**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**CIVIL DIVISION**

**MISCELLANEOUS APPLICATION NO. 411 OF 2014**

*(Arising out of Supreme Court Civil Appeal No. 4 of 2005) and*

*(High Court Civil Suit No.1022 of 1997)*

**GRACE WERE MUHWANA :::::::::::::::::::::::::::::::::::: APPLICANT**

***VERSUS***

**TROPICAL AFRICA BANK LIMITED :::::::::::::::::::: RESPONDENT**

**BEFORE: HON. MR. JUSTICE STEPHEN MUSOTA**

**RULING**

Through M/s Kimuli & Sozi Partners, this application is brought by Notice and Motion under S. 98 of the Civil Procedure Act and S.33 Judicature Act for:

1. A determination of the market value of the suit land comprised in LRV 1289 folio 15 plot No. Misc 437 at Ntinda as at the time of sale by the respondent.
2. An order determining the amount of compensation payable to the applicant pursuant to the orders of the supreme court in SCCA No. 4/2011.
3. The costs of this application be provided for.

The grounds of the application are that:

1. The applicant was the successful party in the Supreme Court Civil Appeal No. 4 of 2011.
2. The Supreme Court *interalia* ordered that the applicant be paid compensation for her 45% share in the suit property at market value as at the time of its sale with interest at 10% p.a from the time of sale.
3. The Supreme Court directed that the compensation of the value of the suit property at the time of sale be determined by the High court if it cannot be mutually agreed upon by the parties.
4. The Supreme Court further ordered interest of 10% p.a to be paid to the applicant on her 45% share in the suit property from the date of its sale till payment in full.
5. That the applicant and the respondent have failed to agree on a figure constituting the value of the property as at the time of sale.
6. It is in the interest of justice and of all parties that the applicant be granted.

The application is supported by the affidavit of Grace Were Muhwana, the applicant in which she reiterates the grounds in the notice of motion. She made reference to the Statutory Declaration of the respondent’s legal officer which was attached to the respondent’s caveat indicating that there was never any payment received by the respondent at the time of the sale. That the caveat was only released in 2006.

The respondent was represented by Mr. Siraj Alli.

By consensus, it was agreed that the Chief Government Valuer be appointed to make a valuation of the suit property to determine the market value of the suit property at the time of sale. However, there is still a disagreement about when the actual sale of the suit property took place.

Whereas the respondent contends that it was in 1998 the applicants insist that no consideration in terms of payment was made at the time of agreement leading to placement of a caveat by the respondent, which was only lifted 2006 after payment was received. This prompted court to commission a consensus Chief Government Valuer to do valuations for the two contested periods i.e. 1998 and 2006 as the issue of when the sale took place is resolved.

Court allowed respective counsel to file respective submissions on this issue.

In his submissions Mr. Sozi learned counsel for the applicant submitted that both the Court of Appeal and Supreme Court came to the conclusion that the sale of the applicant’s property and her eviction was unlawful and wrongful. That neither of those courts came to an ultimate determination on when the sale took place. That on record was evidence by way of an Agreement of sale indicating that sale took place in 1998 whilst the statutory declaration of the respondent’s Company Secretary clearly stated that as at 27th October 2004, the purchaser had not paid any part of the purchase price. That the respondent’s caveat was then released in 2006 upon receipt of payment. Learned counsel made reference to Page 8 paragraph 20 and paragraphs 9-19 page 37 of the Supreme Court judgment to contend that there was no finding by the court as to the exact date of sale hence leaving it to this court to determine in establishing the compensatable amount.

In reply, Mr. Siraj Alli learned counsel for the respondents submitted that the issue regarding time of sale of the suit property is res-judicata because it was conclusively determined by the Supreme Court in SCCA 4 of 2005. He referred to excerpts for the Supreme Court judgment at Page 8 paragraph 20 suggesting that their Lordships were alive to the controversy relating to the time of sale of the suit property. That the assertion by the respondent that the sale was in 2006 is an afterthought.

