IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 073 of 2019

In the matter between

OKELLO DENIS OWEKA **APPELLANT**

And

ODONG RICHARD OCAYA **RESPONDENT**

Heard: 20 March, 2020
Delivered: 22 May, 2020.

Civil Procedure *— Res judicata — section 7 of The Civil Procedure Act — no court may try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court —Res judicata is a doctrine of substantive law. It is to the effect that once the legal rights of parties have been judicially or impartially recognised, such recognition is subsequently conclusive as to those rights. — A determination of the legal rights of parties by a court of competent jurisdiction, upon the supposed merits, and after notice and hearing, ought finally to settle the matter. Where a suit is dismissed in circumstances where the plaintiff has not had an opportunity of being heard on the merits, the matter is not res judicata.*

Contract Law *— Courts will try and interpret agreements in a manner that leads to validity rather than invalidity A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful— Where the wording of the written contract is ambiguous the court may have regard to the surrounding circumstances, but such circumstances are "restricted to evidence of the factual background known to the parties at or before*

the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction"

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellant for specific performance of a contract of sale of land, general damages for breach of contract, *mesne* profits, a permanent injunction and the costs of the suit. His claim was that by an agreement dated 24th January, 2011 he purchased from the appellant, three plots of land located at Lacan Kwite village, Techo Parish, Layibi Division in Gulu Municipality, one of which is comprised in plot 161 Andrea Olal Road, at the price of shs. 10,000,000/= per plot. The respondent paid shs. 23,000,000/= leaving a balance of shs. 7,000,000/= and took possession of the land. At the time of execution of that agreement, the appellant represented to the respondent that the three plots had been surveyed and undertook to hand over the respective title deeds to the respondent. However, the appellant refused and / or failed to hand over the certificates of title to that land. Before he could pay the outstanding balance, the respondent discovered there were adverse claimants to the land, the land had never been surveyed and the appellant had included in the transaction, land that did not belong to him, hence the suit.

[2] In his written statement of defence, the appellant refuted the respondent's claim and contended that he never sold the said land to the respondent. He averred instead that on 11th July, 2010 the respondent executed an agreement of sale of land with the appellant's father, Oweka Peter. The subject matter of that agreement was land comprised in LRV 2175 Folio 3, being 0.179 hectares situated at Layibi, in Gulu Municipality. The appellant was a witness to that transaction. Subsequently during or around the month of August, 2010 the respondent entered into another transaction with the appellant's father, Oweka

Peter, for an additional piece of land at the price of shs. 20,000,000/= It is with regard to that additional land that the respondent paid a total of shs. 12,000,000/= in two instalments leaving a balance of shs. 8,000,000/= Instead, without any claim of right, the respondent took possession of the appellant's land comprised in plot 161 Andrea Olal Road which he fenced off and denied the appellant access thereto. The appellant therefore counterclaimed for a declaration that the land belongs to him, general damages for trespass to land, an order of vacant possession and the costs of the counterclaim.

[3] In his reply to the counterclaim, the respondent denied being a trespasser onto plot 161 Andrea Olal Road. He is the rightful owner thereof by virtue of having purchased the same from the respondent. He prayed that the counterclaim be dismissed with costs.

The appellant's evidence in the court below:

[4] P.W.1 Odongo Richard Ocaya, the respondent, testified that it was on 11th July, 2010 when the appellant's father Oweka Peter sold him one plot of land at the price of shs. 10,000,000/= (exhibit P. Ex.2) which he paid in full. Subsequently on 24th January, 2011 the appellant and his father Oweka Peter sold him three plots of land comprised in plots 9, 11 and 13 Akwi Road (out of the nine plots that arose out of the sub-division of plot Block 2 plot 35), at the price of shs. 10,000,000/= each (exhibit P. Ex.3). He paid the purchase price in full for the plot now in dispute. The land was described as being situate at Lacan Kwite village, along Andrea Olal Road, Block 2 plot 161. The two other plots belonged to the appellant's father, Oweka Peter, hence a total of four plots. Attached to the agreement of 24th January, 2011 was a drawing indicating three plots only and the fourth was not indicated because he paid in full for that plot. The appellant signed the agreement as one of the sellers. The appellant's father did not signed because he had not received payment, which was made later in two instalments, leaving an outstanding balance of shs. 7,000,000/= When the appellant received

payment in full for his plot, he permitted the respondent to take possession of the land. He constructed a house on part of the plot and planted cassava on the other part. A court injunction prevented him from completing the construction which stopped at wall-plate level.

[5] P.W.2, David Kinyera, the advocate who prepared the agreement 11th July, 2010 (exhibit P. Ex.2) testified that he did so on the instructions of the appellant's father, Oweka Peter. He told him he had three plots for sale at the price of shs. 10,000,000/= each, one of which he had previously given to his son, the appellant. He sought the assistance of the witness to find a witness. The witness got the respondent interested but he indicated he had enough money at hand for payment in respect of only on plot, the one belonging to the appellant. This resulted in the agreement signed on 11th July, 2010 when the respondent paid shs. 10,000,000/= (exhibit P. Ex.2) in full for one plot. This plot was one of the nine plots that were a result of the sub-division of Block 2 plot 35 (exhibit P. Ex.4). He subsequently prepared the agreement dated 24th January, 2011 (exhibit P. Ex.3) by which the appellant sod his plot to the respondent. The respondent agreed to purchase two more plots from the appellant's father and additional one from the appellant. He paid for that of the appellant in full. The sketch map of the three plots does not include the one purchased from the appellant. The respondent had money for only one plot at the signing of that agreement and it that is what the appellant received. The appellant needed the money urgently for payment of tuition fees at the university. The appellant's plot was distinct with clear boundaries. The parties inspected it before the transaction.

