

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
LAND DIVISION
CIVIL SUIT NO.0977 OF 2019

DAVID KATEYENGA NSEREKO::::::::::::::::::::: PLAINTIFF

VERSUS

1. SSEMANDA EMMANUEL GODFERY

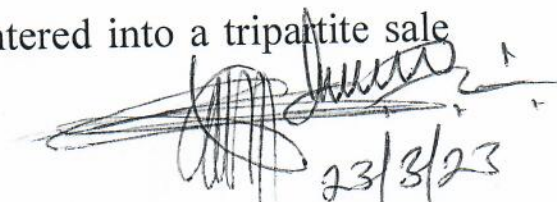
2. LULE SAMUEL:::::::::::::::::::::DEFENDANTS

JUDGEMENT

HON MR. JUSTICE TADEO ASIIMWE

The Plaintiff's claim against the Defendants is for Specific Performance, vacant possession, an order for delivery of certificate of title, *Mesne* Profits, General Damages, interest and Costs of the suit. In alternative an order for payment of the current market value of the suit land plus interest and costs.

The Plaintiff's cause of action is stated in paragraph 4 of the plaint and briefly in that, himself and the Defendants entered into a tripartite sale


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agreement for the land measuring 100ft by 70ft being part of land comprised in Busiro Block 376 plot 1028 in the names of the 2nd defendant at an agreed price of Ugshs.120.000.000 (*one hundred and twenty million only*).

At the execution of the agreement, the Plaintiff made part payment of Ushs. 100.000.000/- (*one hundred million only*) and the balance of twenty million was to be paid after completion transfer of the title into the Plaintiff's names. That subsequently the 1st defendant denied having received the said 1st installment and failed to fulfill the obligations in the agreement hence this suit.

On the other hand the defendants denied the plaintiff's claim and stated that the 1st defendant was never paid the 1st installment of shs 100,000,000/= being part of the consideration.

The following issues were framed for court's determination;

- 1. Whether the plaintiff has a cause of action against the 2nd defendant.**
- 2. Whether the plaintiff purchased the suit land.**
- 3. Whether the defendants breached the terms of the agreement between them and the plaintiff.**
- 4. What remedies are available to the parties?**

At the hearing, the plaintiff was represented by Counsel Golooba Muhamad and Godfery Kyeyune while the 1st defendants by Counsel

Matovu Muhamad and 2nd defendant by Mpagi Sunday. All counsel filled written submissions which I shall consider in this judgement.

In all civil matters, the onus rests on the Plaintiff who must adduce evidence to prove his or her case on the balance of probabilities if she is to obtain the relief sought. Ref: Sections 101-103 of the Evidence Act, Cap.43. See: Lord Denning in Miller versus Minister of Pensions (1947)2 ALL ER 372 at page 373.

In a bid to prove his case, the plaintiff called 3 witnesses while the defendants called 2 witnesses.

PW1 DAVID KATEYENGE NSEREKO testified that in October 2019, the 1st defendant offered to sell the suit property comprised in Busiro block 376 plot 1028 now plot 1227 measuring 100ft by 70ft in Katale. That the 1st defendant informed him that he owned the suit property having bought the same from the 2nd defendant who happened to be an LC chairman. That he made inquiries and personally visited the suit property wherein he confirmed from the 2nd defendant that he had indeed sold the suit land to the 1st defendant in 2014 although he had not concluded the transfers. That he entered in to an agreement with the defendants to purchase the suit land from the 1st defendant at UGX 120,000,000/= (Uganda shillings one hundred twenty million). That payment of consideration was agreed in two instalments of one hundred million Uganda shillings and the second installment of UGX.

200,000,000/= Uganda shillings twenty Million was payable after having the certificate of title transferred in to my name. That the agreement was executed between him and the 1st defendant in the presence of his lawyer Ms. **Rebecca Nakiranda** on the 18th October 2019 but payment was not effected immediately because the 2nd defendant was yet to sign off agreement.

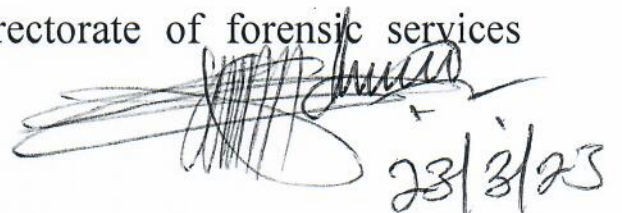
That he withdrew money from the bank and paid the 1st installment in cash and the 1st defendant signed on all pages and acknowledged receipt by signing on the last page of the agreement. That they agreed that all documents of transfer would be collected the next day. That however the next day the 1st defendant denied him entrance to his premises and denied him documents. In cross examination, he confirmed that they had agreed that payment would be by cheque and there was no variation of the same.

In cross examination, he confirmed that under the agreement the agreement was that the first installment was to be paid by cheque. That he however paid by cheque and both defendants signed.

