

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CIVIL DIVISION**  
**CIVIL SUIT NO. 66 OF 2021**

**JJAKIRA GERALD:.....PLAINTIFF**

**VERSUS**

- 1. KIGOZI SOLOMON ALIAS EDWARD MUGABI**
- 2. KIMANJE NSIBAMBI PETER :.....DEFENDANTS**  
*(t/a KIMANJE NSIBAMBI ADVOCATES)*
- 3. KIRUMIRA ARTHUR**

**BEFORE: HON. JUSTICE. SSEKAANA MUSA**

**JUDGMENT**

The plaintiff filed this suit claiming jointly and severally against the 1<sup>st</sup> and 2<sup>nd</sup> defendants for recovery of UGX 500,000,000 for the total failure of consideration pursuant to a contract of sale of land comprised in Kyadondo Block 277 Plot 86, land at Bweyogerere measuring approximately two acres, an interest of 30% on the principal sum and costs of the suit.

The plaintiff contended that the 1<sup>st</sup> defendant and himself had entered into a land sale transaction for the purchase of the 1<sup>st</sup> defendant's property comprised in Kyadondo Block 277 Plot 86, land at Bweyogerere measuring approximately two acres for consideration of UGX 600,000,000. The plaintiff contended that after the land sale agreement was signed, the 3<sup>rd</sup> defendant alerted that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were fraudsters when it was realized at the Wakiso Zonal Land Office that the registered owner Edward A Mugabi was different from the one on the copy of the national identity card he had received from the 1<sup>st</sup> defendant.

The 3<sup>rd</sup> defendant reported the matter to the police and a criminal case was instituted against the 1<sup>st</sup> and 2<sup>nd</sup> defendants as well as the land brokers. The 1<sup>st</sup>

defendant was convicted but later released. The charges against the 2<sup>nd</sup> defendant were dropped by the DPP while the two land brokers settled the claims against them by refunding the money they received as commission to the plaintiff.

The plaintiff then filed a summary suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants seeking to recover his money.

The 2<sup>nd</sup> defendant filed a written statement of defense wherein he stated that the plaintiff did not disclose a cause of action against him. He stated that the money was deposited on the 2<sup>nd</sup> defendant's law firm account and received on behalf of the 1<sup>st</sup> defendant and the same was passed on to the 1<sup>st</sup> defendant.

The 2<sup>nd</sup> defendant denied all the allegations made by the plaintiff. The 2<sup>nd</sup> defendant made an application to have the 3<sup>rd</sup> defendant-(who was counsel for the plaintiff in the land transaction) added as a defendant to the suit which was granted.

The 1<sup>st</sup> defendant allegedly rejected service and never filed an application to for leave to file a defence or defend the suit. The court directed that he be served through the prison officers as provided under Order 5 Rule 19.

The affidavit of service on record however showed that the 1<sup>st</sup> defendant had been released from Kitale by the time service was sought to be effected. Substituted service through newspapers was then effected but the defendant still did not appear to defend the suit.

At the trial, the plaintiff was represented by Counsel Norah Matovu. The 2<sup>nd</sup> defendant was represented by Counsel Brian Othieno and Counsel Wandera Moses while the 3<sup>rd</sup> defendant represented himself.

## **AGREED ISSUES**

- 1. Whether the defendants are liable to refund the plaintiff's money.**
- 2. What remedies are available to the parties?**

The plaintiff led evidence of 2 witnesses while the 2<sup>nd</sup> and 3<sup>rd</sup> defendant all led evidence in their own testimony. The court also watched a CCTV clip from the banking hall of KCB Bank. It was observed in the CCTV that the 3<sup>rd</sup> defendant was present in the bank at the time the 1<sup>st</sup> defendant was paid by the 2<sup>nd</sup> defendant.

The parties were directed to file final written submissions that were considered by this court.