<u>The respondent's evidence in the court below</u>:

[6] D.W.1, Okello Denis Oweka, the appellant, testified that the agreement dated 24th January, 2011 (exhibit P. Ex.3) was for the sale of additional land by his father, Oweka Peter, to the respondent. The appellant signed it on behalf of his

father. She. 10,000,000/= was paid leaving a balance of shs. 10,000,000/= The agreement had a sketch describing his father's three plots of land that was sold and they do not include plot 161 Andrea Olal Road. He signed the agreement of 11th July, 2010 when the respondent paid shs. 10,000,000/= (exhibit P. Ex.2) as a witness. On 16th August, 2010 he signed an acknowledgment of shs. 2,000,000/= as part payment of additional land the respondent purchased from the appellant's father. A final acknowledgement was signed on 14th September, 2011 showing that the respondent owed the appellant's father shs. 2,000,000/= Plot 161 Andrea Olal Road was registered in the appellant's name on 18th August, 2008. It was given to him by his father as a gift following a sub-division of his land. On basis of land he bought from the appellant's father, the respondent encroached approximately 10.5 meters onto that plot. During the year 2013 the respondent filed a suit and a case against the appellant and his father claiming that they had sold him land without a title deed. The police investigated the allegation and found it was not true. The suit was dismissed for want of prosecution. The respondent paid a total of shs. 33,000,000/= in four instalments leaving an outstanding balance of shs. 7,000,000/=

[7] D.W.2 Oweka Peter, the appellant's father, testified that it is him who during the year 2007 gave his son, the appellant, land comprised in plot 161 Andrea Olal Road. He sold the respondent three plots and is not aware of any sale by the appellant of the land comprised in plot 161 Andrea Olal Road. The witness received shs. 10,000,000/= on 11th July, 2010; shs. 2,000,00/= was received by the appellant on his behalf on 16th August, 2010. He first saw the agreement dated 24th January, 2011 (exhibit P. Ex.3) at the police station after the respondent had reported a case against him and the appellant. The respondent paid a total of only shs. 23,000,000/= leaving an outstanding balance of shs. 7,000,000/= for the three plots. Plot 161 Andrea Olal Road is not one of them. It is Block 2 plot 35 (exhibit P. Ex.4) that was sub-divided during the year 2007 to yield the four plots. When the appellant received shs. 10,000,000/= consequent to signing the agreement dated 24th January, 2011 (exhibit P. Ex.3) he signed as

a seller and did not indicate that he received that amount on behalf of this witness.

Proceedings at the *locus in quo*:

[8] The court visited the *locus in quo* on 20th February, 2019 where the trial Magistrate found that three plots were distinct and demarcated by survey mark stones. On these plots is an incomplete structure belonging to the appellant. Adjacent to the three is a un un-surveyed plot now in dispute, plot 161 Andrea Olal Road, measuring 30 meters by 16 metres. On this plot is an incomplete building at wall-plate level belonging to the respondent. No sketch map was drawn.

Judgment of the court below:

[9] In his judgment delivered on 12th July, 2019, the trial Magistrate found that it was an agreed fact that the respondent has an incomplete house constructed on the land in dispute. The respondent presented an agreement of sale between himself and the appellant where plot 161 Andrea Olal Road is the subject matter. The appellant failed to perform his part of the bargain hence justifying a suit for specific performance. The respondent is not a trespasser on the land. The appellant's defence is a bare denial. The counterclaim was therefore dismissed and judgment entered in favour of the respondent against the appellant with orders that; plot 161 Andrea Olal Road is the property of the respondent, the appellant is to perform his part of the contract by surrendering the certificate of title to the land to the respondent, a permanent injunction restraining the appellant from further acts of trespass onto the land, the respondent was awarded shs. 5,000,000/= as general damages with interest at court rate, and the costs of the suit.

The grounds of appeal:

[10] The appellant was dissatisfied with that decision and appealed to this court on the following grounds, namely;

1. The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and reached a wrong conclusion that the land comprised in plot 161 Andrea Olal Road is the property of the respondent having been sold by the appellant, hence occasioning a miscarriage of justice.
2. The learned trial Magistrate erred in law and fact when he failed to consider that the same subject matter had already been determined in Civil Suit No. 69 of 2013 between the same parties and ignored the import of the plaint and order tendered in court.
3. The learned trial Magistrate erred in law and fact when he totally failed to consider the counterclaim and dismissed it without any evaluation thereby occasioning a miscarriage of justice.
4. The learned trial Magistrate erred in law and fact when failed to conduct a visit to the *locus in quo* in accordance with the law hence reaching a wrong decision that prejudiced the appellant.
5. The learned trial Magistrate erred in law and fact when he failed to consider the contradictions and inconsistencies in the respondent's evidence about the agreement and the suit land whereby he came to the wrong conclusion and gave judgment in favour of the respondent to the prejudice of the appellant.
6. The learned trial Magistrate erred in law and fact when he conducted the trial in a confrontational and biased manner against and to the prejudice of the appellant thereby occasioning a miscarriage of justice.

Arguments of Counsel for the appellant:

[11] In their submissions, counsel for the appellant abandoned the fourth ground. With regard to the rest of the grounds they submitted that the agreement dated 24th January, 2011 (exhibit P. Ex.3) names two persons as sellers, the appellant and his father Oweka Peter. The subject matter of the transaction is described as three plots. Plot 161 Andrea Olal Road is not named. The appellant testified that he acted on behalf of his father in that transaction. The sketch drawing attached to the agreement indicates only three and not four plots. The agreement dated 11th July, 2010 (exhibit P. Ex.2) does not name the appellant as a seller, but rather his father Oweka Peter. The appellant sought to rely on an oral agreement, which is prohibited by both *The Evidence Act* and *The Contracts Act, 2010*. A description of the land sold is required to be done in writing. While evidence was adduced showing that the appellant received shs. 10,000,000/= that payment was for an extension of land sold by his father, located at Lacan Kwite and not the appellant's land comprised in Plot 161 Andrea Olal Road. The appellant had before that filed Civil suit No. 69 of 2013 against the appellant's father Oweka Peter, the appellant and a one Okello Denis Oweka which was on 3rd December, 2018 dismissed for want of prosecution. His claim in that suit concerned the same subject matter as in the current proceedings. He indicated that he had purchased three surveyed plots at ahs. 10,000,000/= each. No reference was made to Plot 161 Andrea Olal Road in that suit.

