

**THE REPUBLIC OF UGANDA  
THE HIGH COURT OF UGANDA AT KABALE**

**CIVIL SUIT NO 029 OF 2017**

5 **KORUGYENDO WILBERFORCE-----**  
**PLAINTIFF**

**V**

**1. CENTENARY BANK(U) LIMITED**

**2. RICHARD MUHANGUZI -----**

10 **DEFENDANTS**

**T/A MURAMBI AUCTIONEERS AND  
HIGH COURT BAILIFFS**

**Before: Hon. Lady Justice Olive Kazaarwe Mukwaya**

15

**JUDGMENT**

The Plaintiff, Korugyendo Wilberforce, brought this suit against the Defendants, Centenary Bank Ltd and Richard Muhanguzi t/a Murambi Auctioneers and High Court Bailiffs jointly and severally seeking;

- 20
1. A declaration that the Defendants are jointly and severally in fundamental breach of the land sale agreement dated 17<sup>th</sup> May 2016.
  2. A declaration that the 2<sup>nd</sup> Defendant as duly appointed agent of the 1<sup>st</sup> Defendant, misrepresented the acreage of land that was available for purchase.
  3. Revocation and cancellation of the entire land sale agreement between the
- 25           Plaintiff and the 2<sup>nd</sup> Defendant for and on behalf of the 1<sup>st</sup> Defendant.

4. Refund of the entire purchase price in the sum of UGX 65,000,000/=
5. Special Damages in the sum of UGX 56, 548,000/=
6. General Damages
7. Interest on 4,5 and 6 above.
- 5 8. Costs of the Suit

### Plaintiff's Facts

The Plaintiff bought land comprised in Plot 190-192 FRV 931, Folio 25, Bugongi Road from the Defendants. It was a condition in the land sale agreement that the Plaintiff shall pay part of the purchase price by acquiring a credit facility from the 2<sup>nd</sup> Defendant in the sum of UGX. 30,000,000/=. Mr. Korugyendo acquired the loan. He then paid UGX 65,000,000/= for the suit property. The manager of the 1<sup>st</sup> Defendant's Kabale branch undertook to process the transfer of the duplicate certificate of title into the plaintiff's name upon full payment of the purchase price and all necessary fees.

A few days after the Defendants handed over the suit property to the Plaintiff, he was attacked by Byomugabe Andrew, Ariho Emmanuel, Kyasimire Zion who claimed to be the rightful owners/beneficiaries of suit property. The Plaintiff and his family were violently evicted from the suit property.

Further, following a survey commissioned by the Plaintiff, it turned out that the suit land acreage was less than what was indicated in the sale

agreement by the Defendant. According to the surveyor, the suit land was actually less than what was indicated by the Defendants.

The Plaintiff is desirous of having all the monies expended in the whole  
5 transaction refunded.

### Defendants' Facts

The Defendants acknowledge the fact that the suit property was on the 29<sup>th</sup> October 2012 pledged as loan security for a mortgage by the registered proprietor, Byomugabe  
10 Andrew, in favour of a credit facility of UGX 55,000,000/= (Fifty -five million shillings).

Upon default, the 1<sup>st</sup> Defendant instructed its agents, the 2<sup>nd</sup> Defendant to sell the suit property. The Plaintiff expressed interest in the suit property and an agreement to sell was executed between the 2<sup>nd</sup> Defendant and the Plaintiff on the 17<sup>th</sup> May 2016. Prior  
15 to the purchase, the Plaintiff visited the suit land. Also, the 1<sup>st</sup> Defendant conducted due diligence on the suit property by opening the boundaries and establishing that it corresponded with the certificate of title.

The 2<sup>nd</sup> Defendant went far and beyond the call of duty as vendor by visiting the suit property with him and allowing him to inspect it before they entered the Agreement to  
20 sell. Upon execution of the Agreement, the Plaintiff was put in possession of the suit property. Using the suit property as security, the Plaintiff acquired a loan of UGX 30,000,000/= (Thirty million Shillings) on the 19<sup>th</sup> May 2016. It was for a period of 36 months and as such it gave the 1<sup>st</sup> Defendant a lien over the suit property.