## **DETERMINATION**

*Whether the defendants are liable to refund the plaintiff's money.*

Counsel for the plaintiff submitted that the 1<sup>st</sup> defendant was convicted on three counts of obtaining money by false pretense and impersonation. That there was no contention that the 1<sup>st</sup> defendant was liable to refund the money paid by the plaintiff. Further that, 2 land brokers that had led the plaintiff to the law chambers of the 2<sup>nd</sup> defendant had also settled the plaintiff's claims against them.

It was counsel's submission that the 2<sup>nd</sup> defendant was equally liable to refund the money that was deposited on the bank account of his law firm. Counsel argued that the 2<sup>nd</sup> defendant was accused together with the 1<sup>st</sup> defendant but filed a complaint with the DPP who withdrew the charges against him with no reason for doing so.

Counsel argued that it was on the basis of the 2<sup>nd</sup> defendant's presentations to the plaintiff and the 3<sup>rd</sup> defendant that the plaintiff committed to the land sale transaction with the 1<sup>st</sup> defendant.

Counsel argued that the 2<sup>nd</sup> defendant owed the plaintiff a duty of care owing to his position of being an advocate with over 30 years of experience. Counsel submitted that the 2<sup>nd</sup> defendant was an officer of the court expected to assist in the administration of justice and it was on that premise that the plaintiff considered him liable to refund his money. Counsel argued that it was reckless, irresponsible, and a total breach of trust owed to the plaintiff when the 2<sup>nd</sup>

defendant paid the monies deposited by the plaintiff on his firm's account to the 1<sup>st</sup> defendant.

Counsel for the plaintiff submitted that it was clear that the 2<sup>nd</sup> defendant had masterminded the fraud since everything had happened in his law chambers. That the appearance, ambiance and the actions taken by the 2<sup>nd</sup> defendant provided confidence and a cushion for the impugned land transaction to take place.

Counsel concluded that the 2<sup>nd</sup> defendant should be found liable to refund the plaintiff's money as it was his law firm that received it on their account and it was him that claimed that he had paid it out to the 1<sup>st</sup> defendant without fulfilling the instructions he claimed that he was given and admits that he received the UGX 60,000,000 for no work done which was before the total purchase price. That the 2<sup>nd</sup> defendant claimed during cross-examination that he had agreed with the 1<sup>st</sup> defendant that he would receive 10% of the purchase price which was not even in line with the Advocates Regulations on remuneration. That this behavior was totally unacceptable on the part of a lawyer of a noble profession.

In response, counsel for the 2<sup>nd</sup> defendant submitted that the suit disclosed no cause of action against the 2<sup>nd</sup> defendant. Counsel argued that the 2<sup>nd</sup> defendant was privy to the contract and only witnessed the agreement on behalf of the 1<sup>st</sup> defendant as his client. Counsel also noted that the plaintiff had deviated from their pleadings which was based on contract and not tort that was being alleged in the submissions. Counsel submitted that this was an outright deviation from the pleadings yet a party is bound by their pleadings.

Counsel submitted that the 3<sup>rd</sup> defendant, the plaintiff's then lawyer had drafted the sale agreement and the 1<sup>st</sup> and 2<sup>nd</sup> defendant merely endorsed the said agreement. Counsel submitted that the 2<sup>nd</sup> defendant was neither the vendor and neither did he participate in the drafting of the said contract.

Counsel argued that in determining whether the 2<sup>nd</sup> defendant was liable to refund the plaintiff's money, the court should rely on the sale agreement which

was reduced into writing by the parties to it. Counsel submitted that under clause 3 of the agreement, the vendor/ 1<sup>st</sup> defendant warranted to the plaintiff that he was the registered proprietor and lawful owner of the suit land and as such had good title of the same. That the land being bought was adjacent to the land where the plaintiff carried out business and that the plaintiff knew who he was dealing with.

That under clause 8 of the sale agreement, it was stipulated that the sale agreement constituted the entire agreement between parties to it and there were no other agreements collateral thereto.

