

UGANDA / JUDGMENT

Walugembe Daniel v Katushabe Jane and Others (Civil Suit 2543 of 2015) [2025] UGHCLD 133 (14 July 2025) [2025] UGHCLD 133

COURT

HC: Land Division (Uganda)

BEFORE

Bernard Namanya, J

CASE / FILE NUMBER

Civil Suit 2543 of 2015

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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-2543-2015

WALUGEMBE DANIEL::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

1. KATUSHABE JANE

2. MBABAZI OLIVER LYNN

3. MUTESI JACENT ELVIN::::::::::::::::::::::::::::::::: DEFENDANTS

BEFORE: HON. JUSTICE BERNARD NAMANYA

JUDGMENT

Introduction

1. Sometime in 2013, the plaintiff sought to purchase land and a house comprised in Kibuga Block 383 Plot 6380 at Musaale in Wakiso District ("the suit property"). The plaintiff paid Ushs 100,000,000 to the defendants. The 2nd and 3rd defendants later claimed to be true owners of the suit property and prevented the plaintiff from taking over physical possession. In December 2013, the 3rd defendant became the registered owner of the suit property. The

1st defendant did not file a defence. The 2nd and 3rd defendants filed a joint written statement of

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defence denying ever entering into a land sale transaction with the plaintiff.

2. The suit was initially filed against four defendants (Katushabe Jane, Mutesi Jacent Elvin, Mbabazi Oliver Lynn and Mutesi Jacent Elvin) but on the 3rd October 2016, the suit against the 2nd defendant (Mutesi Jacent Elvin) was withdrawn leaving only three defendants as shown in the title of the suit.

Representation

3. The plaintiff was represented by Advocate Jane Namuddu while the defendant was represented by Advocate Collin Byaruhanga.

The plaintiff's evidence

- 4. The plaintiff produced one witness to prove his case. PW1 (Walugembe Daniel), and relied on the following documents:
- Exh. P1-Voter's card for the 1st defendant.
- Exh. P2-Voter's card for the 2nd defendant.
- Exh. P3-Sale agreement dated 26th November 2013.
- Exh. P4-A certificate of title for the suit property.
- Exh. P5-Transfer form dated 26th November 2013.
- Exh. P6-LC1 letter dated 3rd December 2013.
- Exh. P7-A police report dated 28th May 2014.
- Exh. P8-Judgement of Entebbe Chief Magistrate's Courts.

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- Exh. P9-Search statement dated 18th May 2015.
- 5. PW1 (Walugembe Daniel) testified that on 15/11/2013, he was approached by David Balabyekubo who told him about a house on sale at Kitende. He inspected the suit property and confirmed that it had no encumbrance. PW1 then paid Ushs 100,000,000 to the 1st defendant who handed him the certificate of title, transfer form and sale agreement. When he attempted to transfer the suit property into his name, the Registrar of Titles informed him that the certificate of title was forged, and it was confiscated. He attempted to take possession of the suit property and failed following resistance by the 2nd and 3rd defendants who claimed to be the true owners of the suit property.

The 2nd and 3rd defendant's evidence

- 6. The 2nd and 3rd defendants produced two witnesses to prove their case. DW1 (Mutesi Jacent Elvin and DW2 (Mbabazi Oliver Lynn). They relied on the following documents:
- Exh. D1-Record of proceedings in Entebbe Chief Magistrate's Court.
- Exh. D2(a)-3rd defendant's UK passport issued on 16th July 2012.
- Exh. D2(b)-3rd defendant's UK passport issued on 19th September 2013.
- Exh. D3-Brussels Airlines ticket dated 12th October 2013.

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- Exh. D4-Transfer form dated 11th November 2013 to the 3rd defendant.
- Exh. D5-Photographs of the suit property.
- Exh. D6-A copy of the 3rd defendant's Rwandan National ID.
- Exh. D7-3rd defendant's police statement dated 9th December 2013.
- Exh. D8-Police Bond dated 18th May 2013.
- Exh. D9-A rental sale agreement dated 23/12/2013 between the 3rd defendant and Mr. Rwamilera Alex.
- Exh. D10-A copy of the 3rd defendant's Rwandan passport issued on 6th September 2012.
- 7. DW1 (Mutesi Jacent Elvin) denied any dealings with the plaintiff. That the signature in Exh. P4 dated 26/11/2013 is not hers as on that same date she was in the UK and had left Uganda on 19/10/2013. That the picture in Exh. P2 is not her as well as the date of birth on it as her correct year of birth is 1986 which appears on her passport. That she does not know Kizito Farouk Kamulegeya and he has never acted on her behalf as her Advocate. That she has never attempted to sell her property and has never authorized any person to sell. That she only authorized the estate agents to show potential buyers and take pictures but she does not remember them by name. That she has never received

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any money from the plaintiff, has never been charged with any offence and had no account with Equity Bank.

- 8. DW2 (Mbabazi Oliver Lynn) stated that the signature in Exh. P3 appearing against her name is not hers and that on 26/11/13, she was in Kigali as shown in her passport. That Exh. P1 and Exh. P5 are not hers and the signatures thereon are not hers. That Exh. D4 dated 11/11/2013 is hers and Mutesi Jacent Elvin is her sister with whom she owns the property.

Locus in quo visit

9. A locus visit to the suit property located at Kitende off Entebbe Road was conducted on the 21st March 2015 in the presence of the plaintiff and the 2nd defendant. Advocate Patrick Furah appeared for the plaintiff while Advocate Ronald Muzaale appeared for the 2nd and 3rd defendants. The court observed that the suit property is developed with a residential house.

