THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 75 OF 2006

(Appeal from the Judgment of His Lordship Justice Rubby Aweri Opio in HCCS No. 348 of 2001 given at Kampala on the 6th day of July 2005)

NIPUN NORATTAM BHATIA :::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

CRANE BANK LIMITED ::: RESPONDENT

CORAM: HON. LADY JUSTICE SOLOMY BALUNGI BOSSA, JA
HON. MR. JUSTICE KENNETH KAKURU, JA
HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

JUDGMENT OF HON. JUSTICE KENNETH KAKURU, JA

Background to this Appeal, as set out by the respondent is as follows**.**

The Appellant sued the Respondent in the High Court of Uganda seeking an order of vacant possession of the Land situate at Plot 1 Martin Road, Old Kampala (hereinafter referred to as 'the suit Property') and a declaration that the ownership of the said land had reverted to the estate of the Late Narottam Bhatia. The Appellant sued in his representative capacity as the holder of letters of administration of the estate of the late Narottam Bhatia. The late Narottam Bhatia had entered into a sale agreement with the Respondent in respect of the suit property on the 17th April, 1996 in which he agreed to sell the suit property to the Respondent at US$ 75,000/= (United States Dollars Seventy Five Thousand) half of which was paid on execution of the agreement and the balance was to be paid on

delivery of the title deed in the Respondent's name. Clause 2 of the sale agreement stipulated that the Vendor would indemnify the Purchaser from any loss or damage suffered as a result of any defect in the Vendor's title to the suit property.

The late Narottam Bhatia was a sole beneficiary of the suit property under a trust created by the registered proprietors now deceased. Having failed to trace the trust deed, the late Narottam Bhatia claimed he had failed to transfer the title to the Respondent and decided to invoke Clause 2 above. The Respondent declined the refund and hence the suit in the High Court. The trial judge dismissed the suit with costs and entered judgment in favour of the Respondent on the Counterclaim.

The appellant set out seven grounds in his Memorandum of Appeal as follows.

1. **The learned trial judge erred in law and in fact in finding that the appellant was not entitled to invoke clause 2 of the sale agreement.**
2. **The learned trial judge erred in law and in fact in finding that the appellant was in breach of its contractual obligations under the sale agreement.**
3. **The learned trial judge erred in fact and in law in finding that the respondent was not a trespasser on the suit land.**
4. **The learned trial judge erred in law in granting the respondent an order of specific performance in addition to an award of general damages.**

5. **The learned trial judge erred in law in giving simultaneously and in the same matter, two alternative and contradictory judgments resulting in a miscarriage of justice.**
6. **The learned trial judge erred in awarding the sum of US $20,000/= in general damages which amount was excessive in the circumstances.**
7. **The learned trial judge erred in law and in fact in granting the respondent an exorbitant interest rate of 36% per annum compounded weekly on the dollar amount of $37,500/= that he had awarded as special damages in his alternative judgment.**

He seeks an order of this Court setting aside the judgment of the High Court and substituting it with an order in favour of the appellant as prayed in the plaint.

During the hearing the Appellant was represented by Mr. E. Byenkya while the Respondent was represented by Mr. Ronald Tusingwire.

It is the duty of the first appellate court to reappraise or re-evaluate the entire evidence on record and make its own finding of fact on the issues while giving allowance for the fact that it had not seen the witnesses as they testified before it can decide on whether the decision of the trial court can be supported. See: **Mujuni Ruhenba vs. Skanka Jensen Ltd Court of Appeal Civil Appeal No. 56 of 2000** (unreported).

During the hearing counsel for the appellant chose to argue grounds 1, 2 and 3 together since they all related to the issue whether or not the Appellant could invoke Clause 2 of the Agreement. There are two Clause 2 of the agreement of sale of land dated 12th April 1996 (hereinafter referred

to as “the Agreement”). This was clearly a drafting problem. However, the operative Clause 2 for these purposes is found at page 2 of the agreement and reads;

> *“...the vendor undertakes to indemnify the purchaser for any loss or damage suffered as a result of any defect in the vendor’s title to the property which may prevent the purchaser from acquiring legal title to the same or from acquiring quiet possession of the same, and in such event a full refund shall be effected and the property shall revert fully to the vendor...”*

Counsel for the appellant (plaintiff in the lower court) submitted that the learned judge wrongly found that the appellant did not have a defect in the title to the suit property which prevented him from transferring the said property into the names of the Respondent Bank (defendant in the lower court). He further submitted that it was known by all the parties that Mr. Nipun Bhatia did not have legal but rather equitable title to the suit property and therefore its perfection into a legal transfer was always in issue that is why the parties inserted clause 2 in the agreement. The suit property was held in trust for his late father however the actual trust deed had been lost.