[12] Counsel argued further that the respondent's claim was in respect of an extension of land to that bought from the appellant's father at Lacan Kwite village. The appellant never applied for the re-instatement of that suit. The appellant field a counterclaim by which he sought to recover Plot 161 Andrea Olal Road from the respondent. The appellant relied on an unenforceable alleged contract with the respondent to justify his activities on the land, including the construction of a building. The respondent is therefore a trespasser on that land. The appellant adduced evidence showing that his father gave him that land in the year 2007. It

was subsequently surveyed as Plot 161 Andrea Olal Road and registered in the appellant's name during August, 2008. The respondent cut down the appellant's four mature eucalyptus trees that existed on that land. The appellant therefore should have been awarded shs. 50,000,000/= as general damages for trespass to land. The respondent relied on the agreement dated 24th January, 2011 (exhibit P. Ex.3) as evidence of a sale of three plots from the appellant's father and at the same time stated it evidenced the transaction between him and the appellant.

[13] Counsel argued further that the agreement dated 24th January, 2011 (exhibit P. Ex.3) was said to be an in respect of an extension to land that was the subject matter of the agreement dated 11th July, 2010 (exhibit P. Ex.2). The appellant was not a party to the latter agreement and therefore exhibit P. Ex.3 could not relate to his land. He was a mere witness to exhibit P. Ex.2. The contradictions in the appellant's evidence relate to the existence of a contract of sale of land and therefore are major contradictions. The trial Magistrate's reference to the appellant being an advocate showed bias in his approach to the trial. The trial Magistrate should not have castigated the appellant as a dishonest advocate yet he gave candid testimony. They prayed that the appeal be allowed.

Arguments of Counsel for the respondents:

[14] The respondent's counsel did not file submissions in response.

Duties of a first appellate court:

[15] It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due

allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

[16] In exercise of its appellate jurisdiction, this court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular, this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

Ground two; failure to find that the suit was *res judicata.*

[17] By the second ground of appeal, it is contended that the trial court misdirected itself when it failed to find that the suit was r*es Judicata*. According to section 7 of *The Civil Procedure Act* no court may try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.

[18] *Res judicata* is a doctrine of substantive law. It is to the effect that once the legal rights of parties have been judicially or impartially recognised, such recognition is subsequently conclusive as to those rights. A determination of the legal rights of parties by a court of competent jurisdiction, upon the supposed merits, and after notice and hearing, ought finally to settle the matter. Where a suit is dismissed in circumstances where the plaintiff has not had an opportunity of being heard on

the merits, the matter is not *res judicata* (see *Keharchand v. Jan Mohamed (1919-21) 8 E.A.L.R. 64; Bukondo Yeremiya v. E. Rwananenyere [1978] HCB 96* and *Isaac Bob Busulwa v. Ibrahim Kakinda [1979] HCB 179*). In the instant case, Civil Suit No. 69 of 2013 had not proceeded beyond the stage of pleadings. There was never a decision on the merits. This ground therefore is misconceived. and accordingly fails.

Ground six; Judicial Bias

[19] It was contended in ground six of appeal that the trial was conducted in a confrontational manner. By this, counsel for the appellant accuses the trial Magistrate of bias and animosity toward the appellant. Principle 4.1 of *The Judicial Code of Conduct, 2003* requires judicial officers all time to conduct themselves in a manner consistent with the dignity of the judicial office. A judicial officer must behave in public with the sensitivity and self-control demanded of judicial office, because a display of injudicious temperament is demeaning to the processes of justice and inconsistent with the dignity of judicial office. This requires judicial officers to be patient, dignified and courteous to the advocates and parties who appear before them. They must refrain from speech, gestures or other conduct that could reasonably be perceived as harassment. They should not only abstain from making disparaging, demeaning or sarcastic remarks or comments but should also abstain from any conduct that may be characterised as uncivil, abrasive, abusive, hostile or obstructive. Proper judicial temperament generally is thought to manifest in consistent exercise of patience, level-headedness in challenging moments, treating people with courtesy, projecting a dignified demeanour, and being a respectful.

[20] However, it is indisputable that judicial officers are human and consequently experience emotion. Emotion generally cannot be eliminated; it can only be regulated. It is for that reason that our legal culture insists that such judicial emotion be tightly controlled because judicial emotion, including indignation,

might sometimes be appropriate, even valuable. The law does not require a court to refrain from justifiable criticism but only the maintenance of composure. It is not every observation and passing remark of the court below that is appealable. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.

[21] Although a judicial officer on the bench must keep his or her emotions out of the proceedings regardless of the provocations, expressions of frustration or anger emerging as spontaneous reactions, when provoked by some objectively discernible cause, will not suffice as proof of bias or partiality. Expression of such emotions may do so if it reveals an attitude or opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favouritism or antagonism as to make fair judgment impossible. The indignation must be so extreme as to display clear inability to render fair judgment. The line is crossed when the expressions used are indicative of a favourable or unfavourable predisposition that deserves to be characterised as "bias" or "prejudice." It must be such a pervasive bias and prejudice shown by otherwise judicial conduct as would constitute bias against a party.