The Defendants contended that they executed their duties with regard to the suit  
25 property and the Plaintiff and there was no cause of action against them.

### Issues

**1. Whether there was breach of contract of the land sale agreement by the Defendants?**

**2. What remedies are available to the Parties?**

### **The Law**

5 S. 2 of The Contracts Act No.7 of 2010 defines a ‘contract’ as follows;

‘contract means an agreement enforceable by law as defined in s.10’

S.10 provides that;

10 *(1) A contract is an agreement made with the free consent of parties with capacity to contract, for lawful consideration and with lawful object, with the intention to be legally bound.*

In the case of Ronald Kasibante v Shell Uganda Ltd HCCS No. 542 of 2006 [2008] ULR 690, Hon. Justice Hellen Obura, as she then was, defined breach of contract as follows;

15 ‘Breach of contract is the breaking of the obligation which a contract imposes which confers a right of action for damages on the injured party. It entitles him to treat the contract as discharged if the other party renounces the contract or makes the performance impossible or substantially fails to perform his promise; the victim is left suing for damages, treating the contract as discharged or seeking a discretionary remedy.’

20 It was the duty of the Plaintiff to establish on a balance of probabilities that there was breach of contract.

### **Submissions of Counsel**

Counsel for the Plaintiff submitted that the Defendants were in fundamental breach of the agreement of sale as follows;

- 5 a. The Defendants failed to place the Plaintiff in quiet, peaceful occupation and possession of the suit property. Contrary to the agreement between the parties, a few days after taking possession. the Plaintiff was attacked and violently chased from the suit property by the registered proprietor Mr. Byomugabe Andrew and his siblings Mr. Ariho Emmanuel and Ms. Kyasimire Zion who claimed to be rightful owners of suit property. Two police reports marked Exb. P.12 were tendered into evidence to support this claim. Exb. P.18 is a letter of complaint
- 10 dated 20th February 2017 authored by the Plaintiff to the 1st Defendant bank requesting their assistance. Mr. Arinaitwe for the Plaintiff invited this Court to invoke the famous Latin maxim "nemo dat quo non habet" which literally means "no one gives what he does not have" and find that the Defendants purportedly sold to the Plaintiff what they did not have.
- 15 b. The Defendants undertook to process the transfer of land title into the Plaintiff's name but to date this has never been done.
- c. There was a misrepresentation on the acreage of the suit property purchased. The Defendants indicated in the agreement that they had sold 0.375 hectares of land. Upon instructing a surveyor to open boundaries, the acreage was actually 0.283 hectares. A
- 20 surveyor's report, Exb. P.17 dated 24th August 2016 was admitted to support this claim.

For the reasons outlined above Counsel for the Plaintiff submitted that the Defendants are in total breach of the agreement and are deliberately wasting this court's time by defending this suit without any basis at all.

In reply, Counsel for the Defendants submitted that the Defendants were not in breach

25 of the agreement of sale as follows;

a. The loan of UGX 30,000,000/= obtained by the Plaintiff from the 1st Defendant was not a condition precedent to the agreement to sell the suit property. It was a separate and distinct transaction entered into after the agreement had been concluded.

b. Clause 5 of the agreement stated as follows; “Upon the purchaser paying the bank the agreed purchase price, the bank shall deliver to the purchaser the following  
5 namely; Transfer of the land duly executed by the Bank, consent to transfer the land executed by the vendor, and certificate of title to the land as described above.” From the wording, the 1st Defendant bank undertook to ‘deliver’ the listed things to the purchaser. This was done. Exb. P.11 was evidence that the Defendants had fulfilled  
10 their obligations to transfer the suit property to the Plaintiff and hand over the Certificate of title. Counsel for the Defendant added that the Plaintiff’s denial of receipt of the original Certificate of Title was a dent on his credibility as a witness. He later used the same title as security to obtain a loan from the 1st Defendant.