Counsel for the Appellant pointed out that even though his client was the vendor, the suit property was actually in the hands of a third party the family of the late Col Moses Nyanzi (alias Drago) and that the respondent bank wanted to buy it for the said person.

Counsel for the Respondent submitted that it was not true that the appellant did not undertake enough efforts to transfer the property to the

respondent bank but rather all attempts to effect the transfer failed and that is why the appellant invoked clause 2 of the agreement.

Counsel for the Respondent submitted that the learned trial judge rightly found that the appellant did not undertake sufficient efforts to transfer the suit property. This is because the Registrar of Titles had written to the appellants that they could have used the procedure under Sections 134 and 166 of the Registration of Titles Act (Cap hereinafter referred to as "The RTA"), there was therefore no basis in learned counsel's view for the appellants to invoke clause 2.

Counsel for the Respondent however, conceded that the family of the late Col Nyanzi (Drago) was in possession of the suit property.

I have had the opportunity to review the submissions of both counsels and the record of the court below. The purpose of the agreement was to transfer legal title from the appellant to the respondent.

Legal title signifies "a trite that evidences apparent ownership but does not necessarily signify full and complete title or a beneficial interest". **BLACK'S LAW DICTIONARY, NINTH EDITION (Bryan A. Garner, Ed)**. The effect of a trust is to separate legal title and administrative authority of particular property from the beneficial title or equitable interest in that same property. In this case, a trust created by the appellant grandfather made Mrs. Suman Kara the trustee and the appellant's father the beneficiary. Therefore, the legal title to the property at interest remains in the trust and the appellant's aunt retains administrative rights over it. Without a determination by the court or consent of Mrs. Kara, the appellant has been and continues to be unable to convey full legal title to a purchaser.

The agreement that the parties signed creates rights and obligations in two distinct stages. First, an agreement to sell creates the corresponding obligations to convey title and render payment. This stage culminates in the closing, where title is actually transferred. Suit may be brought for a breach of contract, and the remedies for contractual breach apply.

The second is after title is transferred, the buyer may acquire different rights based on the title deed. In this stage, the buyer may be entitled to protections from liability as a bona-fide purchaser for value without notice.

Here the seller may also be obligated to indemnify the buyer from various third party claims or later discovered defects.

In this case, these two stages are continuously confused and conflated. The “agreement of sale” purports to immediately transfer “all the property herein described to hold absolutely without encumbrances”. (See 47 of the record of proceedings in the High Court). Thus, not only is the distinction between a contract to sell property and the actual transfer of title completely ignored, but Appellant also attempts to convey a greater ownership interest than he had at the time.

Thus, the contract may either be treated as void and unenforceable in its entirety, or it may be treated as a mere contract for the sale of land and not as an actual conveyance of property. Assuming the latter approach, there are several issues that this case presents.

Looking at the evidence as a whole it appears unlikely that the title in this agreement could be perfected under Section 166 of the RTA as there is no trust deed as it is said to be lost and Section 134 of the RTA does not apply because the appellant as Administrator of his father’s estate could not be

registered as a proprietor of the suit property when his late father was only a beneficiary of the same under a trust that had been created by the registered proprietors that had gone missing.

There is also the question of possession. A review of the evidence clearly shows that the suit property was neither in the possession of the appellant as vendor and ultimately the respondent bank as purchaser but rather the property has been for along time and continues to be in the possession of the third party the family of the late Lt. Col. Nyanzi. This is a clear encumbrance. The agreement was therefore concluded above this reality on the ground possibly as a way to regain possession of the suit property from the third party who nobody was willing to tackle head on.

It is therefore not in doubt that there was a high possibility that this agreement for the above reasons would go into default and this is where clause 2 of the agreement comes in.

Clause 2.2 provided the remedy in case of a specific type of contractual breach. This interpretation is supported by the language specifying those defects "*which may prevent the purchaser from acquiring legal title.....".*If the defect was such as to "*prevent*" the purchaser from acquiring title, then It would seem by implication that the transfer of title would not take place. This to my mind is the reasonable interpretation reading the contract as a whole. It is clear from Clauses 1-2 in the contract specifically 2(b) that Vendor was obligated to convey title to Purchaser and register it in Purchaser's name, *"having discharged all encumbrances thereon*".

