

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CIVIL DIVISION**  
**CIVIL SUIT NO 564 OF 2016**

1. HARRIET MUSHEGA
2. EDDIE KWIZERA ::: PLAINTIFF
3. MUTAMBI MUSHEGA

**VERSUS**

**KASHAYA WILSON:::DEFENDANT**

**BEFORE HON. JUSTICE SSEKAANA MUSA**

**JUDGMENT**

**BACKGROUND**

The plaintiffs filed this suit against the defendant payment of 432,000,000/=, general damages, interest and costs of the suit.

The defendant contacted the plaintiffs and requested them to help him recover his land comprised in Plots 1 and 3 Nadiaope Road, Mbuya which they did and he undertook to pay them for their services and disbursements.

On 20/1/2012 the defendant executed an acknowledgment of debts with the 3 plaintiffs for their services acknowledging that he owes the 1<sup>st</sup> plaintiff; 350,000,000/=, the 2<sup>nd</sup> plaintiff shs. 50,000,000/= and the 3<sup>rd</sup> plaintiff; 32,000,000/=.

The plaintiffs' claim to have secured the defendant's land but he neglected, failed and or refused to give the cheques to the plaintiffs and has not paid the agreed sums.

The defendant denied the plaintiffs' claims contending that they have never recovered his land at any one time since the said land was already registered in his names and was in possession of the said land.

That the amount claimed was only a commission which they were entitled upon bringing buyers of the defendant's land. They never brought any buyer and therefore they could not claim the said commission from the defendant.

The plaintiff was represented by *Mr. Rwalinda Godfrey* whereas the defendant was represented by *Mr. Herbert Katabarwa*.

The plaintiff filed a joint scheduling memorandum wherein he proposed the following issues for determination by this court.

1. *Whether the defendant is indebted to the plaintiffs?*
2. *Remedies*

The parties proceeded by way of witness statements and the witnesses were cross-examined. The 2<sup>nd</sup> plaintiff did not appear in court and it was deemed that he had abandoned his claim against the defendant. The respective counsel filed written submissions; and accordingly filed the same. This Court has considered the same in writing this Judgment.

## **DETERMINATION OF ISSUES**

### **Issue 1**

*Whether the defendant is indebted to the plaintiffs'?*

Counsel for the plaintiff submitted that the PW1's evidence was to the effect that in April 2011 the plaintiff requested the plaintiffs' to help him recover his land comprised in plot 1 & 3 Nadiope Road, Mbuya, kampala

District whose lease had expired and they agreed to do as requested and they all agreed to do as requested by the defendant who undertook to pay them for their services upon completion of the work assigned and on 20<sup>th</sup> January 2012 they executed an acknowledgement of debts.

PW1 testified that she contacted the officials of Kampala District Land Board to ensure that the lease for the defendant's land is renewed or extended and to avail facilitation to execute the defendant's assignment and pay the requisite fees for the renewal of the lease.

PW2-(3<sup>rd</sup> plaintiff) further testified that her role was to contact the Kampala District Land Board to ensure that the defendant's lease which had expired was renewed and vigorously engage bibanja claimants on the land to accept compensation and peacefully vacate it.

The defendant in his testimony stated that he obtained a lease in 2003 and that the said lease was extended in 2011. That the said land had squatters on one side who were disturbing him and wanted much money in compensation. That the 1<sup>st</sup> plaintiff told him that in order to successfully sell the land to the Indians; they had to do everything possible to evict the squatters.

The 1<sup>st</sup> plaintiff told the defendant that she had a friend the 2<sup>nd</sup> plaintiff who was a member of Parliament and had serious connections with State house who were able to help in evicting squatters using security agencies.

The 3<sup>rd</sup> plaintiff who is a brother to the 1<sup>st</sup> plaintiff as a lawyer was to assist in legal work and filing of suits against squatters and obtain court orders to evict them.

