THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO.102 OF 2012

5 **GERALD NSUBUGA::::::::::::::::::::::::::::::::::::APPELLANT**

VERSUS

PETWA RWOMUSHORO::::::::::::::::::::::::::::RESPONDENT

*(Appeal from the Judgment and Decree of High Court (Land Division sitting at the International Crimes Division) before Justice **Elizabeth***
10 ***Ibanda Nahamya** in Civil Suit No. CS-0184 of 2008)*

CORAM: HON. JUSTICE ALFONSE OWINY DOLLO, DCJ

HON. JUSTICE KENNETH KAKURU, JA

HON. JUSTICE STEPHEN MUSOTA, JA

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JUDGMENT OF COURT

The brief facts of the appeal are that the Appellant was the registered proprietor of land comprised in Kyadondo Block 185 Plot576 at Namugongo measuring 75 acres. The Appellant sold 3
20 acres of land out of the 75 acres to the Respondent at a consideration of 75 million of which the respondent paid 70 million. The Appellant subdivided the 75 acres into various plots which included Plot 3857 and 3870, the subject of this appeal.

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Subsequently, a one Tempora Bisase disputed the Appellant's title to the 75 acres. Upon complaint by the said Tempora Bisase, the Appellant's name was cancelled from all the subdivisions except 3857 and 3870 since these had already been registered in the Respondent's name. Tempora Bisase approached the Respondent demanding that she either pays more money or loses the land since the Appellant from whom she had purchased had lost the rest of land. The Respondent paid more money to Tempora Bisase whereupon the Register was allegedly streamlined and the Respondent retained the land.

The Respondent filed Civil Suit No. 184 of 2008 against the appellant claiming for refund of the purchase price for total failure of consideration. The Appellant in his defence pleaded that there was no total failure of consideration. The Learned Trial Judge found in favour of the Respondent that there was total failure of consideration and ordered the Appellant to refund 70m paid by the Respondent plus interest at 25% per annum and costs of the suit.

The Appellant was dissatisfied with the decision of the High Court and appealed to the Court of Appeal on the grounds that:

1. The Learned Trial Judge erred in law and fact when she held that there was total failure of consideration.
2. The Learned Trial Judge erred in law and fact when, in the circumstances of the case, she ordered the Appellant to pay the Respondent all the money the Respondent had paid in respect of suit land.
3. The Learned Trial Judge erred in law and fact when, in the circumstances of the case, she awarded interest to the Respondent.
4. The Learned Trial Judge erred in law and fact when, in the circumstances of the case, she awarded costs to the Respondent.

Representation

At the hearing of the appeal, Mr. Walter Bakirana appeared for the appellant while Ms. Patricia Nyangoma appeared for the respondent.

Submissions of the appellant

Counsel for the appellant submitted that the respondent retained her land and all the evidence adduced in proof of cancellation of the land titles was not credible. That whereas exhibit PE9 (white page for Block 185 plot 3857) and PE16 (white page for block 185 plot 6319) indicated that the certificates of title were cancelled, the Registrar of Titles failed to produce documents to support the entries on the exhibits and there was no instrument by which the respondent's name was cancelled from the titles. DEX2 which was produced to prove the transfer of land from the administrators of the late Kupuliyano Bisase to Tempora Bisase indicated a different instrument number from that used on the original certificate of title to effect the entry.

Further, that there was no notice of cancellation of the certificates of title as required under section 91 of the Land Act. The respondent was a bonafide purchaser for value without notice and therefore she had clean title to the land comprised in Block 185 plots 38 and 3870 which could not be impeached. There was no total failure of consideration as was held by the trial Judge because the respondent re-purchased the land from Tepora Bisase at only 10,000,000/= which was less than the market value.

Submissions of the respondent

The respondent's counsel submitted that exhibit P9 that demonstrated the fact that the transfer into the names of Gerald Nsubuga was from Bisase and not from the administrators of the estate.

The evidence of PW1 showed that Gerald Nsubuga had not purchased the land from the administrators of the late Kupiliyano Bisase. Under section 94 of the Registration of Titles Act, the estate of the deceased is paramount and there was no way the appellant would have purchased the suit land without first dealing with the estate of the late Bisase.

Consideration of the appeal

We have carefully listened to both parties and considered the submissions by respective counsel. We have also perused the pleadings and the authorities cited to us.

We are alive to the law that requires this court, as a first appellate Court, to re-appraise the evidence and to make our own inferences on all issues of law and fact. **See: Fr. Narcensio Begumisa & others vs. Eric Tibebaaga (Supreme Court Civil Appeal No. 17 of 2002)** and the Rule 30(1) of the Rules of this Court.

The issue for this court to resolve is whether there was total failure of consideration which entitled the respondent to a refund of the entire purchase price for the land comprised in Block 185 Plot 3857 and 3870 at Namugongo.

PW2, the respondent, testified that she bought two plots of land (Plots 2857 and 3870) from the appellant for 75 million shillings and she paid 70 million when the agreement was executed. She obtained a certificate of title but when she went back to the suit land the following day for inspection, she found many villagers with weapons ready to attack them. PW2 then received a call from her lawyers that her certificate of title had been cancelled on the basis that the land belonged to someone else. She was instructed to return the duplicate certificates of title on the basis that the land belonged to the estate of the late Kupriano Bisase Lufo. PW2 went to Tempora Bisase, the rightful owner, and paid him 50 million for plot 3857 and 3870 after

which transfer forms were signed and the land registered in her names.