c. The 1st Defendant as the registered mortgagee on the suit property was possessed  
15 of good title to pass on to the Plaintiff. Under sections 19 and 20 of the Mortgage Act, 2010, the mortgagee is given the right to take possession of the mortgaged land and sell the same where the mortgagor has defaulted on payment. The Defendants had the right to proceed with the sale of the suit property to the Plaintiff on 17th day of May 2016. Exb. P.10, a hand over report dated 18th May 2016 was evidence that the suit property  
20 was placed in the Plaintiff’s possession. The Plaintiff testified that there were no occupants inhabiting this property at the time he carried out the inspection and when he concluded the transaction.

d. Counsel for the Defendants submitted that the wording in the agreement was not ambiguous. A contract is ambiguous if it is reasonably subject to more than one  
25 interpretation or if it is unclear what the parties intended. When it is read by an ordinary prudent person, he or she can easily observe the ambiguity of the language of the

document. A reading of Clauses 3, 4, 5, 6 and 7 of the agreement revealed the intentions of the parties, which were clearly stated. She relied on the case of Nile Bank Vs Translink [2005] 2 EALR 237 where the Court found that construing the intention of the parties, “the court is obliged to discern the intention of the parties from the words used in the contract”. There was therefore, no evidence of a fundamental breach of the agreement of sale of the suit property.

e. There was no misrepresentation of the acreage of the suit property, the acreage on the certificate of title was maintained on the mortgage deed and the advert declaring that it was available for sale by public auction published by the Defendants. Secondly, the Plaintiff had an opportunity to inspect the suit property prior to purchase and he did not raise the anomaly, choosing to do so after the agreement had been executed.

Counsel for the Defendants implored this Court to find that the suit lacked merit and to dismiss it with costs.

## **RESOLUTION OF THE ISSUES**

### **Issue 1**

#### **Whether there was breach of contract of the land sale agreement by the Defendants?**

The Agreement of Sale dated 17<sup>th</sup> May 2016, Exb. P.9, was duly executed by both parties. This is an agreed fact. Mr. Korugyendo’s complaint is that while he fully carried out his obligations under agreement, the Defendants failed to meet their obligations there under. DW1, Mr. Edimond Mugarura, the Manager Credit Services of the 1<sup>st</sup> Defendant bank testified that as far as he was concerned, the 1<sup>st</sup> Defendant bank honestly transacted with the Plaintiff and executed all their duties with regard to passing possession and ownership to the Plaintiff.

#### **1. Plaintiff and Defendants obligations under the Agreement of Sale**

The Plaintiff, as purchaser under Clause 1 of the Agreement, was obligated to pay UGX 65,000,000/= as total purchase price for the land to the 1<sup>st</sup> Defendant bank.

Following receipt of payment, Clause 5 obligated the 1<sup>st</sup> Defendant bank to deliver to the Plaintiff; Transfer of the land duly executed by the 1<sup>st</sup> Defendant, Consent to  
5 Transfer the land executed by the Vendor and Certificate of Title to the land as described in the Agreement.

In addition, Clause 6 further obligated the 1<sup>st</sup> Defendant bank to perform and execute all acts, matters and things that shall be necessary to effect transfer of the land to the Plaintiff.

10 Lastly, the Plaintiff was obligated under Clause 7 to bear the cost and charges incidental to the preparation and completion of these presents including government duties, legal fees if any and stamp duties. The Auctioneer's fees were to be borne by the 1<sup>st</sup> Defendant.

15 The 2<sup>nd</sup> Defendant, Mr. Richard Muhanguzi signed on the Agreement on behalf of the 1<sup>st</sup> Defendant. Mr. Korugyendo Wilberforce signed in his capacity as purchaser.

## 2. Fulfilment of Obligations by the Parties under the Agreement.

The Plaintiff testified that he made full payment and paid all the dues as agreed and the Defendants did not dispute this. But the absence of the documentary proof of payment left this Court with no precise date of payment.

20 Circumstantial evidence led by the Plaintiff, to prove payment included Exb. P.10. A document titled, 'Handover the Property of Byomugabe Andrew(Defaulter)', dated 18<sup>th</sup> May 2016. It is an acknowledgment by the 1<sup>st</sup> Defendant bank and the 2<sup>nd</sup> Defendant Court Bailiff company that the mortgaged suit property was officially handed over to the Plaintiff and he is in possession. Mr. Korugyendo Wilberforce is  
25 referred to as the 'highest bidder' following the public auction of the suit property

in the document and also as ‘buyer’ in the document. It however makes no mention of Exb. P.9, the Agreement to sell or the date the purchase price was paid. Supposedly, the reference to the ‘buyer’ was sufficient to draw the nexus between the two documents.

