

THE REPUBLIC OF UGANDA

**CIVIL SUIT NO. 838 OF 2020 CONSOLIDATED WITH CIVIL SUIT NO.
798 OF 2020**

MAXENSISA NAMUDDU:.....PLANTIFF

VERSUS

1. AHMAD NSUBUGA

2. HATIMI NASSER LUMWENO:.....DEFENDANTS

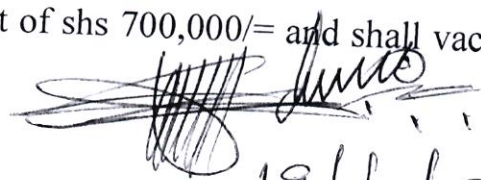
JUDGEMENT.

HON. JUSTICE TADEO ASIMWE.

Background.

The Plaintiff brought this suit against the Defendants for recovery of land, comprised in Kibuga block 24 plot 162 at Lungujja, rental arrears, Mesne Profits, vacant possession, General Damages, and Costs of the suit.

The Plaintiff's case is that on 24th April 2018 entered in to a sale agreement with the 1st defendant for the purchase of land comprised in Kibuga block 24 plot 162 at Lungujja at a consideration of ugx 600,000,000/= (six hundred million) and that the the transaction was to be concluded by the 2nd defendant as the 1st defendants advocate. That the plaintiff paid the above amount to the 1st defendant in installments and that the final instalment on 10/03/2020. That it was agreed the 1st defendant stays on the suit property as a tenant at an agreed rent of shs 700,000/= and shall vacate


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when transfer to the plaintiff is concluded. The said transfer was done in September 2020 by registering the plaintiff but the 1st defendant never vacated as promised breaching the agreement.

The 1st Defendant instead filed civil suit number 798 of 2020 challenging registration of the plaintiff in the suit property for being fraudulently procured, an order for cancelation, and reinstatement of his names on title among others. The plaintiff filed a defence in civil suit no. 798/2020 and denied the defendant's claim contending that as registered proprietor is protected by the law having purchased it from the defendant.

Due to the Defendant's failure to fulfill her part of the contract, the Plaintiff alleges that she has suffered financial loss because she had commercial prospects for the property. She alleged breach of contract on the part of the Defendant and that she had suffered a lot of inconvenience and suffering.

At scheduling, the following issues were raised for Court's determination;

1. *Whether full consideration was paid by the plaintiff Maxensia Namuddu to the 1st defendant Ahmed Nsubuga.*
2. *Whether registration of the plaintiff to the suit land was fraudulent.*
3. *Remedies available to the parties.*

Representation.

At the hearing of this case the plaintiff was represented by Counsel Swabur Marzuq, the 1st defendant by counsel Levis Karugaba while the 2nd was represented himself since he is an advocate.

All lawyers filed submissions in this matter which I shall consider in this Judgement.

The Law.

In all civil matters, the onus rests on the Plaintiff who must adduce evidence to prove his or her case on the balance of probabilities if she is to obtain the relief sought.

Ref: Sections 101-103 of the Evidence Act, Cap.43. **See: Lord Denning in Miller versus Minister of Pensions (1947)2 ALL ER 372 at page 373.**

In a bid to prove her case the plaintiff led evidence of 2 witnesses, the 1st defendant led evidence of one witness while the 2nd defendant also led evidence of one witness.

PW1 Namuddu Maxensia in her witness statement the 1st defendant is her predecessor in title to the suit land having bought the suit land from him. That she lawfully and for valuable consideration acquired the suit land from the plaintiff without committing any fraud. That on the 24th of April she met with the 1st defendant and his wife over the suit land and they agreed that the purchase price would be 600,000,000/= that however the plaintiff would advance 5 million for him to process the certificate of title and to also get necessary transfer documents from the estate of the late Abu Mayanja from whom he acquired the suit land. That the defendant kept taking money in small bits and by the time the special certificate of title was availed, she had paid 80,000,000/= that due to the fact that it was discovered that the suit land was an acre less, they orally agreed that the purchase price would be 550,000,000/= that she secured a loan facility and paid the 550,000,000/=. That upon the said payment the 1st defendant disappeared and stopped picking calls. That she reported to police and indeed after summons of the 1st defendant and his lawyer the 1st defendant appeared and police advised to settle. That family meeting was convened and they agreed that 100,000,000 extra was to be paid in full to settle the purchase price. And that it was agreed that this money be paid