[21] The appellant seems to think that the trial Magistrate was so concerned with him as an individual that he engaged in such criticism. However, expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as judicial officers, sometimes display, are insufficient for establishing bias or partiality (see *Liteky v. U.S., 510 U.S. 540, 555-56 (1994*). Appearance of bias must be determined by an objective standard under which the trial Magistrate who is applying it in a particular case must decide whether an ordinary person advised of the assertions of historical fact, and disregarding the assertions of inferences and conclusions, would reasonably believe the trial Magistrate to be biased or prejudiced against the party making the assertion. Statements orally or

in writing issued during proceedings that are critical or even disapproving of a party or that party's contentions ordinarily do not support a challenge, grounded on alleged bias or partiality.

[22] It is settled law that a judgment of court must demonstrate in full a dispassionate consideration of all the issues properly raised and heard and must reflect on the result of such exercise. In other words, it must show a clear resolution of all the issues that arise for decision in the case and end up with an ultimate verdict which flows logically from the facts as pleaded and found proved. In the present case, the court's statements on which the appellant bases his arguments do not constitute evidence of bias, but are instead comments aimed at expressing the court's concerns regarding the nature of his defence and his behaviour during the litigation. They consist of ordinary admonishments to a party to the proceedings. They are not tastelessness, sarcastic, exaggeration, subversive or disrespectful. They occurred in the course of the proceedings, and are not based upon knowledge acquired outside the proceedings nor displayed deep-seated and unequivocal antagonism that would render fair judgment impossible.

[23] The court's statements were essentially like criticism of what it considered to be a less than honest testimony. The criticism may be a personal affront to the appellant only in the sense that it jolted the appellant into self-reflection, but importantly they were a factual statement. The appellant may have chosen to take the criticism as offensive, but that makes no difference since the criticism was restricted to pointing out that his conduct and testimony was not consistent with his professional calling, when he testified in half-truths before the court. It must also be reiterated that the appellant in effect insulted himself by conducting himself that way. He cannot fault the court for having pointed out the problem. This ground too fails.

Grounds one, three and five; failure properly evaluate evidence and to consider the counter claim.

[24] In grounds one, three and five, the trial court is faulted for its failure to properly evaluate the evidence, contradictions and inconsistencies, and its failure to consider the counterclaim. Pivotal to the decision was the agreement dated 11th July, 2010 (exhibit P. Ex.1), where the seller was named as D.W.2 Oweka Peter. The purchase price was stated to be shs. 10,000,000/= paid in full. It stated that the land sold was part of Block 2 plot 35, with the area so sold measuring approximately 17 m x 40 m from Chwa tree up to Kituba tree, i.e. from the mark stone up to the road reserve. The appellant signed as a witness.

[25] This agreement was followed by an acknowledgement dated 16th August, 2010 the appellant received shs. 2,000,000/= "on behalf of" D.W.2 Oweka Peter "for an extension of land" forming part of plot 35 (exhibit P. Ex.2). This acknowledgement was followed by an agreement dated 24th January, 2011 (exhibit P. Ex.3), where the sellers were named as the appellant, Okello Denis Oweka and his father, D.W.2 Oweka Peter. The purchase price is stated as shs. 20,000,000/= with shs. 10,000,000/= up to leave a balance of shs. 10,000,000/= owing. A drawing incoporated as part of the agreement indicates three plots; the first being the subject of the agreement of 11th July, 2010 (exhibit P. Ex.1); the second measuring 22 m x 40 m and the third 22 m x 40 m. Subsequent to this agreement, by a written acknowledgment dated 14th September, 2011 (exhibit P. Ex.3) D.W.2 Oweka Peter acknowledged having received shs. 11,000,000/= shs. 2,000,000/= and shs. 7,000,000/= hence a total of shs. 20,000,000/=

[26] Whereas the respondent contended that he paid a total of shs. 33,000,000/= for four plots at the price of shs. 10,000,000/= each; one purchased from the appellant and paid for in full, and three from the appellant's father D.W.2 Oweka Peter, all for a total of shs. 40,000,000/= therefore leaving an outstanding balance of shs. 7,000,000/= only, the appellant contended that the he has never

sold any plot of land to the respondent. The appellant contends that his only involvement in the transaction was that of a witnesses and subsequently as an agent authorised to receive, for and on behalf of his father, D.W.2 Oweka Peter, two of the instalment paid. He contended that D.W.2 Oweka Peter sold the respondent only three plots in respect of which he received a total of only shs. 12,000,000/= in two instalments; shs. 2,000,000/= on 16th August, 2010 (exhibit P. Ex.2), and shs. 10,000,000/= on 24th January, 2011 (exhibit P. Ex.3). The rest was received by his father, D.W.2 Oweka Peter.

[27] The disparity of the two accounts of the transaction as narrated by both parties and reflected in the agreement of 24th January, 2011 (exhibit P. Ex.3), raises the question whether or not it is too uncertain to be enforced. It is self-evident that a court cannot enforce a contract when it cannot understand its terms. The contract must clearly and sufficiently set out the subject matter of the agreement so that it can be ascertained. In every case what will be considered to be a sufficient description has to be done with reference to the surrounding circumstances and the facts. It should be capable of being rendered certain or being ascertained in the light of all the facts and circumstances. Its adequacy depends upon the degree of certainty attained when the words are applied to things. A contract could be void for uncertainty due to the vague language used. There is no binding contract where the language used is so obscure and incapable of any precise or definite meaning that he court is unable to attribute to the parties any particular contractual intention.

[28] However, Courts will try and interpret agreements in a manner that leads to validity rather than invalidity (*ut res magis valeat quam pereat*). A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful (see *WN Hillas & Co Ltd v. Arcos Ltd [I932]All E.R. 494*). "The courts are always loath to hold a clause invalid for uncertainty if a reasonable meaning can be given to it. Their duty is to put a fair meaning upon it, unless this is utterly

impossible, and not, as has been said "to repose on the easy pillow of saying that the whole is void for uncertainty" (see *Hammond v. Vam Ltd. [I9721 2 N.S.W.L.R. 16 at 18*). The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other. A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.