5 This Court is satisfied with the evidence such as it is that the Plaintiff paid full purchase price for the suit property thereby fulfilling his obligations under Clause 1 of the Agreement.

Thereafter, by the Plaintiff’s admission, he was put in possession of the suit property by the Defendants. He testified that during the short time he occupied the premises,  
10 Exb. 14 and 15, receipts for hardware and tiles, demonstrated that he was able to carry out a few renovations. However, Mr. Korugyendo did not enjoy possession for long. A few days after taking occupation, he testified that he was violently forced of the suit property. Two police reports, Exb. P.12, were tendered into evidence to support the claim of violent removal from the suit property. Mr. Andrew  
15 Byomugabe, the mortgagee and registered proprietor to the suit property, was the sole suspect on the first report on the charges of malicious damage to property and criminal trespass. The second report of Threatening Violence did not name a suspect. It was these acts that the Plaintiff claimed contributed to breach of contract since the Defendants had failed to secure his quiet possession of the suit property.

20 Exb. P.11 is a duly executed Transfer instrument dated 14<sup>th</sup> September 2016. It pertains to the suit property. The 1<sup>st</sup> Defendant bank, as registered mortgagee transferred the land to the Plaintiff as purchaser. In their Written Statement of Defence, the Defendants admitted under Paragraph 2(l) and 2(m) that the Plaintiff acquired a loan of UGX 30,000,000/= from the 1<sup>st</sup> Defendant bank, two days after  
25 the execution of the land sell agreement, on the 19<sup>th</sup> May 2016. The result was that the 1<sup>st</sup> Defendant bank had a lien created over the suit property for the 36 -month

period when the loan was running. This position was reiterated in the testimony of DW1, Mr. Edmond Mugarura, Manager Credit Services for the 1<sup>st</sup> Defendant bank. In effect it was not possible to proceed with meeting all their obligations as contained under Clauses 5 and 6 of the Agreement of Sell regarding effecting the transfer of the suit property into the name of the Plaintiff.

Exb.P.6 also marked Exb.D.2, the loan agreement deserves further scrutiny. Three properties were listed as security for the credit facility. First on the list was Freehold Register Volume 931, Folio 25, Plot 190-192 Bugongi Road, Kabale District. This is the suit property. The purpose of the facility was explained thus;

*'The Facility has been sanctioned to finance the purchase of land with a residential house located at plot 190-192, Volume 931, Folio 25, Bugongi Road, Kabale'.*

It is evident that the suit property was pledged as security for a credit facility to finance its purchase by the Plaintiff. A perusal of the Plaintiff's bank statement from the 1<sup>st</sup> Defendant bank marked Exb. P.7, indicates that the loan amount less charges, a sum of UGX 29,255,000/=, was credited on his account on the 19<sup>th</sup> May 2016.

DW1's testimony that it was a commercial loan was at odds with the content of Exb.P.6/D.2. Counsel for the Defendants submitted that the Agreement for sell and the loan agreement were not related but this was clearly not the case. The processing of the loan may not have been an express condition precedent to the Agreement of sell, as submitted by Counsel for the Plaintiff, but the two transactions were related and intertwined. The loan agreement expressly provided that the sole purpose of the loan was to purchase the suit property. The very same suit property which was pledged as security for the loan to secure its purchase.

To add to the intricacy of the transaction, the 2<sup>nd</sup> Defendant, Richard Muhanguzi, who was the auctioneer who declared the Plaintiff the highest bidder at the public auction, was the first guarantor of the Plaintiff's loan. The Plaintiff in his evidence

in chief readily admits this fact. The loan fact sheet, annexure 'C' to the Defendant's Written Statement of Defence makes this clear. It was highly suspicious that the 2<sup>nd</sup> Defendant would offer himself as guarantor for the loan that would make it possible for the Plaintiff to acquire the suit property. This action spoke to a close relationship  
5 between the Plaintiff and the 2<sup>nd</sup> Defendant and leads this Court to seriously doubt the transparency and impartiality of the bidding process that saw the Plaintiff emerge as highest bidder.