Thus, a failure to convey title would be a breach of contract. Moreover, it seems illogical to draft an agreement whereby the same act (refusing to

convey title) would be both a breach of the contract and permitted by the contract. Thus clause 2.2 prescribed the remedy in case of such a breach to be refund and reversion (essentially rescinding the contract).

Applying this interpretation then Appellant did in fact breach the contract by failing to deliver legal title. However, Respondent's remedy is limited to the refund provided for by the contract. Conversely, Appellant was entitled to a return of all property transferred, but in this case neither the vendor nor the purchaser ever had physical possession of the suit property so there was no physical property to return or give up.

In relation to ground 1 the learned judge did err when he found that the appellant could not invoke clause 2 of the sales agreement.

In relation to ground 2 the learned judge was correct in his findings that the appellant was in breach of its contractual obligations under the agreement of sale.

In relation to ground three since physical possession was in the hands of a third party, it was not possible for the respondent bank to be a trespasser.

The appellant then argued grounds 4, 5, 6 and 7 together as remedies. Counsel for the appellant submitted that the learned Judge gave two judgments in one which made it difficult to enforce. He further submitted that general damages should not have been awarded because there was no order for specific performance. In this regard he relied on the Judgment of **Wroth vs. Fothergill** [1874] 1 All ER 897.

Counsel for the appellant further submitted that the interest awarded was too high at 36% pa with weekly rests on the US Dollars.

Counsel for the respondent submitted in reply that the learned judge correctly applied his discretion in granting general damages as there had been breach of contract by the appellant. He also found no fault with the interest awarded as it was in line with what Banks at the time were charging.

I have considered the submission of both counsel and also perused the record of the trial court.

I think the appellant is uncertain of what he wants to achieve by this appeal, or he probably misunderstood the judgment of the High Court.

My understanding of that judgment is that it was in favour of the respondent. It directed the appellant to opt for one of the two orders of Court. The orders as set out in the decree are as follows:

a) A declaration that the defendant is in lawful possession of the suit land situate at Plot 1 Martin Road, Old Kampala.
b) An order of specific performance against the plaintiff
c) General damages for inconvenience to the tune of US 20,000/=
d) In the alternative: Special damages of USD 37,500/= plus interest at 36% per annum with weekly rests from 17th April, 1996 until payment in full.

Although the decree is framed in accordance with the orders of the trial judge as they appear at P.2 of his judgment, the order itself does not reflect the whole picture. At P.21 of His judgment page 134 of the record of appeal the learned trial judge states as follows;

"As regards specific performance, it is clear that plaintiff neglected and or refused to invoke the provision of the Registration of Titles Act and the Succession Act to effect transfer of the property into the names of the defendant. I accordingly order the plaintiff to make use of the above provisions in order to fulfill his obligations under the sale agreement.

In the alternative if the defendant is bent on the property he should indemnify the purchaser for the loss and damage suffered".

It's clear to me that the Judge gave the appellant two alternatives and not two judgments as Mr. Byenkya submitted in this Court.

The first alternative was for the appellant to go back and exhaust all legal avenues available to him in order to perfect the title. That is to transfer the title into the names of the respondent. The learned judge had already held that the respondent was in lawful possession. Because of the inconvenience caused to the respondent by the appellant in delaying to have the title transferred the judge awarded the respondent USD 20,000/= as general damages.

In the alternative, the appellant was free to repossess the property, refund USD 37,500/= with interest at 36%per annum with weekly rests from 17th April, 1996 until payment in full. This is my understanding of the judgment of court. The appellant chose the second alternative. That is to refund the money and pay interest on it, then repossess the property.

The appeal as I understand it is made only in respect of interest. The appellant is willing and asserts he has at all material times been willing to refund the money but the respondent had rejected the refund.

He now appeals only against the interest rate and the mode of calculation of interest. It is the appellant's case that interest at 36% per annum on United States Dollar is too high. That fact that it is compounded weekly, makes it even higher. As far as I can determine, that is all this court is required to determine in this appeal.

I agree that interest at 36% per annum or dollars in far too high. The learned judge did not state the basis of decision in this regard.

Counsel for the respondent submitted that, the judge was right to award punitive interest. But the judge did not say that the interest was punitive and why.