[29] Once a contract has been reduced to writing, extrinsic evidence is not normally admissible to contradict, qualify or add to the written terms. However, when the contrast is in danger of failing altogether, due to vagueness or to ambiguity which cannot be resolved by application of a rule of construction, extrinsic evidence, even direct evidence of intention, should be freely admitted in order to save the contract. In such a case, a contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.

[30] Where the wording of the written contract is ambiguous the court may have regard to the surrounding circumstances, but such circumstances are "restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction" (see *Prenn v. Simmonds [1971] 1 WLR 1381 at 1385* per Lord Wilberforce). After all, interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract (see *Investors Compensation Scheme Ltd v. West Bromwich Building Society (ICS) [1998] 1 WLR 896 at 912-913*).

[31] To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties (see *Bank of Credit and Commerce International SA v. Ali [2002] 1 AC 251*). Evidence of surrounding circumstances though is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning.

[32] Furthermore, when, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded. Words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected. When the parties have agreed upon the essentials, the law will supply, by appropriate implications, the necessary "machinery", the "subsidiary means of carrying out the contract" (see *Nicolene Ltd v. Simmonds [1953] 1 QB 543*). For a contract to fail for uncertainty the meaningless or vague phrase must relate to a significant aspect of the agreement itself, without which there could not be a proper agreement that could be upheld by the courts.

[33] A transaction of sale of land may be executed using either (i) a single contract or (ii) a series of separate but closely interrelated (linked) contracts which together make possible a "single composite transaction." There are often situations where separate transactions are so closely linked or continuous that they cannot be evaluated adequately on a separate basis. When multiple contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, they are to be taken together. Initial vagueness can be cured if conduct of the parties subsequent to the execution of the contract supplies reliable additional evidence of the true meaning of the agreement (see *Foley v. Classique Coaches [I9341 All E.R. 88*). A provision often refers to a contract

clause in the same contract or another contract. Such a cross reference indicates how the two provisions interact; whether the one is an elaboration on the other, subordinated or prevailing.

[34] In addition, a contract can be rendered sufficiently certain by partial implementation. If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it. A term is ineffectual when it suffers from conceptual confusion or vacuity to such a degree that its application to particular situations becomes a matter of unguided speculation. Furthermore, where an agreement is partly written and partly oral, parol evidence which may resolve an ambiguity and / or fill in a missing term or condition in the written contract may be admitted.

[35] When the circumstances in which this transaction unfolded are placed on the time scale, it emerges that the appellant's father D.W.2 Oweka Peter was at all material time the registered proprietor of land comprised in LRV 2175 Folio 3 Omoro Block 2 Plot 35 Okena Road. It was a 44 year lease of approximately 0.39 hectares at Layibi Koro, Odoro, Gulu. It was registered in his name on 27th September, 1993. Sometime during the year 2006, D.W.2 Oweka Peter partitioned off that title, land measuring approximately 0.043 hectares, now comprised in LRV 3526 Folio 21, Plot 161 Andrea Olal Road whose title deed was issued on 12th April, 2006. It was first registered in the name of D.W.2 Oweka Peter on 7th April, 2006. It was on 18th August, 2008 transferred into the name of the appellant (document D. ID.1- Title deed and exhibit D. Ex.2 - statement of search dated 2nd March, 2011). It is a 44 year lease of at Layibi Koro, Odoro, Gulu with effect from 1st November, 1992.

[36] Following a subdivision LRV 2175 Folio 3 Omoro Block 2 Plot 35 Okena Road into five other plots; 157, 159, 161 (now in dispute), 163 and 165. The residue thereafter became plot 1 with an acreage of 0.179 hectares, out of which D.W.2

Oweka Peter, sold three plots yet to ne portioned off that title. The cadastral history of Plot 161 Andrea Olal Road now in dispute, raises the question of whether or not it was part of the transaction of sale of the three plots to be carved out of Omoro Block 2 Plot 1 Okena Road, or not. It is the task of the court to ascertain the legal nature of any transaction whose enforcement is sought and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded.

[37] The first question to be determined is whether or not the sale concerned three plots as contended by the appellant, or four plots as contended by the respondent. The answer to this is to be found in the amount of money paid by the respondent. It does not seem to be in dispute that the price of each plot was fixed at shs. 10,000,000/= In his testimony, D.W.2 Oweka Peter admitted having sold the respondent three plots and to have received the following payments in respect thereof; shs. 10,000,000/= on 11th July, 2010 (exhibit P. Ex.2), shs. 2,000,000/= (received on his behalf by the appellant on 16th August, 2010 as per exhibit P. Ex.2), shs. 1,000,000/= in two instalments sometime after 16th August, 2010 but before 14th September, 2011 and shs. 11,000,000/= received on 14th September, 2011 (exhibit P. Ex.3), hence a total of shs. 24,000,000/= This is consistent with the respondent's testimony that in writing it was stated that he owes D.W.2 Oweka Peter shs. 7,000,000/= he realises that he overpaid him by shs. 1,000,000/= since the true sum owing should have been shs. 6,000,000/=

[38] On the other hand, the appellant in his testimony admitted having received shs. 2,000,000/= on 16th August, 2010 (exhibit P. Ex.2), and shs. 10,000,000/= on 24th January, 2011 (exhibit P. Ex.3). Whereas the appellant accounted for the shs. 2,000,000/= he received on 16th August, 2010 since that sum is acknowledged by his father D.W.2 Oweka Peter as having been made in part payment of the transaction relating to the three plots he sold to the respondent, he totally failed to explain the incidence of the additional shs. 10,000,000/= he received on 24th January, 2011. Curiously, whereas the appellant categorically signed the

agreement dated 11th July, 2010 (exhibit P. Ex.1) as a witness, where the seller was named as D.W.2 Oweka Peter, and signed the acknowledgement dated 16th August, 2010 "on behalf of" D.W.2 Oweka Peter "for an extension of land" forming part of plot 35 (exhibit P. Ex.2), he executed the agreement dated 24th January, 2011 (exhibit P. Ex.3), as one of two co-vendors by signing as "seller," the other one being his father, D.W.2 Oweka Peter. To compound matters further, although named as one of the two sellers, D.W.2 Oweka Peter never signed the agreement and stated under cross-examination that he was seeing that agreement for first time when it was presented to him in court. He denied having received the shs. 10,000,000/= paid by the respondent and received by the appellant, at the signing of that agreement, despite the cross-reference to being payment for "for an extension of land." This paints a clear picture of progression in the appellant's involvement in the transaction. He began as a witness, progressed to an agent and thereafter to a co-vendor.