Further, the same loan fact sheet indicated that the Plaintiff had been a customer with the 1<sup>st</sup> Defendant bank since 4<sup>th</sup> March 2002. By the time he responded to the advert that put the suit property on sale, he had been the 1<sup>st</sup> Defendant bank's  
10 customer for at least 12 years. He willingly and voluntarily pledged the suit property in which he had an equitable interest under the Agreement to sell, as security for the loan to purchase it. The Auctioneer was his guarantor. Both were or should have been aware that the legal and actual transfer of the property into the Plaintiff's name  
15 was rendered impractical the moment the suit property was pledged in the 1<sup>st</sup> Defendant bank as security for the next 36 months.

In short, the Plaintiff does not come to Court with clean hands. He participated and benefited from the situation that rendered the 1<sup>st</sup> Defendant unable to fulfil its obligations under Clause 5 and 6 of the Agreement.

To arrive at a finding that the Defendants were in breach of the Agreement, this  
20 Court had to be satisfied that the Defendants had failed to fulfil their obligations as provided for under the Agreement. See **Nakana Trading Co. Ltd v Coffee Marketing Board C.S 137/1991** and **Black's Law Dictionary, 5<sup>th</sup> Edition p.171.**

There was evidence of hand over of the suit property on the 18<sup>th</sup> May 2016, by the  
25 Defendants to the Plaintiff, Exb. P.10. The Plaintiff admitted that he pledged the suit property as security for financing part payment of the purchase price, on the 19<sup>th</sup>

May 2016. This was 1 day after the suit property had been handed over to him. Lastly, the 1<sup>st</sup> Defendant executed a Transfer in the Plaintiff's behalf, Exb. P.11.

Section 92(1) of the Registration of Titles Act cap 230 provides for the form of transfer as follows;

5       ‘*The proprietor of land and of a lease or mortgage or of any estate, right or interest therein respectively may transfer the same by a transfer in one of the forms in the Seventh Schedule to this Act...*’

This Court is satisfied that Exb. P.11 met the requirements of the Registration of Titles Act as described in section 92(1). This document was evidence of the transfer  
10 of ownership of the suit land from the 1<sup>st</sup> Defendant bank to Plaintiff. The disturbance on the suit property arose after the Agreement for Sale had been executed. This Court is of the view that third party interests of the disgruntled mortgagee, Mr. Andrew Byomugabe and others could have been dealt with by way of lodging of a caveat and even court action of necessary. With the complication of  
15 the loan obligation to the very same bank that he was purchased the land from, it was impractical for the 1<sup>st</sup> Defendant bank to put the credit facility at risk by relinquishing it to the Plaintiff to protect his equitable proprietary interests.

It is therefore my finding that the suit property was transferred into the possession of the Plaintiff to the extent that the restrictions raised by the loan agreement, Exb.  
20 P.6 allowed. Clause 5 and 6 were fulfilled by the Defendants.

### 3. Acreage of the suit property

It was the Plaintiff's claim that the Defendants' misrepresented the acreage of the suit property under the Agreement of Sell. In the case of **Francis Paul v Namwandu Muterwana (Civil Appeal No. 20 of 2014) [2017] UGHCLD 35**, Hon Justice  
25 Flavia Zeija, as he then was, had this to say;

5 *‘My understanding of a misrepresentation is a false statement of fact or law which induces the representee to enter a contract. There must be a false statement of fact or law as opposed to opinion or estimate of future events. (See Bisset v Wilkinson (1927) AC 177). Once it has been established that a false statement has been made, then it is necessary for the representee to demonstrate that the false statement induced them to enter the contract (See Horsfall v Thomas(1862) 1 H&C 90). If the representee does an act to adopt the contract, or demonstrate a willingness to continue with the contract after becoming aware of the misrepresentation they will lose the right to rescind (See Long v Lloyd (1958) 1 WLR 753.*

10 In the instant suit, Exb. P.19 a survey report dated 20<sup>th</sup> June 2017, prepared on the instructions of the 1<sup>st</sup> Defendant bank’s Credit Manager, revealed that; ‘approximately 0.092 acres of the subject plot are encroached on by the access road. This leaves a net usable area of approximately 0.743 acres. Under the Agreement the acreage of the suit
 15 property was indicated as 0.375 hectares (0.927 acres).

