

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

CIVIL SUIT NO. 366 OF 2017

LUZINDA MARION BABIRYE.....**PLAINTIFF**
Suing through her lawful attorney Wasswa Luke

VERSUS

- 1. SSEKAMATTE**
(Alias Mulwana Samuel)
- 2. MUKUNGU FREDRICK**
- 3. (Alias Kiiza Moses**

- 4. Kisawuzi Godfrey**
- 5. A ONE FRED**
(Alias Mugisha Jerome)

.....**DEFENDANTS**

BEFORE HON. JUSTICE MUSA SSEKAANA

JUDGMENT

BACKGROUND

The plaintiff filed this suit seeking compensation in general damages, special damages, exemplary damages, interest and costs of the suit for the fraudulent actions of the defendants.

The plaintiff while in Netherland got in touch with M/S LG Property Agents where she found the 4th defendant who purportedly informed her that he was an employee of the said company dealing in real estate. The 4th defendant introduced the 1st, 2nd and 3rd defendants to the plaintiff as the registered

proprietors of the land comprised in Bulemezi Block 746, Plot 6, Plot 10, and Plot 11 land at Bale. The plaintiff requested for photocopies of the certificate of title and instructed her lawyers to make searches at the land registry. The said search was made at Bukalasa land office and search certificates were issued showing that the 1st, 2nd and 3rd defendants were the registered proprietors in there misrepresented names. The plaintiff and her brother Wasswa Luke carried out a physical search together with the defendants and it showed that the land belonged to the defendants. There were people cultivating on the land on behalf of the defendants who affirmed the ownership. The parties entered into an agreement where the plaintiff agreed to purchase 200 acres from the 1st, 2nd and 3rd defendants at a purchase price of UGX. 140,000,000/= at UGX.700, 000/= for each acre. An agreement was executed and the 1st installment of UGX.100,000,000/= paid. The defendants tendered in their 3 original duplicate certificates of title and their national identity cards. The plaintiff opted to pay the balance earlier and take possession only to find that all known mobile phones of the defendants were off raising suspicion of fraudulent acts. The plaintiff travelled back to Bukalasa to lodge caveats on the said land only to be notified by the Registrar that the said titles were forged and were hence cancelled. The plaintiff has requested them to refund the monies but all in vain.

The plaintiff was represented by Mr. Faisal Mularila whereas the defendants did not enter appearance to defend the suit having been served.

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

- 1. Whether there was breach of a contract by the defendants.*

2. *Whether the agreement between the plaintiff and the defendants was procured vitiated by fraud and misrepresentation.*
3. *Whether the plaintiff is entitled to money had and received.*
4. *What remedies are available to the parties?*

The parties were ordered to file written submissions; the plaintiff accordingly filed the same but the defendants did not.

The submissions were considered by this court.

DETERMINATION OF ISSUES

Issues 1 and 2 shall be resolved by this court together accordingly

Issue 1

Whether there was a breach of contract by the defendants.

Issue 2

Whether the agreement between the plaintiff and the defendants was procured vitiated by fraud and misrepresentation.

Submissions

Counsel for the plaintiff submitted that there was a valid contract between the plaintiff and the defendants as defined under section 10 of the Contracts Act, 2010. He cited the matter of **Dr. Vicent Karuhanga v Nic and URA (2008) ULR at pg.666** where court stated considerations for an agreement to amount to a contract. It was stated that the defendants represented to the plaintiff that they had land for sale where a purchase price of UGX. 140,000,000/= was agreed upon and an installment of UGX. 100,000,000/= paid to the vendors who were

“Kisawuzi Godfrey”, “Mulwana Samuel” and “Kizza Moses” upon all parties appending their signatures on the agreement. The defendants handed over the duplicate certificates of title to the plaintiff’s lawyer to be given to the plaintiff upon payment of the balance worth UGX. 40,000,000/=.

Counsel defined the breach of a contract as a violation of a contractual obligation by failing to perform one’s own promise by repudiating it or by interfering with another party’s performance (**see: Black’s Law Dictionary 8th Edition pg.200**). PW1 testified that when she called the defendants to visit the land for the purposes of surveying her portion, all the known telephone contacts were off. It was also testified that PW1 and PW2 went with the investigating officer and took the duplicate certificate of titles that were deposited with the lawyers to Bukalasa for certification where they were informed by the Registrar that the said titles were forged and cancelled. PW1 and PW2 also found out that the suit land was owned by Kizza Moses, Kisawuzi Godfrey and Mulwana Samuel but the 1st, 2nd and 3rd defendants had forged the national identity cards.

Counsel further submitted that failure to file a defense raises a presumption or constructive admission of the claim in the plaint and must be accepted as truth (**see: Sylan Kakugu Tumwesigyire v Trans Sahara International General TRDG L.L.C HCT-00-CC-CS-0095 of 2005**).

The defendants were duly served but did not file a written statement of defence, counsel therefore submitted that the plaintiff’s plaint and evidence are taken as truth.

Determination

Issue 1 and issue 2 shall be resolved together by court.

As defined by counsel, there was a binding contract between the plaintiff and the defendants for the sale and purchase of land at a consideration of UGX. 140,000,000/=. The plaintiff entered into an agreement with the 1st, 2nd and 3rd defendants for sale and purchase of land in Luweero. This contract was acted upon by the plaintiff who made a part payment of UGX. 100,000,000/= and remained with an outstanding of UGX. 40,000,000/=. The defendants however did not meet their obligation under the contract as they misrepresented on being the land owners and also forged the certificates of titles to the land which were later cancelled by the Registrar of lands. This was a breach of the contract by the defendants due to the fraud and misrepresentation to the plaintiff.

