the Withdrawal of the caveat ought to be attested never ensured either its registration or attestation. Though she again claimed that the document was supposed to be witnessed by her fellow advocate Mr. Bautu Robert (DW4), there's no evidence that the said Bautu ever witnessed it.
- t35l Lastly, though DW1 claim that the Plaintiff was well versed with English, Mr. Robert Bautu (DW4) nevertheless clarified this during cross examination thus:

"I never witnessed Adah Tugume sign the agreement.... She could have signed in the presence of Kabahuma who attested the agreement since it was said that Adah Tugume did not understand English....". it is Birungi Sheila (DW1) who requested me to avail him to her to help in translation to Runyakitara."

Indeed, DW1 during cross examination conceded that Nyakahuma is the one who explained to the Plaintiff in Rukiga the contents of the agreement. This is indeed exemplified by the certificate of translation on the agreement to Luganda and Rukiga, the languages of the parties to the contract.

- t36l I find the foregoing clearly sufficient evidence that DW1 told the Court lies when she insisted that the Plaintiff was literate in English and therefore she is the one who drafted the Withdrawal of the caveat (P. Exh.3).

- [3 7] Besides, none of the witnesses who claim to have witnessed the execution of the sale agreement at Kitintale could relate to the events that allegedly occurred at the site of the execution of the Agreement. For example, the defendant explained that he paid 74 million in cash to the Vendor and his wife, the Plaintiff. DW I could not tell whether the defendant paid cash or through the bank and how much was paid upon the execution of the agreement. DW2 could not tell how much the defendant paid at the execution of the agreement. DW4 did not attend the execution of the agreement. In brief, no witness testified witnessing payment of any money during the execution of the Agreement.
- [38] The inconsistencies and contradictions in the evidence of DW1-DW4 as highlighted above portraying the Defendant's witnesses' failure to properly relate to the events that allegedly occurred at the Suit property premises where the Sale Agreement was allegedly executed, leads to the only irresistible conclusion that in the circumstances of this case;
- (a) There is a likelihood that the impugned agreement of the sale of the suit property was not executed at the suit property.
- (b) If at all the agreement was executed at the Suit property, then the Plaintiff was not present and therefore, did not participate in its execution.

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- (b) Forgery of agreement document the Plaintiff's signature and Withdrawal of In the the Sale caveat
- [39] Counsel for the Plaintiff urged this Court to invoke Section 72 of the Evidence Act for comparison of the Plaintiff's signatures on the Caveat together with the affidavit in support of the Caveat(P. Exh.2), then her signature which she provided during cross examination (D. Exh.1), with that which is attributed to her on the impugned sale agreement and the Withdrawal of the Caveat (P. Exh.3). Section 72 of the Evidence Act provides thus:

"72. Comparison of signatures, writing or seal with others admitted or proved.

- (1)In order to ascertain whether a signature writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any purpose.
- (2)The court may direct any person in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by that person.
- [40] In the instant case, I have carefully and critically looked at the Plaintiff's signature on the Caveat and its accompanying affidavit

she placed on the Suit property (P. Exh.2), then the specimen signature she provided in my presence during her cross examination (D. Exh. 1), these signatures clearly, are distinctively different from those attributed to her on the Sale Agreement (P. Exh. 1) and the Withdrawal of Caveat (P. Exh.3). It is also the case with her signatures on her Marriage certificate dated 15/5/2010(P. Exh. 10) and her Witness statement on record dated 18/L/2023 which are similar to those on P. Exh.2 and the D. Exh.1 but appear different from those attributed to her on the Sale agreement and the Withdrawal of the Caveat (P. Exh.3).

[41] The totality of the foregoing leads to only one conclusion, that the purported Sale Agreement is tainted with forgery of signature of the spousal consent. It was intended to perpetuate a grand fraud to defeat the Plaintiff's interest as a spouse in the suit property. In the premises, I am satisfied that the Plaintiff did not provide the necessary spousal consent prior to the purported transaction of the Suit property between the Defendant and the Plaintiff's deceased husband. The Plaintiff's purported signatures on the Sale Agreement and the Withdrawal of the caveat are forgeries and therefore the 2 documents in question are null and void, thus have no binding effect on the plaintiff.

Issue 6: What remedies are available to the parties

Civil Suit No. 753 of 2013:

(a)A declaration that the Sale agreement entered between the late Charles Tumwesigye and the Defendant, Mr. Sebuwufu Mohammed be declared null and void for illegality.

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[42] The sale Agreement of the Suit property was void ab initio for want of spousal consent and illegal for forgery of the Plaintiff's signatures thereon. As a result, the Sale Agreement is accordingly declared null and void for illegality.

(b)The Defendant's caveat on the Suit Property.

[a3] The Defendant placed a Caveat on the suit property as the purchaser, it is accordingly vacated, and it is ordered that the Commissioner Land Registration enters or notes its vacation.

(c) An order for the plaintiff's immediate possession of the suit property.

[44] The evidence on record is to the effect that the Plaintiff is already in possession of the Suit property by virtue of a Court Order and Bailiff's Return dated 20'n of November 2018. The Plaintiff's possession of this property is therefore, in premises accordingly maintained.

(d) General damages.