Counsel for the Defendants argued that the acreage indicated on the Agreement was copied from the Certificate of Title to the suit property. This was not sufficient due diligence for a banking facility such as the 1<sup>st</sup> Defendant. If the survey report had been timely it would have served its purpose of revealing the reality on the ground. The key
 20 observations made under the report were as follows;

*‘We observed that the area depicted on the copy of the title, (say 0.927 acres) is bigger compared to the area calculated from field/ground measurements (say 0.835 acres). Our valuation considers the area from field ground measurements.’*

Then;

25 *‘Approximately 0.092 acres of the subject plot are encroached on by the access road. This leaves the net useable area of approximately 0.743 acres.’*

The 1<sup>st</sup> Defendant bank commissioned the belated survey of the suit property after the Plaintiff had carried out his own and brought it to their attention. The prudent thing to have done was to have the acreage properly ascertained prior to entering the transactions. On the other hand, the Plaintiff entered into the Agreement of sale of the  
5 suit property with some haste and then commissioned his own survey of the same on the 26<sup>th</sup> August 2016, three months after he took possession and seemingly only after his quiet possession had been disrupted by third parties.

As the vendor, moreover in circumstances of forced sale like the instant case, the 1<sup>st</sup> Defendant was duty bound to ascertain the boundaries of the suit property and reflect  
10 the accurate acreage on the Agreement of Sale. This was especially since almost four years had passed from the 23<sup>rd</sup> November 2012 since the 1<sup>st</sup> Defendant registered the mortgage on the suit property. The Defendants failed in this responsibility which resulted in misrepresentation on the acreage of the suit property. Acreage informs value and inevitably the purchase price.

15 This Court is satisfied that the Plaintiff has proved that the Defendants misrepresented the acreage of the suit property in the Agreement of Sell.

## **2.REMEDIES**

It is clear that the Plaintiff has already taken a benefit in the suit property, arising out of the Agreement to sell. He used the suit property as security for the loan. The orders  
20 for revocation of the Agreement of sale and refund of the purchase price are denied. Mr. Korugyendo paid for the suit property, obtained a loan by pledging it as security, and had it transferred to him by the 1<sup>st</sup> Defendant.

The misrepresentation was one of fact. In the circumstances, the Defendants shall pay to the Plaintiff the value of the suit property equivalent to the short fall in acreage caused  
25 by the misrepresentation by the Defendants. Costs incidental to the survey are also awarded to the Plaintiff.

The Plaintiff endeavoured to adduce evidence of rental security costs incurred as a result of being removed from the suit property. Following this Court's findings, these claims are untenable against the Defendants. The evidence adduced by the Plaintiff himself is that third parties led by Mr. Andrew Byomugabe, the mortgage defaulter, are directly responsible for his woes.

Finally, the Plaintiff as the partially successful party is awarded costs of the suit.

**In conclusion, this Court finds for the Plaintiff's suit is partially successful. Judgment is entered for the Plaintiff and I hereby Order as follows;**

1. The Defendants misrepresented the acreage of the suit property to the Plaintiff under the Agreement of Sale.
2. The Defendants shall pay to the Plaintiff the value of the suit property equivalent to the short fall in acreage, 0.092 acres, caused by the misrepresentation by the Defendants.
3. Costs incidental to the survey amounting to UGX 5,000,000/= are awarded to the Plaintiff.
4. Costs of the suit are awarded to the Plaintiff.

-----

Olive Kazaarwe Mukwaya

**Judge**

10/8/2020

Delivered by email to:

**Representation:**

Mr. Sande Duncan- M/S Joshua Namara for the Plaintiff

Mr. Arinaitwe Bright- M/S Muhumuza- Kiiza & Co. Advocates for the  
Defendants

5

10

15