through their lawyer Nasser Lumweno. That the said money was paid in two installments to the lawyer. That upon payment the plaintiff duly executed the, the transfer instruments for the subject land and forwarded the same to his lawyer, Nasser Lumweno.

That the plaintiff's son had a caveat on the suit land withdrew the same upon payment that she was registered on title and that without any legal basis and justifiable reason, the 1st defendant has refused to vacate the house or hand over vacant possession. That she has suffered financial loss, mental anguish as a result of the plaintiff's unfair conduct. That she seeks mesne profits and general damages of 100,000,000/=

In cross examination she confirmed having paid 650,000,000/= in total the extra 50 million being payment for a sitting tenant and the family lawyer. That after payment of 550, the seller disappeared and a case was reported at police. That after an amicable settlement, it was agreed that she pays extra 100,000,000/ to conclude all the balances. That the payments were witnessed by the seller's wife, son and driver.

PW2 Evaristo Mugabi, in his witness statement stated that the plaintiff is his wife and that the 1st defendant sold to the plaintiff the suit land comprised in Kibuga block 24 plot 162 at Lunguja. That he was a lawyer and agent of the purchaser Maxensia Namuddu in the said transaction. That the plaintiff for a money consideration purchased the suit land and that indeed some of the payments were effected by himself on behalf of the first defendant. That currently the plaintiff is the owner of the suit land but without reasonable excuse the plaintiff has deliberately refused to hand over vacant possession of the suit land which amounts to breach of the contract and trespass. That the 1st defendant has no justifiable claim against the plaintiff for the latter fulfilled her end of the bargain by paying the agreed purchase price to the

plaintiff and that indeed the plaintiff issued the instruments of transfer where the defendant became registered.

In cross examination PW2 he confirmed having written the acknowledgement receipts and corroborated pw1 in the consideration paid in installments of small amounts except the 70 million which he paid to rescue the title from a money lender. That receipts form moneys received were signed by the seller.

On the other hand the 2nd defendant testified as DW1. In his witness statement he stated that in 2018 the 1st defendant came to his office with intentions of selling the suit land where he stays. That he did not have a certificate of title and wanted get one. That the suit land was given to the 1st defendant by the executors of the estate of the 2nd defendant's father who did not have title. That he advised him to find some money to facilitate the procurement of one. That the 1st defendant subsequently appeared in 2020 complaining that thieves had stolen money given to him by the plaintiff's husband. That the following day he was summoned by old Kampala police where the 1st defendant was facing a complaint of fraud... That settlement was suggested and in a meeting the 1st defendant asked the plaintiff for extra 100,000,000/=. That this agreement was drafted and signed by all parties. That the defendant did not have title as he had mortgaged it at 30,000.000 and that he used part of the 100 million to recover the title which he brought to his office. That the first defendant willingly signed all transfer documents in his presence. That he processed title for the plaintiff and gave him his title. That he later learnt that the 1st defendant had refused to vacate the suit land.

In cross examination DW1 confirmed that the 1st defendant is related to him as his grandfather in Buganda culture but acted as his advocate towards the end of the transaction in respect to the suit land and confirmed PE3 a memorandum of

understanding between the parties for payment of the extra 100,000,000/= as final payment to the 1st defendant. He also confirmed PE2 in which the first defendant received the said payment where he was a witness and received the money on his behalf as final payment for the suit property. He confirmed having been instructed to transfer the suit property to the plaintiff which he successfully did and wondered why he was sued. That both parties gave him their duly signed documents which he filled. That the seller still occupies the suit property despite full consideration and advice to leave by the family which is inappropriate. In further cross examination by the 1st defendants counsel he confirmed that he was not party to the earlier payments and that no disputes arose before the signing of PE4

The first defendant also testified as DW2 and his written statement of defence he stated that he entered in to a transaction of sale of land with the plaintiff in respect to the suit land for a consideration of 600,000,000/=. That he received 100,000,000/= from the 2nd defendant and another 70,000,000,000/= from the plaintiff. That the claim that he received 600,000,000/= from her is false.