The award of interest is guided by established principles. Either it is the court rate, or commercial rate, or central bank rate. At least there ought to have been a guideline. This is especially so as the Civil Procedure Act prevents courts from enforcing payment of interest that is harsh and unconscionable.

Section 26 of the Civil Procedure Act provides as follows:

> **26. Interest.**
>
> 1. *Where an agreement for the payment of interest is sought to be enforced, and the court is of opinion that the rate agreed to be paid is harsh and unconscionable and ought not to be enforced by legal process, the court may give judgment for the payment of interest at such rate as it may think just.*
> 2. *Where and insofar as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court*

deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

3. *Where such a decree is silent with respect to the payment of further interest on the aggregate sum specified in subsection (2) from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6% per year.*

In the case of **Asam Products and another vs. National Bank of Commerce; Court of Appeal Civil Appeal No. 51 of 2003** this court found that interest at 25% per annum which included as agreed penalty of 5% was neither harsh nor unconscionable. Interest in that case was in respect of a loan granted to the appellant in that appeal by the respondent Bank. The appellant had defaulted. The loan was in Uganda Shillings. In this particular appeal before me, there was no loan.

The agreement does not even mention that upon refund of USD 37,500/= under clause 2 of the appellant would pay any interest. If the parties had wanted interest to accrue, they would have clearly stated so in clause 2 of the agreement. They did not. I find no basis upon which the judge awarded interest. I would have been inclined to allow this appeal and set aside the order the High Court in respect of interest and substitute it with order of refund of USD 37,500/= with simple interest at a rate of 6% per annum

from date this judgment until payment in full that would have been more appropriate. This is because the interest charged on US dollar is far less than that charged on Uganda Shillings. This, it seems is as a result of the exchange rate and the central bank rate.

This is because English law for a long time has accepted a third category of remedy that is generally different from that in tort and contract that provides against unjust enrichment or benefit (See the speech of **Lord Wright** in the case of **Fibrosa Spolka Akcyjna versus Fairbairn Lawson Combe Barbour Ltd [1943] AC 32 at 61)**.

Since in this case the appellant received US$ 37,500 from the respondent bank for a consideration that totally failed, the respondent bank could recover this sum of US $ 37,500 as money had and received and nothing more.

In the **Fribrosa case (supra) Lord Wright**, had this to say on unjust enrichment:

> *The claim in the action was to recover a prepayment of Pounds 1,000 made on account of the price under a contract which had been frustrated. The claim was for money paid for a consideration which had failed. It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generally different from remedies in contract or in tort, and are now*

recognized to fall within a third category of the common law which has been called quasi-contract or restitution (emphasis added).

Restitution is an equitable remedy. Courts have long held that actions for money had and received lie "for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition (express or implied) or extortion or oppression or undue advantage taken of the plaintiff's situation contrary to laws made for the protection of persons under those circumstances".

As **Lord Mansfield** CJ put it in ***Moses versus Macferlan***.

"The gist of this kind of action is that the defendant, upon circumstances of the case is obliged by the ties of natural justice and equity to refund the money"

However, there is the question of whether this agreement of sale is valid and enforceable by the parties.

The **Financial Institutions Act Cap 54, Section 18** thereof prohibits financial institutions such as the respondent from purchasing immovable property, except only in specific circumstances.

Section 18 (c) provides as follows:

18(1) A financial institution shall not –

(c) purchase or acquire any immovable property or any right in it except as may be reasonably necessary for the purpose of conducting its business or of housing or

providing amenities for its staff, but this paragraph shall not prevent a financial institution –

(i) from letting part of any building which is used for the purpose of conducting its business; or

(ii) from securing a debt on any immovable property and in the event of default in payment of such debt, from holding such immovable property for realization at the earlier moment suitable to that financial institution.

It is not in dispute that the respondent is a financial institution which is defined under **Section 9(n)** as follows:

"Financial institution includes a bank.....

Contravention of **Section 18** of that Act is an offence under **Section 52 (5)** and **(6)**. They both provide as follows:-

52 (5) ***A financial institution which contravenes any provision of this Act commits an offence; ....***

52 (6) ***where a director or officer of a financial institution authorizes or commits the contravention of any provision of this Act, he or she shall be personally liable to the penalty specified in relation to the contravention.***

The agreement of sale of the suit property was entered into in contravention of the law. It was not for the purpose of conducting its business or of housing or providing amenities for its staff.