PW1, a Registrar of Titles at the Ministry of Lands, testified that according to the entries on Exhibit P.1, the plot 3857 was initially registered in the names of Nsubuga Gerald in instrument No. KLA291136 on 3rd March 2006. Later, it was transferred to the names of the respondent vide instrument No. KLA292002 on 22nd March 2006 and then was re-instated to Kupriano Lufo Bisase vide instrument No. 124478 on 22nd May 2006. The land was then transferred to Josephus Lufo Kisosonkole, Dolphin Bisase Kisosonkole and Tempora Bisase Kisosonkole as administrators of the estate of the late Kupriano Bisase under Administration Cause No. 554 of 1998 and the later transferred to Tempora Bisase. From Tempora Bisase, the land was then transferred to Petwa Rwomushoro's name vide instrument No. KLA301558 and is currently registered in the names of Dr. Kiiza Hilary entered on 21st May 2010.

PW1 testified concerning the re-instatement of Kupriano Lufo Bisase that it was because prior to Gerald Nsubuga's Registration, the land was registered in the name of Kupriano Lufo Bisase and there were disputes concerning how Gerald Nsubuga got registered on the title.

The appellant testified that he acquired the land from Rebecca Musoke and Kaddu, the administrators of the estate of the late Kupriano Lufo Bisase. That the respondent did not reveal to the appellant that the certificates of title she had been given had been cancelled. During cross examination, the appellant testified that in 2008, he got to know that the plaintiff's certificate of title had been canceled but was not given any documentation to that effect. PW1 testified that a transfer is deemed to be complete once a Registrar of Titles completes a memorial and signs it. A stamp is always affixed at the lodgment desk and the Registrar of Titles cannot sign on the

white pages and on the certificate of title and issue it to the owner without completing a memorial.

A failure of consideration occurs if sufficient consideration was contemplated by the parties at the time the contract was entered into, 5 but either on account of some innate defect in the thing to be given, or nonperformance in whole or in part of that which the promisee agreed to do, nothing of value can be or is received by the promisee.

The sale agreement made between the appellant and the respondent included a clause that the purchaser would get the land free of any 10 encumbrances. Clause 8 states that;

"The vendor guarantees to the purchaser that the land constituting the subject matter of these presents be free from any adverse claims, encumbrances, third party interest and any such other claims that may affect the interest of the purchaser. For avoidance of doubt the 15 *vendor hereby undertakes to fully indemnify the purchaser in the event of failure of consideration or any third party claims over ownership of the said land or any other disturbance."*

The evidence on record shows that the respondent did not get quiet possession as was agreed in the sale agreement. Whereas her name 20 was re-instated on the certificate of title, it was after she made another payment to the rightful owner of the suit land. In the case of **Joseph Muluuta v. Katama Silvano, S.C.C.A No. 11 of 1999** court stated that if a party receives consideration and does not receive anything in return, then he is entitled to a refund of the 25 money. It is not in doubt that the appellant received 70 million with a clear intention to sale to the respondent plots 2857 and 3870 but the respondent did not receive quiet possession of the land she had purchased. There is sufficient evidence to show that the respondent made another payment to Tempora Bisase in order to retain the land 30 she had purchased.

However, the testimony of the respondent showed that she paid 50,000,000/= to Tempora Bisase for the land yet the transfer indicated a payment of 10,000,000/=. The appellant claims that the respondent only paid 10,000,000/= because she had already paid 5 the 70,000,000/= and the 10,000,000/= was just to compensate the squatters on the land. The transfer marked Exhibit PExh.10 indicates that the respondent paid a consideration of 10,000,000/= for transfer of plots 2857 and 3870. We do not accept counsel for the appellant's contention that the respondent only paid 10,000,000/= 10 because she had earlier paid 70,000,000/= for the land. The agreement made between the appellant and the respondent was separate and distinct from the agreement made between the respondent and Tempora Bisase. The learned trial Judge was right to hold that there was total failure of consideration and order a 15 refund of all the money the respondent had paid in respect of the suit land. The respondent did not get the land she paid the appellant for. Grounds 1 and 2 of the appeal therefore fail.

Ground 3 of the appeal faults the trial Judge for awarding interest to the respondent on the purchase price paid to the appellant. It is a 20 well settled principal that the award of interest is in the discretion of the Court. The basis of an award of interest traditionally is that the defendant has kept the plaintiff out of his/her money, and the defendant has had the use of it himself so he ought to compensate the plaintiff accordingly (see **Harbutt's Placticine Ltd v.Wayne tank** 25 **and Pump Co Ltd [1970] QB 447**). As already noted above, the respondent paid 70,000,000/= to the appellant as consideration for land she never received as per the agreement. We find no reason to fault the trial Judge's award of interest to the respondent.

Section 27 of the Civil Procedure Act provides that the costs of and 30 incident to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent those costs are to be paid, and to give all necessary directions for the purposes aforesaid. The object of costs

is to indemnify the successful party for having to pursue or defend their rights in court. They are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. (*Tobin and Twomey v. Kerry Foods Ltd., [1999] 1 I.L.R.M. 428 at 432; Adams v. London improved Motor Coach Buildirs Ltd., [1921] 1 K.B. 495 at p. 499.* We find no reason to interfere with the trial Judge's award of costs. Ground 4 of the appeal also fails.

In the circumstances, we find no merit in this appeal whatsoever. We find no reason to fault the learned trial Judge's decision and we accordingly uphold it.

This appeal is therefore dismissed with costs at this court and at the court below.

Dated this 10th of April 2019

Hon. Justice Alfonse Owiny Dollo, DCJ

Hon. Justice Kenneth Kakuru, JA

Hon. Justice Stephen Musota, JA