It was agreed under clause 10 that the vendor shall return all the monies paid to him with interest if there was any defect in title or third-party claims or interest, if the sale and/or transfer of the property fails as a result of default or breach on the part of the vendor or if a court of competent jurisdiction set aside the sale on the basis of want of title on part of the vendor or account of any defect, fraud, breach in the vendor's title or for any other cause by the vendor and that the vendor should refund the consideration had and received and all sums of money paid by the purchaser to the vendor and all the costs and expenses together with interest at the prevailing commercial bank rate of 30%.

Counsel submitted that the obligation to refund the plaintiff's money as was agreed upon squarely fell on the 1<sup>st</sup> defendant. That the 2<sup>nd</sup> defendant's law firm account was merely used as a vessel through which the money reached the 1<sup>st</sup> defendant.

With regard to the allegation that the 2<sup>nd</sup> defendant convinced the plaintiff to execute the transaction, counsel for the 2<sup>nd</sup> defendant submitted that this allegation was false. Counsel submitted that the plaintiff had conducted their own search to his utmost satisfaction with the guidance of his lawyer, the 3<sup>rd</sup> defendant. That the plaintiff had a lawyer who represented him and had a professional duty to guide his client through the transaction and carry out sufficient due diligence before drafting the agreement or paying the purchase price to the 1<sup>st</sup> defendant. The plaintiff according to his witness statement was

dealing with his said neighbor and had even bought a 20 decimal kibanja from his said neighbor. The plaintiff therefore knew the 1<sup>st</sup> defendant as a neighbor whom he was dealing with.

Counsel submitted that the 2<sup>nd</sup> defendant who transacts from his law firm had no capacity to foresee that the owner was rogue since the vendor presented to him his National Identification Card with his photographs and with the name Edward Allan Mugabi which were the same with the documents that were presented to the plaintiff. That it was impractical for lawyers to start carrying out investigations about their potential clients from National Identification Registration Authority and Uganda Registration Services Bureau to verify their names before taking up instructions and if that was the case, then lawyers would end up with no clients at all since it would require them to first incur costs and expenses of searching about the true identities of potential clients before taking on instructions from them.

Counsel also submitted that since the matter was based on breach of contract, the 2<sup>nd</sup> defendant was a mere agent and could not be sued on a contract where there was a principal.

Counsel also submitted that the plaintiff's submissions that the 2<sup>nd</sup> defendant had undertaken to complete the amalgamation process were misleading since it was the 1<sup>st</sup> defendant who was a party to the contract who undertook to do the same. Counsel also submitted that the plaintiff's submissions that he should not have been paid for amalgamation, sale and witnessing the agreement on behalf of his client was flawed since he was paid by the 1<sup>st</sup> defendant who he acted for. The contract to refund all the monies was between the plaintiff and 1<sup>st</sup> defendant.

Counsel concluded that there was no cause of action against the 2<sup>nd</sup> defendant since he was not a party to the contract, was not the plaintiff's counsel, and was never paid his legal fees by the plaintiff and it was agreed under the agreement that a refund if any would be met by the 1<sup>st</sup> defendant.

The 3<sup>rd</sup> defendant on the other hand submitted that the plaintiff had no claim whatsoever against him. He stated that his addition as a party had been

instigated by the 2<sup>nd</sup> defendant which was contrary to the principle in *Batemuka vs Anywae & anor [1987] HCB 71* that the plaintiff is at liberty to sue anybody he thinks he has a claim against and cannot be forced to sue somebody.

He also reiterated the plaintiff's submissions that the 2<sup>nd</sup> defendant owed the plaintiff a duty of care owing to his professional statements that induced the plaintiff's payment of the monies into the 2<sup>nd</sup> defendant's account and the same should be imposed by the court. Counsel submitted that if not for the presentations of the 2<sup>nd</sup> defendant the damage would not have occurred, whilst the plaintiff could have undertaken further due diligence, the representations by the 2<sup>nd</sup> defendant closed all such due diligence.