[39] By virtue of the cross-referencing in the underlying documentation, the cadastral history of the land, the modes of payment, and progression in the appellant's involvement the transaction from a witness through to a co-vendor, the agreement that the parties actually executed in reality, is evidenced by their conduct, which in this context is treated as representing the best evidence of the actual / true nature / substance of their contract. These were a series of separately executed but interrelated (linked) agreements, resulting in a composite transaction, in the sense that aspects of the respondent's agreement with the appellant on the one hand and with D.W.2 Oweka Peter on the other are so co-dependent that they should not be separated. The dealings between them are grouped together because they are the total dealings between the three parties, relating more or less to the same subject matter. Court will treat a series of formally separate steps as a single transaction if the steps are in substance integrated, interdependent, and focused toward a particular result. This was a transaction in which the appellant together with his father D.W.2 Oweka Peter

intended to sell to the respondent, multiple plots of land who cadastral history is traceable to LRV 2175 Folio 3 Omoro Block 2 Plot 35 Okena Road.

[40] Where an interrelated series of steps are taken pursuant to a plan to achieve an intended result, the legal consequences are to be determined not by viewing each step in isolation, but by considering all of them as an integrated whole, as component parts of an overall plan. In the circumstances of this case, it would be inequitable to divide a whole transaction between parties up into artificially separate agreements. As the substance of the agreement is evidenced by the agreements actually executed by the parties, the agreement which they formally purported to undertake (as conveyed by their terms) will be given effect only if it is consistent with the agreement they actually executed. The central purpose of this analytical approach is to ensure the legal consequences of a particular transaction turn on substance rather than form.

[41] Explaining the circumstances in which the agreement of 24th January, 2011 (exhibit P. Ex.3) was signed, the respondents stated that he chose to pay in full for the plot the appellant offered him in the same area, as he deferred payment of the balance owed to D.W.2 Oweka Peter in respect of the three plots, since there was a dispute between D.W.2 Oweka Peter and another person claiming interest in one of the plots. The respondent's version is corroborated by the fact that the appellant executed the agreement of 24th January, 2011 (exhibit P. Ex.3), explicitly as one of two co-vendors, not as either a witness as he had done before on 11th July, 2010 (exhibit P. Ex.1), or an agent as he had done before on 16th August, 2010 (exhibit P. Ex.2). It is further corroborated by the fact that whereas the payments received by D.W.2 Oweka Peter account fully for the three plots he sold to the respondent, the appellant failed to account for the shs. 10,000,000/= he received upon the signing of the agreement of 24th January, 2011 (exhibit P. Ex.3), yet that sum represents the price agreed per plot. The circumstantial evidence irresistibly points to the fact that the respondent purchased four plots and not three plots as contended by the appellant. While

D.W.2 Oweka Peter sold the respondent three plots in respect of which there is an outstanding balance of shs. 7,000,000/= the appellant sold the respondent one plot for which the respondent pain in full in a lump sum on 24th January, 2011.

[42] Although the specifications of the plot thereby sold where not stated in the agreement, this is not fatal to the transaction. There is no doubt that the subject matter and price are important terms of any agreement of sale and yet they too need only be ascertainable, not necessarily ascertained. Something is certain if it can be rendered certain or is capable of being rendered certain in application. Certainty is ideally obtained with reference to a mechanism contained in the contract, but may also be achieved with reference to an objectively determinable external standard or mechanism. One way of doing that is by implying a necessary term in the contract by way of the officious bystander test, i.e. "if, while the parties were making the bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common "Oh, of course!" (see *Shirlaw v. Southern Foundries (1926) Ltd [1939] 2 KB 206*).

[43] In every case in which it is said that some provision ought to be implied in an agreement, the question for the court is whether such a provision would spell out in express words what the agreement, read against the relevant background, would reasonably be understood to mean (see *Attorney-General of Belize v. Belize Telecom Ltd [2009] 2 All ER 1127*). The notion that a term will be implied if a reasonable reader of the contract, knowing all its provisions and the surrounding circumstances, would understand it to be implied is quite acceptable, provided that (i) the reasonable reader is treated as reading the contract at the time it was made and (ii) he would consider the term to be so obvious as to go without saying or to be necessary for business efficacy. This principle will apply even where the term to be implied is one that relates to the subject matter of the contract. A description in a contract that might otherwise be indefinite becomes

definite and adequate when applied to the only subject-matter that can reasonably fit it. In a case such as this, the court will assume that a man is selling his own property (see *Auerbach v. Nelson [1919] 2 Ch. 383*). The description will be rejected as inadequate if the seller is the owner of two or more parcels, to any one of which it may be applied with equal fitness. It will be accepted as sufficient if he is the owner of only one.

[44] For example in *Plant v. Bourne [1897] 2 Ch. 281* "twenty-four acres of land, freehold, at Totmonslow" the question was whether there was sufficient identification of the subject-matter of the sale. The court held that the vendor was presumably selling his own 24 acres and not another's, and that the description was sufficient to let in extrinsic evidence that he had only 24 acres in the county. It was further held to be a sufficiently certain description of the property because it was the only parcel of land that the vendor owned at that location. It was clear that there was a contract. Its object was the 24 freehold acres of land which the parties had discussed, and this was ascertained by parol evidence to that effect.