Issues for determination by the court

- i). Whether there was fraud and connivance between the 1st defendant on one hand, and the 2nd and 3rd defendants on the other hand in the transaction for sale of the suit land to the plaintiff?
- ii). What remedies are available to the parties?

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Issue No.1: Whether there was fraud and connivance between the 1st defendant on one hand, and the 2nd and 3rd defendants on the other hand in the transaction for sale of the suit land to the plaintiff?

- 10. Despite proof of service upon the 1st defendant, she did not file a defence and on the 7th March 2017, the court ordered that hearing of the suit proceeds ex parte against her under Order 9 rule 10 of the Civil Procedure Rules.
- 11. The plaintiff asserted that there was fraudulent connivance between the defendants to his detriment. The plaintiff bears the burden of proof, and this being a fraud case, the standard of proof is heavier; it is beyond a mere balance of probabilities. See *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).
- 12. Counsel for the plaintiff submitted that the plaintiff proved connivance between the defendants to the detriment of the plaintiff. On the other hand, counsel for the defendants submitted that there was no connivance as alleged. That the plaintiff failed to carry out due diligence on the suit property.
- 13. I have perused Exh. P7 (Uganda police report dated 28th March 2014 signed by Sanyu Jane, Ag. Divisional CIID Officer, Kajjansi). As to

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"It was established that the alleged original proprietors MBABAZI OLIVER LYNN [2nd defendant] and MUTESI JACENT ALVIN [3rd defendant] through the call data of Warid were in connection with the brokers and they all disappeared.

It was established there was connivance between the imposed Katushabe Jane alias Mbabazi Oliver Lynn, Nsubuga Ronald with the true Mbabazi Oliver Lynn and Mutesi Jacent Elvin after finding a phone number that was frequently contacted by all of them at the time offence was committed.

It was established that the true Mbabazi Oliver Lynn and Mutesi Jacent Alvin handed over the keys to the house to the imposed Katushabe Jane alias Mbabazi Oliver Lynn to enable them defraud the Purchaser Walugembe Daniel."

14. The evidence adduced by the plaintiff on connivance between the 1st defendant and the 2nd and 3rd defendants, was not rebutted by the defendants. In *Attan Okia Moses & Electoral Commission v. Ariko Herbert Edmund Okworo*, Election Petition Appeal No. 7 of 2021 & Election Petition Appeal No. 10 of 2021 (at pp22-23 of the Judgment),

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it was held that when evidence is not challenged by other evidence or in cross examination, it is deemed to be admitted.

15. I therefore believe the evidence adduced by the plaintiff that there was connivance between the 1st defendant and the 2nd and 3rd defendants. The plaintiff paid Ushs 100,000,000 to the 1st defendant who was constantly in touch with the 2nd and 3rd defendants through telephone call data as proved by the Uganda police investigations. The search report on the suit property (dated 18th May 2015) shows that the 3rd defendant (Jacent Elvin Mutesi) is the registered owner of the suit property having been entered on the register on the 17th July 2014 under Instrument Number WAK-00023262. While the evidence adduced by the plaintiff proves that there was fraudulent connivance between the defendants, it is inadequate to warrant the cancellation of the 3rd defendant as the registered owner of the suit property. As was held in the *Kampala Damanico* case (*supra*), evidence that would lead to the cancellation of a certificate of title of land is beyond a mere balance of probabilities. The plaintiff did not adduce evidence that meets this threshold.

What remedies are available to the parties?

16. The plaintiff proved to the satisfaction of the court that on the 26th November 2013, pursuant to a sale agreement (Exh. P3), he paid Ushs 100,000,000 to the defendants which was duly acknowledged. The

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money was for the purchase of the suit property but due to the fraudulent conduct of the defendants, the plaintiff failed to take possession of the suit property. The plaintiff parted with his money in exchange for nothing! About 12 years have gone by since the plaintiff was fraudulently deprived of his money.

- 17. 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.
- 18. 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

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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.

- 19. 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.
- 20. It is the finding of this court that the plaintiff paid Ushs 100,000,000 but the defendants failed to deliver the suit property to him. The defendants are in breach of the contract for sale of land by failing to honour their obligations. The plaintiff is entitled to a refund the purchase price. It is also my decision that in the circumstances of this

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case, the plaintiff is entitled to an award of general damages and payment of interest on the purchase price. In *Uganda Post Limited v. Consolate Mukadisi* [2023] UGSC 58, the Supreme Court of Uganda held that general damages are the direct, natural or probable consequence of the wrongful act complained of, and include damages for pain, suffering, and inconvenience, and their award is supported by Article 126 (2) (c) of the Constitution of Uganda.

Order of the court

- 21. In conclusion, I enter judgment in favour of the plaintiff, and order as follows:
- i). That the defendants (Katushabe Jane, Mbabazi Oliver Lynn and Mutesi Jacent Elvin) jointly and/ or severally shall refund a sum of Ushs 100,000,000 (Uganda Shillings One Hundred Million only) to the plaintiff (Walugembe Daniel).
- ii). The defendants shall pay to the plaintiff interest of 5% per annum on Ushs 100,000,000 from the 26th November 2013 until payment in full.
- iii). That the defendants shall pay general damages of Shs 10,000,000 (Uganda Shillings Ten Million only) to the plaintiff.
- iv). That the defendants shall pay interest of 24% per annum on general damages from the date of judgment until payment in full.

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- v). That the defendants shall pay the costs of the suit.

IT IS SO ORDERED

BERNARD NAMANYA JUDGE 14 July 2025

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