In cross examination, he confirmed that the 2nd defendant is his grand child who helps him with issues concerning the dispute. That the plaintiff reported him to old Kampala police and police advised us to settle it outside police. That he signed papers after settlement and the plaintiff paid 100,000,000/= to his lawyer and the tittle was left with his lawyer for safe custody. He confirmed that he had pledged the tittle to a money lender for consideration of 70,000,000/=that his son lodged a caveat was paid 15 million to vacate the same. That he signed the transfer forms in presence of Lumweno Nasser. That he handed over all the documents to Lumweno to enable him process transfer to Namuddu. That he is still in possession of the suit land due to the court order. That he sold to Mugabe land but retained the house.

Resolutions of issues.

Issue 1

1. WHETHER FULL CONSIDERATION WAS PAID BY THE PLAINTIFF MAXENSIA NAMUDDU TO THE 1ST DEFENDANT AHMED NSUBUGA.

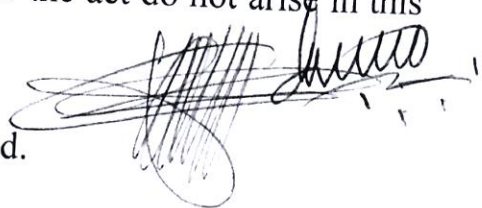
I wish to deal with the preliminary objections raised by the 1st defendant's counsel is that PEX2 and PEX4 are written in English and signed by the 1st defendant who is illiterate hence offending section 3 of the illiterate's protection act. Counsel invited this court to expunge the said documents for being illegal.

To begin with these documents were admitted and marked as exhibits in the presence of counsel. He however did not object to the said documents being admitted on record. Ideally this preliminary objection was an afterthought given the fact that he went ahead to cross examine the witness based on those documents.

Secondly the rationale of section 3 of the illiterate's protection act is to ensure that illiterate persons understand the contents of a document he or she signs.

In this case it is not in dispute that the 1st defendant was represented by an advocate who is a member of his family. The said advocate testified as DW1 and upon cross-examination, he confirmed having been a witness to **PE2 and** received the final consideration for the suit land on behalf of the first defendant. The witness further confirmed having translated and fully explained the contents of PE2 in a family meeting. Therefore the issues illiteracy protection under the act do not arise in this matter.

In effect the 1st preliminary objection is hereby overruled.

A handwritten signature, possibly 'J. M. M.', is written in black ink. Below the signature is a large, dense scribble of black ink, which appears to be a correction or a mark of emphasis.

On the 2nd objection, counsel for the 1st defendant argued that PE7, PE8, and PE9 for offending sections 3 of the illiterates act and section 64 and 65 of the evidence act for not being translated in the language of court and for failure to produce original documents.

I have already found that in this case the 1st defendant was helped by an advocate DW1 who explained to him the transaction in the suit land. The issues of illiteracy still would not arise.

Besides the above documents were objected to by the advocate for not being translated. They were marked as IDs and the witness was ordered to produce a translated version which he did and the documents were admitted as exhibits without any objection from counsel for the 1st defendant after court confirmed that the original documents were in possession of the 1st defendant. Therefore this preliminary objection equally fails.

I shall proceed to deal with the 1st issue on its merits.

It was the Plaintiff's undisputed evidence that on the 24th of April, 2018 she entered into an agreement for the sale of the suit property with the Defendant. A copy of this sale agreement was adduced in evidence as exhibit PE1.

Section 10(1) of the Contracts Acts 2010 defines a contract as;

'an agreement made with a free consent of parties with the capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound'.

As per PE1 it is indeed clear that the plaintiff was to pay 600,000,000/= for the purchase of the suit land.