- [45] It is trite law that damages are the direct and the probable consequence of the act complained of. Such consequences may be loss of undisturbed use of the Suit property, loss of profit, physical inconvenience, mental distress, pain and suffering; Kinyera George Versus Victoria Seeds Ltd H. C. C. S Number 604 of 2015.
- [46] In the circumstances of this case, the Plaintiff has for all these years from 2013 to date been battling for recovery and securing

of a home worth hundreds of millions of shillings from the Defendant, which was also offering her income in form of rent. As a result, she must have suffered immense economic inconvenience and mental stress. The Defendant and the vendor's fraudulent conduct was calculated to procure benefits to themselves at the expense of the Plaintiff and the family at large. In the circumstances of this case, I consider and award the Plaintiff a sum of UgX 2 50,000 ,000/- at L6% interest per annum from the date of Judgment till payment in full.

(e) Costs of the suit

Under Section 27(2) CPA, a successful party is entitled to costs unless for good cause court orders otherwise. In the premises costs are granted to the Plaintiff as the successful party.

civil suit No. 239 Of 2013:**(a) Vacant possession of the Suit property.**

- [47] This Court having found that the Sale transaction of the Suit property between the Plaintiff, Sebuwufu Mohammed and the Defendant Estate was null and void for illegalities, the Plaintiff would in the circumstances not be entitled for the sought order of Vacant possession.

(b) Refund of Consideration (Money had and received).

- [48] According to the Plaintiff, he paid all the consideration for the Suit property, but the Defendant Estate failed to give the Plaintiff the vacant possession of the Suit property.

- [49] The Defendant Estate on the other hand contended that out of the UgX. 500,000,000/= as the total consideration, by close of business on the 30th April 2013 when the Plaintiff was to pay the last instalment of the purchase price as per the terms of the agreement, Ugx. 120,000,000/= was still owing which led to the rescission of the agreement on 1st May 2013. 2^{ndly}, that the Plaintiff in contempt of a Court Order dated 25th September 2013 illegally occupied and collected rent from the suit property for ^a period of 5 years and 2 months totaling to UgX. 463,200,000/= based on the Plaintiff's admission in court during

cross examination that he was earning approximately Ugx. 13,600,000/= from the Suit property per month.

- [50] I have critically looked at D. Exhs. S & 6 which the Plaintiff, Sebuwufu Mohammad claim are proofs that he paid all the consideration. I find that the payments as reflected in the acknowledgments dated 8/1/13, 3L/t/r3, 9/2/13, 19/2/13 & L3/3/13 support the Defendant Estate's position that by 1st May 2013 when the Suit Property Agreement was rescinded, Ugx. 120,000,000/= was owing on the consideration. There is no evidence provided by the Plaintiff of any further payments that were effected or made on the Suit property. The parties' respective claim that the benefits of rent collection from the Suit premises at different stages of possession by either party be translated into payments as either further consideration on the property (as the Plaintiff wants court to hold) or as a set off of the Money had and received (as the Defendant Estate want court to find), is untenable simply because at the time each of the respective party was collecting rent, none of their rights had been

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adjudicated upon to entitle either party such claim. The issue of ownership of the suit property was still in contention and therefore, neither party would take advantage of that time and apply the collected rent to the contract of sale of the suit land.

- [51] It follows therefore, from the foregoing, the proven Money had and received by the Defendant Estate is a total of Ugx. 380,000,000/= (i.e., total consideration of Shs. 500,000,000/= less Shs. 120,000,000/= that was owing on 1st May 2013 when the Agreement was rescinded).
- [52] As regards the installments of UgX. 44,000,000/= and Ugx. 51,000,000/= paid on the Defendant Estate personal Bank Account in Equity Bank without authority, it is taken that the Plaintiff never took risk and failed to take steps to recover the sum from the Account in view of the Vendor's protest and especially, the fact that the Bank was accordingly notified in writing about the irregular deposit of the money on the Vendor's Account by the Defendant.
- [53] Generally, the law is to the effect that Courts do not enforce illegal contracts save where the parties to the illegal contract are not in *Pari delicto*, the less guilty party would be entitled to recover any paid or property transferred under such contract especially where the contract is made illegal on account of being barred by statute; *Kiriri Cotton Co. Ltd Vs Ranchhodd Dewani* I19581 1 E. A 239.
- [54] In the instant case, the Sale Agreement is made illegal on account of being barred by S.39 of the Land Act and forgery of the signature of the Vendor's spousal consent. The Defendant Estate, the Vendor was the highly culpable party because the forged

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signature was of the vendor's wife and the Vendor must have been the orchestrator since he was the main beneficiary of the illegality. It follows therefore the Plaintiff as the less guilty party would be entitled to refund of the sum. received on the blotched consideration. This is also based on the premise that illegality should not be used for unjust enrichment of any party.

[55] In the premises the Defendant Estate shall refund a total of UgX. 380,000,000/= as money had and received on the consideration of the sale of the suit property.

Conclusion

- [56] Judgment is given in the favor of the Plaintiff in the following orders;
- 1 The sale agreement entered into between the Defendant, Sebuwufu Mohammed and the Plaintiff's late husband, the Defendant Estate of the late Charles Tumwesigye is null and void for illegality.
- 2. The Caveat lodged on the Suit property, Kyadondo Block 243 Plot 1289 land at Luzira is accordingly vacated.
- 3. General damages of Ugx. 250,000,000/- at 16% interest per annum from the date of judgment to payment in full
- 4. The plaintiff,/Defendant Estate to refund Shs. ³⁸⁰ 000,000/= to the purchaser, Sebuwufu Mohammed as Money had and received on the consideration of the Suit property.

\$5.\$ Civil Suit No. 239/2013 is dismissed with no orders as to costs and the Plaintiff is awarded costs of the Civil Suit No. \$573/2013\$. \$th.\$

Dated at Kampala this day of May 2023

Byaruhanga Jesse Rugyema
Judge

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