That the Supreme Court upheld the purchase of the suit property. Further that the agreement of sale formed part of the evidence before the Supreme Court and therefore by the court going ahead to uphold the sale of the suit property to Afzal Kkhan and Hassina Soniji it acknowledged that the sale of the suit property took place in 1998.

In rejoinder Mr. Sozi for the applicant insisted the issue of time of sale was never resolved. That if the issue was resolved the Supreme Court would have ordered that the applicant be paid the value of land as at the specific date, being the determined date of sale. That no mention is made of the years 1998 or 2006.

Regarding the valuation by the Chief Government Valuer Mr. Siraj Alli pointed out areas he has reservations on, that:

* The valuation be limited to 1998.
* The interest awarded should be simple interest of 10% for 18 years.
* Bullet 5 of the report is against the decision of the Supreme Court saying that it should be at the time of sale of property.
* Bullet 6 on the disturbance allowance is not provided for in Supreme Court judgment. Learned counsel objects to 30% disturbance allowance.

I have considered the submissions by respective counsel. I thoroughly read Supreme Court judgment and orders made therein.

It is my considered conclusion that the issue of time of sale and value of land at the time were never determined by the Supreme Court, nor deemed to have been determined by it. The Supreme Court came to the determination that the sale of the property by the respondent Bank would be upheld given the evidential gaps which would otherwise have enabled Court to make a definite decision.

I am persuaded by the submissions by Mr. Sozi that the sale of the applicant’s property took place in 2006 when the respondent received the purchase price for the sale. The respondent purported to sale the suit property to Afizal Khan and Hassina Soniji, evicted the applicant in August 1998 and then transferred the land to “the purchasers” before the respondent received any payment for the property in form of purchase price.

I agree that the transfer of the suit land into the said purchaser’s names as registered proprietors was a mere “holding transfer” to defeat the applicant’s claim until an actual sale took place. This took place in 2006 when the respondent lifted its caveat and actually got paid for the property.

It was held in the case of ***Currie Vs Misa (1875) LR 10 EX 153*** that:

***“a mere agreement alone does not amount to a contract unless consideration has passed from one party to another”.***

In the respondents statutory declaration by its Company Secretary it is categorically stated that-

***“……………………… todate the registered proprietors of the above described property have not made any payments”.***

This is in reference to the agreement of 16th September 1997.

This declaration is in support of the caveat dated 27th October 2004. This caveat was only lifted on 6th February 2006 after the consideration had been paid. The word purchase in its plain and ordinary meaning is to buy and there has to be exchange of money.

As rightly submitted by Mr. Sozi, under Section 2(1) of the Mortgage Decree under which the impugned mortgage was created, a sale by a mortgagee could only be for realization of security. Therefore a holding transfer which does not come with consideration, implying that the effect was not to make the respondent Bank realize the security was not contemplated by the law under which the property was purportedly sold. The supreme Court directed specifically that;

***“In the event that the purchaser was a bonafide purchaser for value without notice, then the respondent (now applicant) should be compensated for her share in the land.”***

In the instant case the purchasers only assumed status of purchasers for value without notice when they paid the purchase price. It is only at the time of payment when they parted with valuable consideration that the order of the Supreme Court could be applicable to validate the sale of them.

It is my considered view and I am in agreement with Mr. Sozi learned counsel for the applicant that the sale referred to by the Supreme Court in its judgment which this court is enjoined to enforce is the one consummated to in 2006. The sale of the suit land by the respondent was consummated in 2006 when the purchaser paid the purchase price and the respondent lifted the caveat.

I wish to note that this court is a court of law. It cannot ignore the fact that the purported sale of the suit property in 1998 was in law not a contract of sale. This court would be abdicating its duty to apply the law and to render Justice and would be perpetuating deceit and illegality, if it ignored the fact admitted and asserted by the Respondent Bank that it received no payment whatsoever on that transaction in 1998 until 2006 when it lifted the caveat.