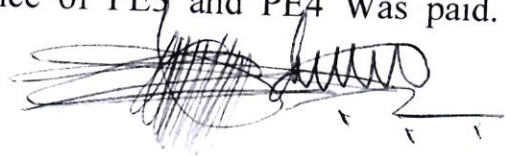
The Plaintiff contends that she paid the entire purchase price and even paid extra money for final settlement after the 1st defendant demanded for the same. This evidence was corroborated by PW2, the husband of the plaintiff who confirmed that the entire purchase price was paid in installments and that some installments were made by him and an extra money was paid beyond what was agreed. Pw1 further stated that she paid the purchase price in several installments and were acknowledged in three receipts.

Indeed these receipts were tendered in court as PE7, PE8 and PE9 where in the total amounts paid /received by the defendant's amounts to ugx 559'000,000/=. PEX7 represents ugx 329,000,000/=, PEX8 represents 160,000,000/= AND PE9 represents ugx 70,000,000/=.

These documents were never objected to and the defendant did not deny the signatures there on. Although the defendants counsel submitted that these receipts were not cross examined on, there is no evidence that he sought to cross examined on the them and court declined.

Further, in a memorandum of understanding was signed by the defendant witnessed by his lawyer DW1 Confirmed that an extra 100,000,000/= be paid to the lawyer DW1 for settlement of the purchase price, the same was paid as per PE3 and PE4.

Dw1 confirmed exhibit PE2 and confirmed receipt of the 100,000.00 million. As final settlement of the purchase price. Perusal of PE2, indeed confirms that the 100,000,000 was to be paid as the final purchase price and that after that the 1st defendant would avail all documents necessary for transfer. DW1 confirmed that he received the said money and was availed all documents for transfer of tittle and indeed transferred the tittle. The interpretation of the above PE2 is that the balance to be paid was 100,000,000/= which by evidence of PE3 and PE4 Was paid.

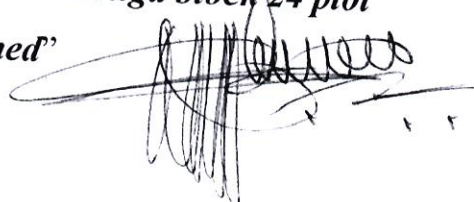


Although the 1st defendants counsel objected to PE2 claiming that it was not translated and therefore offends section of 3 of the illiterates act, the same document was drafted by 1st defendant's relative acted as his advocate. He testified in this court as DW1 and confirmed to this court that he explained the contents of the document PE2 to the 1st defendant who willingly signed. The 1st defendant did not deny signing this document. Even if it were the case the lawyer had misled his client it wouldn't be faulted on the plaintiff.

The law is that once a client instructs an advocate to represent him in any transaction, he is deemed to be his agent and therefore cannot distance himself from the actions of the actions of his advocate.

Besides, even if PE2 was expunged, the evidence of DW1 the lawyer of the 1st defendant was sufficient to establish the fact that 100,000,000/ was to be paid as the final purchase price. He stated that although he did not receive the initial instalments, he was part of the family meeting held at police when the plaintiff reported the 1st defendant where in it was agreed that the plaintiff pays extra 100,000,000/ as a final purchase price. For what it's worth there is sufficient evidence to show that the 10,000,000 was paid without any protest and transfer forms were signed and handed over the same advocate to effect transfer.

To crown it all, PE4 a receipt signed by the 1st defendants advocate was very clear that the payment of 50,000,000/ made on the 10/03/2020 was full and final settlement regarding the purchase of the suit land. And I will quote it verbatim "***Hatimi Nasser Lumweno do here by acknowledge receipt of the sum of shs. 50,000,000/= (shillings fifty Million only) from Maxensia Namuddu as full and final settlement regarding the purchase of land comprised in Kibuga block 24 plot 162 at Lunguja registered in the names of Nsubuga Ahmed'***"



Although the said advocate was sued as the 2nd defendant, there was no evidence on record to fault his participation. As such I find no case against the 2nd defendant who helped both parties to settle their dispute before this case was filed in Court.