Fraud was defined by court in **Fredrick Zaabwe v Orient & 5 Ors Civil Appeal No. 04/2006** while relying on the *Black's Law Dictionary 6TH Edition* page 660, as:

“An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury.

Fraud and misrepresentation vitiate a contract and make the contract voidable (see: **the Contracts Act, 2010, section 16**).

I therefore find that there was breach of a contract between the plaintiff and the defendants and that the defendants misrepresented to the plaintiff about the true ownership of the land and were fraudulent in their dealings.

Issue 1 and 2 is resolved in the affirmative.

Issue 3

Whether the plaintiff is entitled to monies had and received.

Submissions

Counsel for the plaintiff submitted that there was total failure of consideration as the defendants had no land sold to the plaintiff. Counsel cited the case of **Gerald Nsubuga v Petwa Womushro C.A No. 102 of 2012, Court of Appeal**, where it was held that failure of consideration was contemplated by the parties by the time the contract was entered into but either on account of some innate defect in a thing to be given, or non-performance in the whole or part of that which promise agreed to do, nothing of the value can be or is received by the promise. Counsel stated that the defendants fraudulently received UGX. 100,000,000/= from the plaintiff purporting to sale land they have never owned using forged titles. He further stated that under clause 10 of the agreement, the defendants undertook to indemnify the plaintiff in case they fail to deliver vacant possession. In the circumstances, counsel submitted that the plaintiff is entitled to the refund of UGX. 100,000,000/=.

Determination

The plaintiff entered into an agreement with 1st, 2nd and 3rd defendants for purchase of land where she made a part payment of UGX. 100,000,000/= for the same. However, the defendants did not deliver the said land under the agreement after receipt of the agreed purchase price.

I therefore concur with submissions of counsel that this entitles the plaintiff to the money had and received of UGX. 100,000,000/= since the contract was not performed on the side of the defendants.

This issue is therefore answered in the affirmative.

Issue 3

What remedies are available to the parties?

The plaintiff in her pleadings prayed for: Refund of money had and received of 100,000,000/=, General damages, Special Damages, Exemplary damages, Costs of the suit, Interest on the damages at 25% from the date of filing the suit.

The plaintiff is entitled to get back her money paid for the failed land transaction of 100,000,000/=.

Special Damages

As submitted by counsel it is indeed trite that special damages must not only be specifically pleaded but they must also be strictly proved (see *Borham-Carter v. Hyde Park Hotel [1948] 64 TLR.*

The plaintiff led evidence to show that she incurred expenses on instructions to lawyers to carry out a search on the land, lodge caveats, transport costs, legal

fees and deployment of police officers to track the defendants and to also arrest the same. (See: P EXEB 2, P EXEB 4, P EXEB 7, P EXEB 15, P EXEB 19 PW1 and PW2 evidence on record)

I have perused all the records adduced by the plaintiff and I am satisfied that the plaintiff has proved the special damages.

The plaintiff is awarded special damages to the tune of **UGX 22,980,000** as prayed for and proved.

General damages

It was submitted that the plaintiff had to travel from Netherlands to Uganda to buy land that never materialized from the defendants and further to testify before this court against the defendants, facilitate witnesses and psychological torture. Counsel prayed for an award of UGX. 70,000,000/= as damages at an interest rate of 25%

As far as damages are concerned, it is trite law that general damages are awarded in the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the defendant. It is the duty of the claimant to plead and prove that there were damages losses or injuries suffered as a result of the defendant's actions.

I find that the plaintiff has discharged his duty to prove damages and inconvenience caused as a result of the defendants' actions.

The plaintiff is awarded **UGX 30,000,000** as general damages.

Exemplary damages

Counsel submitted that punitive /exemplary damages are awarded to deter the respondents from doing such acts on other public officers (see: **Dorothy Tuma v Elithabeth Muller & Anor C.S No. 229 of 2011**). He stated the defendants forged and presented forged duplicate certificates of titles and national identity cards to the plaintiff and presented themselves as the owners of the said land. The 1st and 2nd defendants also pleaded guilty to the offences but have refused to refund the plaintiff's money and kept threatening the plaintiff to cease from tracking them. He therefore prayed for a sum of UGX. 50,000,000/= as exemplary damages.

The rationale behind the award of exemplary damages: exemplary damages should not be used to enrich the plaintiff, but to punish the defendant and deter him from repeating his conduct.

An award of exemplary damages should not be excessive. The punishment imposed must not exceed what would be likely to have been imposed in criminal proceedings, if the conduct were criminal. Per Spry V.P. in *Obongo Vs Municipal Council of Kisumu [1971] EA 91*. All circumstances of the case must be taken into account, including the behaviour of the plaintiff and whether the defendant had been provoked. See *O'Connor Vs Hewiston [1979] Crim. LR 46, CA*; *Archer Brown [1985] QB 401*.

Bearing those principles in mind I find that an award of **UGX 15,000,000** sufficient as exemplary damages.

The plaintiff is awarded interest at a rate of 20% from the date of filing the suit until payment in full on the refund of 100,000,000/= and interest shall be 12% on the rest of the awards of General and Exemplary damages.

Costs to the plaintiff.

I so order.

SSEKAANA MUSA
JUDGE
13th March 2020.