[45] Many other cases, both in England and in the Unites States of America, enforce the same distinction. The description will be rejected as inadequate if the seller is the owner of two or more parcels, to any one of which it may be applied with equal fitness. It will be accepted as sufficient if he is the owner of only one (see *Shardlow v. Cotterell, 20 Ch. D. 90*; *Doherty v. Hill, 144 Mass. 465, 467*; *Harrigan v. Dodge, 200 Mass. 358*; *Hampe v. Sage, 82 Kan. 728, 733*; *Quinn v. Champagne, 38 Minn. 322*; *Gilbert v. Tremblay,79 N.H. 431*; *Preble v. Higgins, 43 R.I. 10*; *Waring v. Ayres,40 N.Y. 357*; and *Marks v. Cowdin, 226 N.Y. 138, 144*). Therefore the subject matter may be rendered obvious by the context of the agreement. All that the court needs to do is to lay the contract alongside the fact, and the result is ascertained.

[46] In the instant case, the only property that the respondent had within that area was LRV 3526 Folio 21, Plot 161 Andrea Olal Road. When he described himself

as a seller in the agreement of the agreement of 24th January, 2011 (exhibit P. Ex.3), received a sum of shs. 10,000,000/= and described the subject matter of the agreement as being "an extension of land," that description was sufficient to let in extrinsic evidence that he had only that plot to his name. That was a sufficiently certain description of the land the sold to the respondent because it was the only parcel of land that the appellant as vendor owned at that location. The trial court therefore came to the right conclusion and therefore that aspect of grounds one, three and five, of the appeal fails.

[47] It was argued further that the court ought to have found that the agreement was unenforceable for having been oral. According to section 10 (5) of *The Contracts Act, 7 of 2010*, a contract the subject matter of which exceeds twenty five currency points (500,000/=) must be in writing. The goal of the written contract rule remains the avoidance of fraud by requiring written proof of the underlying agreement. Contracts which do not comply with the requirement of the section though are not void, but are merely unenforceable by action (see for example *Britain v. Rossiter (1879) 11 QBD 123*). In the instant case, it is not correct to state that the agreement between the appellant and the respondent was entirely oral, it was partly in writing (as evinced by the agreement of 24th January, 2011 (exhibit P. Ex.3) and partly oral (as some of its terms were supplied by the oral testimony of the respondent and as inferred from the parties' conduct).

[48] To satisfy the requirements of section 10 (5) of *The Contracts Act, 7 of 2010*, writing all material terms is not required. If court enforcement is sought, a written contract shows the parties' obligations and avoids a "he said, she said" dispute, that is sufficient. The "writing" envisaged does not require a formal written contract. This requirement is satisfied by any signed writing that;- (i) reasonably identifies the subject matter of the contract, (ii) is sufficient to indicate that a contract exists, and (iii) states with reasonable certainty the material terms of the contract. It can be a receipt or even an informal letter.

[49] Furthermore, multiple writings can be combined to show that a single contract exists to satisfy this requirement. It is necessary, in order to justify the reading of documents together for this purpose, that there should be a document signed by the party to be bound, which, while not containing in itself all the necessary ingredients of the required memorandum, does contain some reference, express or implied, to some other document or transaction. Where any such reference can be spelt out of a document so signed, then parol evidence may be given to identify the other document referred to, or, as the case may be, to explain the other transaction, and to identify any document relating to it. If by this process a document is brought to light which contains in writing all the terms of the bargain so far as not contained in the document signed by the party to be charged, then the two documents can be read together so as to constitute a sufficient memorandum (see *Timmins v. Moreland Street Properties Ltd [1958] Ch 110*). In order to join two or more documents, one of the documents must be signed and must contain some reference, express or implied, to some other document or transaction.

[50] Alternatively, the doctrine of part performance is the equitable means to combat the harshness of the writing requirement. It is a doctrine of equity that a contract required to be evidenced in writing will still be enforceable even if it is not so evidenced provided that one of the parties does certain acts by which the contract is partly performed. Under that principle of equity, even if a contract that should be in writing under section 10 (5) of *The Contracts Act, 7 of 2010* is not in writing, that does not eliminate the possibility of its enforceability. Performance can also satisfy section 10 (5) of *The Contracts Act, 7 of 2010*. The reason is that, while the provision is designed to avoid fraudulent enforcement of contracts that never took place, that the contract was carried out can also be powerful confirmation of the agreement.

[51] Therefore performance can also allow an agreement of sale of land to be enforceable without a written agreement. In this context, performance means

payment plus either possession of the land by the purchaser or improvements made to the land by the purchaser. Again, the reason here is that it is exceedingly unlikely that a purchaser would make payment, the seller would accept payment and the purchaser would be allowed to possess or improve the property unless there was a legitimate agreement to sell the land (see *Fall v. Hazelrigg, 45 Ind. 576*). The possession of the purchaser must be in pursuance of the contract, and open and visible, and the improvements made must be lasting and valuable. These acts are regarded as sufficient safeguards against frauds and perjuries. When such acts have been done in part performance of a contract for the purchase of lands as will entitle the purchaser to a specific performance. Part performance on the part of the purchaser, with an offer to perform in full, will be sufficient to compel the vendor to perform his part, by conveying the property.

[52] The acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged (see *Maddison v. Anderson (1883) 8 App Cas 467*). This means that the acts could only have been done for the purposes of fulfilling the alleged agreement and that there is no other reason to perform those acts. Such acts must have been allowed by the other party. Generally, this includes acts which are closely related to the use or possession of the land, such as taking possession or carrying out improvements and cultivating the land. In the instant case, the respondent not only paid the purchase price in full, but he also took possession of the land and began construction of a building thereon, which when the court visited the locus in quo, was found to be at wall-plate level.