It is therefore the finding of this court that that the plaintiff paid full purchase price for the suit property.

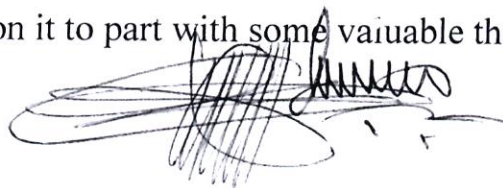
Therefore, issue 1 is answered in the affirmative.

ISSUE 2 WHETHER REGISTRATION OF THE PLAINTIFF WAS FRAUDULENT.

The defendants alleged fraud in civil suit no.798 of 2020 and listed the following as particulars of fraud.

1. Accepting plaintiffs name to be used to defraud the 1st defendant.
2. Purporting to defeat the interest of the 1st defendant on the suit land well aware of the rights/claims and interest of the plaintiff in respect of the suit land.
3. Procuring of the registration of her names on the plaintiffs land tittle whereas she did not get his consent to it nor purchase the land.
4. Intimidating and sending agents to forcefully take over, occupy and possess the suit property even after having been warned of the fraudulent acts.
5. For purposes of defrauding the government of its revenue, the first defendant under declared the true purchase price against what was agreed in the sale agreement.

The Court in the case of **Fredrick Zaabwe Vs Orient Bank & Others SCCA No, of 2006**, defined fraud to mean the intentional perversion of the truth by a person for the purpose of inducing another in reliance upon it to part with some vaiuable thing



belonging to him or her or to surrender a legal right. It is a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations or concealment of that which deceives and it is intended to deceive another so that he or she shall act upon it to his or her legal injury.

In Kampala Bottlers Ltd vs Damanico (U) Ltd, SCCA No.22 of 1992, it was held that; “ fraud must be strictly proved, the burden being heavier than one on balance of Probabilities generally applied in civil matters, it was further held that; ‘The party must prove that the fraud was attributed to the transferee. It must be attributable either directly or by necessary implication, that is; the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act.”

In this case, although the 1st defendant pleaded, he led no evidence to prove the same. His allegations are based on the fact that the registration was done without paying the purchase price fully and without his consent.

However this court has already found that the purchase price was paid. Further as per PE2 and evidence of DW1 the 1st defendants lawyer, it was agreed that after payment of the extra 100,000,000/=the final purchase payment, the 1st defendant would avail all documents necessary for registration. Indeed by evidence of PE3 and PE4 the said amount was paid AND PE4 is very clear that it was the last payment for the suit land.

DW1 confirmed that when the said money was paid the 1st defendant furnished all documents necessary for transfer, and his son equally withdrew the caveat as per PEX5 and he proceeded to register the plaintiff on title. The transfer process was carried out by the advocate of the 1st defendant who in effect is his agent and therefore cannot distance himself from the actions of his advocate.

Further, the 1st defendant himself in cross examination, confirmed that he signed PE2 in the presence of his lawyer the 2nd defendant and that he signed the transfer forms in presence of Mr. Lumweno and handed over all the documents to Lumweno to enable him process transfer to Namuddu the plaintiff. How then can he turn around and claim that the transfer process was fraudulent. I therefore find that registration of the plaintiff was not fraudulent.

Therefore, issue 2 is answered in the negative.

Issue 3. What Remedies available to the parties

The plaintiff sought for the following remedies

- 1. A declaration that the plaintiff Maxensia Namuddu is the lawful registered proprietor of land comprised in kibuga block 24 plot 162 at Lungujja having acquired the same bonafide and valuable consideration without any fraud.**

I have already found that that the plaintiff lawfully acquired and registered herself on the suit land without fraud and I so declare.

- 2. An order of vacant possession and /or eviction doth issue immediately against the said Ahmad Nsubuga) to vacate the suit land.**

Having earlier found that the plaintiff legally acquired the suit land, she is entitled to vacant possession. The 1st defendant has no color of right on the suit land and should vacate the suit land for the benefit of the plaintiff.