The purpose for the purchase is clearly set out in the testimony of appellant at page 163 of the record of appeal he states;

> *"I was approached by Mr. Sudhir Ruparelia to sell the property to the Bank. He waited it for his client Lt. Col. Moses Nyanzi.*

At page 164 of the record the appellant in his testimony continues as follows;

> *"A few months later Sudhir Ruparelia approached me to say the Bank was interested in purchasing the property on behalf of their client. He named the client as Lt. Col. Nyanzi"*

This is corroborated by the evidence of the Director and Vice Chairman of the respondent Bank, Mr. Sudhir Ruparelia.

In his own testimony at P.181 of the record he states as follows;

> *"Plot 1 Martin Road was acquired by the defendant in order to sell to prospective client. The client was the late Lt. Col. Dragon's (sic) family. The defendant acquired that land from Bhatia. This is an agreement of sale (exhibit P3) in respect of the said property it was made on 17th April, 1996".*

At page 184 of the record Mr. Ruparelia goes on to state as follows:

> *"As I talk now the property belongs to the family of the late Lt. Col. Dragon. They took possession from the date of the sale agreement. The family of the late is the one collecting rent from that property"*

It is clear from the evidence above that the respondent and its director Mr. Ruparelia acted in breach of **Section 18 (c) (supra)** when they sought to purchase the suit property from the appellant. They both committed an offence. It is trite law that an agreement entered into in contravention of the law is a nullity and it is unenforceable.

Interestingly this was the holding of the Supreme Court affirming the decision of this Court in a similar transaction involving the respondent Bank.

Active Automobile Spares Ltd vs. Crane Bank and Rajesh Pakesh; Supreme court Civil Appeal No. 21 of 2001.

The Supreme Court summed up the case as follows:-

> *"It is trite law that courts will not condone or enforce an illegality. This well established principle of the law was put this way by* ***Lindley L.J, in Scott vs. Brown Doering –MCNo.1 & Co (3) (1892) 2QD, 724 at P.728****: " Exturpi causa non oritur action. This old and well known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence by the plaintiff proves the illegality the court ought not to assist him."*

*In the same case, **A.I.Smith, L.J** said: "If a plaintiff cannot maintain his cause of action without showing, as part of such cause of action, that he has been guilty of illegality, then the court will not assist him."*

*In the earlier case of **Taylor vs. Chester (4) (1869) L.R.4 Q.B. 309**, it was said at P.314:*

"The true test for determining whether or not the plaintiff and the defendant were in pari delicto, is by considering whether the plaintiff could make out his case otherwise than through the medium and by aid of the illegal transaction."

In the present case, the appellant and the Bank were in pari delicto in the illegal transaction under consideration. The appellant cannot make out its case for refund of the US dollars 97,000/= without depending on the illegal transaction. In the circumstances the Court cannot order for the return of its money."

In that case the Supreme Court refused to enforce an illegal contract against the respondent, and no remedies were granted to any of the parties. This court cannot condone an illegality either. It cannot enforce an illegal contract. In this case I find that both the appellant and the respondent and its Director were in *pari delicto* in the illegal transaction.

I am alive to the fact that the matters I have raised herein were neither pleaded nor conversed at the trial and at the hearing of this appeal. However it is now trite law that an illegality once brought to the attention of court overrides all matters including pleadings. See **Makula International vs. His Eminence Emmanuel Cardinal Nsubuga 1982 HCB page 11**.

In any event this court has a duty as the first appellant court to re-appraise all the evidence on record and make his own conclusion as to whether the decision arrived at by the trial court can be supported or not. This duty is provided for under **Rule 30(1)** of the Rules of this Court, which provides as follows:-

> ***30(1) On any appeal from the decision of a High Court acting in exercise of its original jurisdiction the court may;***
>
> ***a) Re-appraise the evidence and draw inferences of fact.***

See also **Pandya vs. R. [1957] EA 32 and Milly Masembe vs. Sugar Corporation of Uganda Ltd; Civil Appeal No. 10 of 1997, Fredrick Zaabwe vs. Orient Bank & 5 others Supreme Court Civil Appeal N.4 of 2006**.

In the result this appeal fails.

The judgment of the High Court is hereby set aside as the contract is unenforceable on account of illegality and it is substituted with an order dismissing the suit.

No order as to costs.

Dated at Kampala this.....20th..... day of.....December..... 2013.

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HON KENNETH KAKURU
JUSTICE OF APPEAL