The defendant further testified that they had a meeting at Speke Hotel in Kampala and signed a small hand written agreement as basis of their claim in future upon fulfilling their undertakings. They remained with the agreement, they promised me that they will ensure that the squatters will be evicted and the plaintiff assured the defendant that she had a buyer.

## Determination

The defendant seems to agree that he engaged the plaintiff to assist him in securing his land from squatters' and does not deny signing the acknowledgment between himself and the plaintiffs. But he seems to contend that the clause for "securing my land was fraudulently smuggled into the agreement after by the plaintiffs".

Secondly, the defendant filed an additional witness statement after 5 months introducing a different version of events very different from the pleading presented in court.

The defendant has departed from his pleadings and the evidence he tried to give is partly a departure from what was pleaded in his Written Statement of defence. The defendant had notice of the said acknowledgement of debt from the time he filed a defence but never pleaded any alteration in the acknowledgment.

This would be a complete departure from the pleading which is contrary to Order 6 rule 7 of the civil procedure rules. In the case of *Interfreight Forwarders (U) Ltd v East Africa Development Bank Ltd* SCCA No. 33 of 1992 the Supreme Court held that;

*"A party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed to succeed on a case not set up by him and be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of pleadings."*

The defendant's evidence which is inconsistent with the defence filed in court is not considered in the determination of this matter, specifically alleging that certain words were inserted in the acknowledgment for the debt. This is an afterthought intended to depart from the defence.

It is not in contention that both parties entered acknowledgement of debt which he signed accepting to pay the plaintiffs' a specified sum of money for certain work/service which they agreed to do execute while in their meeting at Speke hotel. He tried changing the version of events to being an acknowledgment for a commission but the evidence given is clear that it involved several things which were supposed to be done.

What is clear in the circumstances is that an acknowledgement was executed with a promise to pay, the payments were supposed to be cushioned with cheques as security and failure to give the cheques the plaintiffs' were supposed to take the matters to courts of law. Indeed they have come to court as agreed.

It's the court's duty to interpret contracts made by the parties and not rewriting them for the parties "*A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of the contract unless coercion, fraud or undue influence are pleaded and proved*" See; ***National Bank of Kenya v Pipe Plastic Sankolit (K) Ltd & Anor [2001]***.

The **Evidence Act, Cap 6 under sec. 101** is very clear to the extent that whoever desires court to give judgement as to any legal right dependent on the existence of facts which he or she asserts must prove that those facts exist. In the circumstances, the plaintiff proved that indeed the defendant breached the said loan agreement thorough their evidence.

The main contention is who between the Plaintiff and the Defendant is telling the truth as to whether the loan was paid or was not paid. Both parties led oral evidence for and against the assertions but the plaintiff led documentary evidence to support the claim.

In ***Ahmed Adel Abdallah v Sheikh Hamad Isa and Ali Khalifa [2019]EWHC 27***, the court laid down the guidance on how the court should approach acute conflicts of evidence among witnesses on the events that occurred.

The Court noted in *para 20* that the guidance applied to both cases of fraud and cases where fraud is not alleged. Thus;

*It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents to the witnesses' motives and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth.*

The defendant's contention that the acknowledgment was for a commission is unsatisfactory and contrary to what they agreed upon at Speke hotel, is materially inconsistent with the admitted documentary evidence, and is irreconcilable with the inherent probabilities of having no financial obligation towards the plaintiffs.

Therefore my finding is that, the defendant is indebted to the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs in accordance with the acknowledgement.

Accordingly issue 1 is answered in the affirmative.

### ***Remedies***

The 1<sup>st</sup> and 3<sup>rd</sup> plaintiff are therefore entitled to recovery of 350,000,000/= and 32,000,000/= as pleaded.

The plaintiffs did not lead any evidence to prove general damages and the same is disallowed.

The plaintiffs are awarded interest at a rate of 12% on the decretal sum from the date of judgment the suit until payment in full. Costs to the plaintiffs.

I so order.

***Dated, signed and delivered be email and whatsapp at Kampala this 22<sup>nd</sup> day of May 2020***

**SSEKAANA MUSA**

**JUDGE**