In view of my above conclusions, I will now turn to the valuation made by the Chief Government Valuer, the valuer who was agreed upon by consensus.

In his 2006 valuation the Chief Government Valuer made the following report:

*“Valuation:*

*Having considered all the relevant factors affecting the real property marked in Ntinda, with particular reference to the subject property and its neighbourhood, we are of the opinion that compensation Award due at 45% interest in property comprised in LRV 1289 folio 15 plot No. M437, Ntinda Kampala is as follows:*

*“ (i) Value of land (2006) – UGX 225,000,000/=*

 *(ii) Value of building (2006) – UGX 54,000,000/=*

 *(iii) 10% interest p.a. of (i) & (ii) above for 18 years from 2006 - UGX 723,654,146/=*

 *(iv) Present value of land UGX 675,000,000/=*

 *(v) Present value of buildings UGX 135,000,000/=*

 *(vi) 30% disturbance allowance (iii + iv + v)*

*UGX 460,096,000/=*

 *(vii) Compensation award, UGX 1,993,750,389/=*

The orders of the Supreme Court were as follows:-

***“(a) The appellant (Tropical Bank) refunds to the respondent her proven share of 45% in the suit property of 45% of the Market value of the suit property at time of its sale.***

***(b) In the event that the value of the suit property was not ascertained as at the time of its sale and that it cannot be mutually agreed upon by the parties, the respondents should move the High Court for purposes of establishing this value.***

***(c) The appellant (Tropical Bank) pays the respondent interest on her 45% share of the suit property, from the date of the sale of the suit property at the rate of 10% per annum until payment in full.***

***(d) The appellant pays the respondent two thirds (*** $\frac{2}{3}$*)* ***costs of the appeal and the full costs in the two courts below.”***

In his submissions, Mr. Siraj Alli faulted the Government Chief Valuer for his conclusions. That the interest ordered was 10% simple interest for 18 years. That bullet IV & V is against the Supreme Court decision. The value should be at the time of sale of property.

Regarding disturbance allowance, learned counsel submitted that this is not provided for in the judgment therefore the valuer had no authority to include it in valuation. That the respondents are agreeable to claims i, ii & iii if interest is calculated properly.

In reply, Mr. Sozi learned counsel for the applicant agreed with the report contending that since it is a technical report, he is unable to fault it.

After studying the valuation report and the submissions on it, I am inclined to agree with Mr. Siraj Alli that the valuation which was ordered by the Supreme Court was at the time of sale. This court has ruled that the time of sale was in 2006. Therefore it was not necessary for the Chief Government Valuer to give the valuation as of today. Items IV, V of the valuation report as at the year 2006 shall not be included in the valuation.

Secondly, disturbance allowance will be excluded because it did not form part of the Supreme Court judgment. Therefore the value of the suit property at the time of sale was as follows:

1. Value of land (2006) – UGX.225,000,000/=
2. Value of building (2006) – UGX.54,000,000/=

Interest chargeable is 10% per annum on i & ii on the 45% share in the suit property market value as at the time of sale above not for 18 years but 10 years since the year of sale.

As per the order of the Supreme Court Tropical Bank has to refund to the applicant her proven share in the suit property of 45% of the market value of the suit property as at the time of sale, in 2006. The value is as has been provided by the Chief Government Valuer.

Consequently the entitlement to the applicant is as follows:-

1. 45% of the 2006 value of the suit land of Shs.279,000,000/=;
2. 10% interest per annum on the 125,550,000/= is shs.12,555,000/=;
3. 10% interest for 10 years in shs. 125,550,000/=;
4. The principle of 125,550,000/= plus interest of 125,550,000/= amounts to shs.251,100,000/= as due to the applicant.
5. If the amount due is not promptly paid, it will carry additional interest of 10% per year of default till payment in full.

It is so ordered.

**Stephen Musota**

**J U D G E**

**25.01.2016.**