[53] Besides that, Courts of equity will not permit a statute to be made an instrument of fraud (see *Steadman v. Steadman [1976] AC 536; [1974] 2 All ER 977*). It is in keeping with equitable principles that in proper circumstances a person will not be allowed "fraudulently" to take advantage of a defence of this kind. If one party to an agreement stands by and lets the other party incur expense or prejudice his

position on the faith of the agreement being valid he will not then be allowed to turn round and assert that the agreement is unenforceable.

[54] The object of the section 10 (5) of *The Contracts Act, 7 of 2010*, in requiring contracts for the sale of land whose value exceeds shs. 500,000/= to be in writing, is to prevent persons, by fraud and perjury, from asserting unjust claims to land. Courts of equity have held that the mischief intended to be remedied by a writing can be as effectually prevented by open and visible acts of part performance. Such acts of part performance take the place of the writing required by the Act. In such case, the purchaser will not rely solely upon parol evidence of the contract, but upon his open and undisputed possession of the land purchased, and his expenditure of money on the erection of valuable and permanent improvements; all of which acts are open and visible to all.

[55] The classic concept of sale of land entails three essential components. To constitute a transaction of sale, there must be; - (i) an agreement to transfer title, (ii) supported by consideration, and (iii) an actual transfer of possession / title in the land. There are clear circumstances, such as in this case, in which injustice could be caused if a person genuinely believes he has a contract to buy a piece of land and does work on it, to the knowledge of the owner, it seems wrong that the owner should be allowed to retain the improved land and the "purchaser" receive nothing (see *Pascoe v. Turner [1979] 1 W.L.R. 431* and *Attorney-General of Hong Kong v. Humphreys Estate [1987] 2 W.L.R. 343 at 346 and 352*). Even where the contract is invalid, "the most equitable compensation for expenditure made on the faith of a contract which turns out to be invalid would be an opportunity to complete the purchase on the terms supposed to have been in force (see *Lee-Parker v. het (No. 2)[19721 1 W.L.R. 755 at pp. 780-78 1*) and not voiding the contract.

[56] The appellant contended that since the particulars of the land he sold were not stated in the agreement, the transaction did not relate to his land. Indeed an

agreement for the sale of land is not an *uberrimae fidei* contract, hence it is not in the category requiring the highest standard of good faith that imposes a duty of disclosure on the vendor of all material facts that could influence the decision of the buyer. In a contract of sale of land the vendor does not have to disclose all material facts surrounding the subject matter. The principle applicable is that of *caveat emptor* (buyer beware), by which the onus is on the buyer to investigate the land he or she is acquiring (see *Chandelor v. Lopus 79 Eng Rep.3*) and the seller is under a limited duty to disclose latent encumbrances and defects in title (see *Reeve v. Berridge (1888) 20 Q.B.D. 523; Yandle & Sons v. Sutton [1922] 2 Ch 199; Miller v. Cannon Hill Estates, Ltd. [1931] 2 KB. 113; Perry v. Sharon Development Co., Ltd [1937J 4 All E.R. 390* and *Jennings v. Tavener [1955] 2 All E.R. 769*). A latent defect is one which is generally not discoverable on an inspection of the land. As regards defects in title as distinct from defects in the property itself, they are almost always to be regarded as latent because *prima facie* the seller knows his title and the purchaser does not.

[57] Under this limited duty to disclose latent defects of title, aspects of the vendor's title that are not discoverable upon a reasonable physical inspection of the land by the purchaser exercising ordinary care, for example an undisclosed public or private right of way (see *Ashburner v. Sewell [1891] 3 Ch 405*), ought to be disclosed rather than concealed. Active concealment of a fact is equivalent to a positive statement that the fact does not exist. Where, as in the instant case, the vendor was aware that the buyer was interested in causing a survey and securing a title deed to the land purchased, for the vendor to present the land as un-surveyed at the time of sale whereas not, was a fraudulent misrepresentation or misdescription. Words are not necessary for a representation. Conduct will suffice. The appellant demonstrated an intent to deceive the purchaser's in this matter by this failure to correct the latter's misunderstanding when the opportunity presented itself at the time of signing that agreement.

[58] The appellant had the duty to disclose that what he was selling was titled land and this would have enabled the respondent then to undertake a search of title. Concealment of this fact denied the respondent the opportunity to undertake that search as certainly this was not a fact discoverable on mere physical inspection of the land. The respondent was throughout the transaction denied knowledge of this fact yet the appellant and D.W.2 Oweka Peter had all along alleged to the contrary. Consequently, as far as the evidence before court stands, there was nothing at all to put the respondent on inquiry as to that particular matter.

[59] When a seller breaches a land sale contract, the purchaser is entitled to specific performance, which means that a court will force the seller to go through the sale. This is because each parcel of land is considered unique, and monetary damages are therefore not considered adequate to truly give the purchaser the benefit of his bargain. The buyer can also recover monetary damages for other breaches such as remaining in the property longer than is allowed under the agreement or failing to fix defects in title or failing to live up to other responsibilities under the contract. However where a party is able to enforce an oral contract due to the doctrine of part performance, that party cannot sue for damages, even if there has been a breach of the (oral) contract (see *Lavery v. Pursel 39 Ch.D.508; In re Northumberland Avenue Hotel Company 3 Ch.D. 16; Hart v. Hart 18 Ch.D.685* and *J.C. Williamson Ltd. v. Luckey and Mulholland (1931) C.L.R. 146.*). The only remedy available is specific performance. Through this remedy, the court will compel the other party to perform the contract as agreed.

Order:

[60] In the final result, there is no merit in the appeal. It is accordingly dismissed. The costs of the appeal and of the court below are awarded to the respondent.

Delivered electronically this 22nd day of May, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Masaba, Owakukikoru-Muhumuza and Co. Advocates

For the respondent : M/s Oyet Moses and Co. Advocates