Counsel concluded that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were liable to refund the plaintiff's money but specifically the 2<sup>nd</sup> defendant as the architect who orchestrated the fraud in his chambers to defraud the plaintiff.

### *Analysis*

The plaintiff filed this suit claiming recovery of UGX 500,000,000 for the total failure of consideration pursuant to a contract of sale of land comprised in Kyadondo Block 277 Plot 86, land at Bweyogerere between the plaintiff and the 1<sup>st</sup> defendant. From the pleadings, the plaintiff contended that the 1<sup>st</sup> and 2<sup>nd</sup> defendants persuaded him to deposit the monies on the 2<sup>nd</sup> defendant's law firm account.

That the plaintiff was notified by the 3<sup>rd</sup> defendant that the vendor was not the registered proprietor and urged the 2<sup>nd</sup> defendant to refund the plaintiff's money. The plaintiff contended further that the 1<sup>st</sup> defendant in the presence of the 2<sup>nd</sup> defendant who was his witness on the agreement had guaranteed to have good title for the said land and committed himself to refund all monies paid by the defendant in case any defect in the title was found or if the transfer of title failed.

In his defense, the 2<sup>nd</sup> defendant contended that he had not guaranteed the plaintiff that the 1<sup>st</sup> defendant had good title for the said land but the 1<sup>st</sup>

defendant and the plaintiff came to the 2<sup>nd</sup> defendant's office when they had already conducted a search and had already agreed on the terms of the transaction including a refund of all the money paid by the plaintiff to the 1<sup>st</sup> defendant. That the 2<sup>nd</sup> defendant agreed to receive the purchase price on behalf of the 1<sup>st</sup> defendant and passed it over less by UGX 60,000,000 which was his legal fees. The 2<sup>nd</sup> defendant contended that the agreement did not require him to refund the legal fees as received since he was not working for the plaintiff and as such as the plaintiff had no cause of action against him.

Criminal charges were preferred against the 1<sup>st</sup> and 2<sup>nd</sup> defendants however the 1<sup>st</sup> defendant was convicted and all charges against the 2<sup>nd</sup> defendant were dropped. The DPP found that there was no case against the 2<sup>nd</sup> defendant.

Under *clause 10 of the sale agreement*, the vendor and purchaser agreed that if the vendor failed to pass good title then he would refund all the monies paid to the purchaser. Given that the vendor failed to pass good title, he is liable to refund all the monies received from the plaintiff as consideration for the land sale.

On the other hand, the 2<sup>nd</sup> defendant was acting as an agent for the 1<sup>st</sup> defendant in this transaction. His duty was to witness the sale agreement and receive monies on behalf of the 1<sup>st</sup> defendant who was his client. He was not privy to the agreement between the plaintiff and the 1<sup>st</sup> defendant. Under section 118 of the Contracts Act 2010 an agent means a person employed by a principal to do any act for the principal or to represent the principal in dealing with a third person.

The agency is terminated when the business of the agency is completed or the purpose of the agency is frustrated. The 1<sup>st</sup> defendant hired the 2<sup>nd</sup> defendant as his advocate in the impugned transaction. He had two duties as noted above; witness the agreement and receive the purchase price on behalf of the 1<sup>st</sup> defendant. Upon the discovery that the 1<sup>st</sup> defendant was not the registered proprietor of the land in issue and yet the money had already been passed on to the 1<sup>st</sup> defendant, the relationship between the 1<sup>st</sup> and 2<sup>nd</sup> defendants was terminated.



Furthermore, as an agent of the 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant did not act for and on behalf of the plaintiff. He could/cannot be held liable for the misgivings of his client. He did not have a duty to carry out due diligence on behalf of the plaintiff as a purchaser who also had the 3<sup>rd</sup> defendant as his advocate in the transaction. His duty went as far as he was instructed by the 1<sup>st</sup> defendant.