- 3. An order for *mesne profit***

The Plaintiff prayed for *mesne profits* of ugx 50,000,000/=.

Section 2(m) of the Civil Procedure Act (Cap.71) defines *mesne profits* as



'..... those profits which the person in wrongful possession of the property actually received or might, with ordinary diligence have received from it, together with the interest on those profits, but shall not include profits due to improvements made by the person in wrongful possession'.

In the case of; **George Kasedde Mukasa versus Emmanuel Wambedde & 4 Ors,** High Court Civil Suit No. 459 of 1998, Mukiibi J. stated,

'and correctly so in my view, as follows; it is settled law that wrongful possession of the Defendant is the very essence of a claim for mesne profits'.

In **Elliott versus Boynton [1924] 1 Ch. 236 [CA] Warrington, L.J, at page 250** said;

'now damages by way of mesne profits are awarded in cases where the Defendant has wrongfully withheld possession of the land from the Plaintiff.

In **Busiro Coffee Farmers & Dealers Ltd versus Tom Kayongo & 2 Others HCCS NO. 532/92,** it was held by this Court that;

'where a Defendant remains in wrongful possession, he is liable to pay mesne profits to the person entitled to possession., hence for a claim of mesne profits accrue, a Defendant must be in wrongful possession of the suit property as against the Plaintiff and deriving profits from the property'

Applying these principles to the instant case, it was a finding of this Court that the Defendant is in wrongful possession of the suit property however there is no evidence that the 1st defendant was deriving profits in the suit land. In the circumstances of this case, it would not be appropriate to grant this remedy to the Plaintiff.



4. The Plaintiff sought for General damages for breach of contract.

Black's Law Dictionary 9th Edn at page 445 defines damages as the sum of money which a person wronged is entitled to receive from the wrong doer as compensation for the wrong. It is trite law that damages are the direct probable consequence off the act complained of. Ref: Storms versus Hutchison (1905) AC 515.

In the case of Assist (U) Ltd. versus Italian Asphalt and Haulage & Anor, HCCS No. 1291 of 1999 at 35 it was held that;

'the consequences could be loss of profit, physical, inconvenience, mental distress, pain and suffering'.

It was the Plaintiff's evidence that the conduct of the 1st defendant inconvenienced her physically, emotionally and mentally. That given the general inconvenience occasioned to the Plaintiff, a figure of shs.50, 000,000/- million (*fifty million only*) would be fair and adequate.

The Plaintiff entered into the agreement for the sale of the suit property with the Defendant on 24th of April 2018. The last installment for the purchase price was paid on 10/03/2020 as per PE4. It is now 3 years and 3 months the Defendant has refused to give vacant possession to the plaintiff.

In the circumstances, the sum of Ug shs. 10,000,000/= (*ten million*) would be fair compensation in general damages which is awarded.

5. The Plaintiff sought for the costs of the suit.

Section 27 of the Civil Procedure Act provides that;

'costs are discretion of the Court of Judge. Subsection (2) of the Act provides that the costs of any action, cause or other matter or issue shall follow the event unless the Court or Judge shall for good reasons otherwise order.

In the instant case, the Plaintiff being the successful party is awarded the costs of the suit.

Therefore, Judgment is accordingly entered for the Plaintiff in the following terms;

1. A declaration that the plaintiff is the rightfully registered proprietor of the suit comprised in Kibuga block 24 plot 162 at Lungujja.
2. An order of vacant possession is issued against the said Ahmad Nsubuga) to vacate the suit land within 14 days from the date of judgement.
3. Mesne profits not awarded.
4. The Plaintiff is granted to Ug shs. 10,000,000/- (*ten million only*) as general damages.
5. The Plaintiff awarded costs of the suit against the 1st defendant.
6. The case against the 2nd defendant is dismissed with costs against the plaintiff.

I so order.

A handwritten signature in black ink, appearing to read 'Tadeo Asiimwe', is written over a horizontal dotted line. The signature is somewhat stylized and overlaps the line.

TADEO ASIIMWE

JUDGE

19/06/2023