The allegation that the 2<sup>nd</sup> defendant persuaded the plaintiff into the transaction also does not make sense or hold any water. The plaintiff stated that he owned the land next to the land in issue and was therefore neighbors with the 1<sup>st</sup> defendant. The plaintiff and the land brokers also met before coming to the 2<sup>nd</sup> defendant's office and further, the plaintiff and 1<sup>st</sup> defendant had already agreed on the terms of their agreement before engaging the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant is also the son-in-law of the plaintiff. From this, it is apparent that everyone involved in the transaction was familiar with each other except for the 2<sup>nd</sup> defendant which leaves a bad taste in my mouth.

The plaintiff submitted that the 3<sup>rd</sup> defendant had stopped the 2<sup>nd</sup> defendant from releasing the money to the 1<sup>st</sup> defendant. This evidence is also contrary to what was seen in the CCTV recording or clip (D-2 Ex13) which showed that the 3<sup>rd</sup> defendant as counsel for the plaintiff was indeed present in the banking hall when the 1<sup>st</sup> defendant was paid. This court observed that the 3<sup>rd</sup> defendant had denied being present during cross-examination at the time money was released to the 1<sup>st</sup> defendant.

This court is duty bound to consider the totality of evidence lead by each of the parties. The assessment of the sad evidence makes the 2<sup>nd</sup> defendant's evidence more credible than the plaintiff. This has given this court a reasoned belief of the evidence of the 2<sup>nd</sup> defendant or a reasoned preference of their version to the plaintiff and 3<sup>rd</sup> defendant. *See Adesina v Ojo (2012) 10 NWLR p.552*

Lastly, the plaintiff and 3<sup>rd</sup> defendant's submissions on the duty of care in tort owed by the 2<sup>nd</sup> defendant to the plaintiff are struck off. The plaintiff attempted to introduce a new cause of action against the 2<sup>nd</sup> defendant in their submissions

that was not pleaded i.e that the 2<sup>nd</sup> defendant owed a professional duty to the plaintiff.

In *Interfreight Forwarders (U) Ltd v. East African Development Bank*, SCCA No. 33 of 1992, it was stated that; “A party is expected and is bound to prove the case as alleged by him. He will not be allowed to succeed on a case not so set up by him and be allowed at the trial to change his case or set up a case at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of the pleadings.”

The plaintiff cannot therefore submit on a cause of action that they did not plead in their plaint.

It is true that the role of counsel in representing his client is mainly to ensure that his client gets the best of legal representation within the scope of his instructions, there is a corresponding duty on counsel to ensure that his conduct is within the framework etiquette and conduct for lawyers as stipulated in the regulations. See *Martin Amidu v The Attorney-General, Waterville Holdings (BVI Ltd (Alfred Agbesi Woyome) [2013] 62 GMJ SC 91*

The plaintiff's claim as presented was strictly out of breach of contract and not tortious liability for a duty owed to the clients or other parties. Each party had their advocates who represented them in the transaction, a failure or lapse of one counsel should not be visited on the other advocate.

The plaintiff from their pleadings and submissions makes no claim against the 3<sup>rd</sup> defendant and as such he cannot be found liable to refund the monies to the plaintiff.

On that note, the 1<sup>st</sup> defendant is liable to refund the monies received from the plaintiff for the botched land transaction. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants are not liable for the same.

## **Issue 2: What remedies are available to the parties?**

The case against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is accordingly dismissed with no order as to costs.

The matter succeeds against the 1<sup>st</sup> defendant since he never filed a defence and was convicted for obtaining money by false pretences. The 1<sup>st</sup> defendant is hereby ordered to refund **UGX 500,000,000** received from the plaintiff as consideration for the land sale agreement.

The plaintiff is awarded interest of 25% on the principal sum from the date of receipt until payment in full.

The 1<sup>st</sup> defendant shall pay costs for the suit.

It is so ordered.

**SSEKAANA MUSA**

**JUDGE**

**16<sup>th</sup> June 2023**