PW2 Rebecca Nakiranda testified that at around October 2019, the plaintiff informed her that he wanted to purchase the suit property comprised in Busiro block 376 plot 1028 now plot 1227 in Katale from the 1st defendant who had informed him that the land was still in the names of the 2nd defendant who was not opposed to the sale. That the plaintiff informed her that he was to purchase the suit property from the 1st

defendant and that the 2nd defendant had agreed to the arrangement to sign and had over all transfer documents to him as well as the duplicate certificate of tittle. That she drafted a tripartite agreement to be signed by the plaintiff and both defendants, wherein the defendants had an undertaking to hand over all necessary documents for transfer to the plaintiff upon its due signing. That on the same day in the afternoon, the plaintiff and the 1st defendant went to her office to execute the purchase agreement and the parties agreed that the first installment would be on a cash basis. That the plaintiff and the 1st defendant both signed the agreement in her presence as a witness thereto but she advised the plaintiff to only pay after the 2nd defendant also had signed the agreement. That the plaintiff informed her that he had to go to the bank to withdraw money and thereafter meet both defendants to sign. That on Sunday the 20th of October, 2019, the plaintiff called her informing her that the 1st defendant had agreed to hand over the transfer documents to him on threat day but he had instead been arrested on the 1st defendant's complaint on allegations of conspiracy to steal the defendants land. That she went to police and recorded a statement

PW3, CHELANGAT SYLVIA, testified that the plaintiff filed at Nalumunye police station against the 1st defendant for allegedly conning him of 100,000,000/= in a land transaction. That as part of the investigations, the OC CID wrote a letter referenced CRB NO242/19 dated 22ND OCTOBER 2019 to the directorate of forensic services



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submitting exhibits and requesting for an analysis of the same. that the exhibits were attached, an agreement of sale of land dated 18/10/19 with an acknowledgement receipt by Ssemanda Emmanuel the 1st defendant at the back of the last paper and samples of handwriting/signatures of the 1st defendant. That she analyzed the hand writings in the exhibits and samples from the 1st defendant and found that they had significant similarities and that her observation was that the hand writing and signature in the land sale agreement and the samples brought by the 1st defendant is by the same author and that she made a report to that effect.

On the other hand, DW1 SSEMANDA EMMANUEL GODFREY, testified in this court and stated that on the 18th day of October 2019, the plaintiff, 2nd defendant and himself executed a land sale agreement where he intended to sell the suit land to the plaintiff at a consideration of 120,000,000/= payable in two instalments. That the agreement was drawn by the plaintiff's advocate. That the 1st installment was to be paid in cash. That the plaintiff preferred to make payments on the bank account which he asked for and pretended to have deposited money on my bank account. That he however was shocked to find no money was deposited on the account. That he signed the documents basing on representation and trust of the plaintiffs' lawyer.

In cross examination, he confirmed that he signed the agreement with no influence. He confirmed that he signed an acknowledgement of receipt for 100 million and 20 million to be paid on completion. That however. They

only received 300,00k as kanzu for the buyer. He however confirmed that kanzu is only paid to a and lord in a kibanja holding whereas the suit property is registered land. That on signing of the agreement he did not receive the first instalment and that he signed the agreement trusting the lawyer.

DW2 testified in this court and stated that he sold the suit property measuring 100x100 to the 1st defendant in 2014. That after the execution of the sale agreement, he handed over to the 1st defendant all necessary documents for transfer and that upon full purchase, and he took possession of the land. That in 2019 he informed him that he wanted to sell the house and that he had misplaced the documents of transfer. That he requested him to execute the agreement with the seller. That they signed the agreement together with the 1st defendant. That according to the agreement he understood that payment was by cheques, that after signing, the plaintiff brought proof of payment as asked for transfers. That instead he declined because he expected evidence of cheques not acknowledgement of money. That he went ahead and called the 1st defendant who told him that he hadn't received any money from the plaintiff by whatever mode.

In cross examination, he confirmed that the suit land belonged to him and he sold it to the 1st defendant but transfers were pending. That the 1st defendant made an agreement to sale the same property to the plaintiff. That in their agreement transfer documents were to be given to the

plaintiff after the first installment was paid. That he did not witness any payment apart from 300,000/= for stamps. That he did not hand over the transfer documents because the 1st defendant told him that they gave him cheques which had not matured.

Resolutions of issues.

Issue 1 whether the plaintiff has a cause of action against the 2nd defendant.

A cause of action is defined as every fact which is material to be proved to enable the plaintiff succeed or every fact which if denied, the plaintiff must prove in order to obtain a judgment. (**Cooke vs Gull LR 8E.P 116, Read v Brown 22 QBD P.31**). It is disclosed when it is shown that the plaintiff had a right, and that right was violated, resulting in damage and the defendant is liable. This position has been reiterated in the Supreme Court decision of **Tororo Cement Co. Ltd v Frokina International Limited SCCA No.2 of2001**.

*The question of whether a plaint discloses a cause of action must be determined upon perusal of the plaint alone together with anything attached so as to form part of it. See; **Kebirungi v Road Trainers Ltd & 2 others [2008] HCB 72, Kapeka Coffee Works Ltd v NPART CACA No. 3 of 2000.***

It is settled that a cause of action arises when a right of the plaintiff is affected by the defendant's acts or omissions. (See; Elly B. Mugabi v Nyanza Textiles Industries Ltd [1992-1993] HCB 227).

In this case the plaintiff pleaded that he signed a tripartite agreement with the defendants to pay a contract sum in two installments where upon transfers and property documents would be given to the plaintiff. The plaintiff presented PEX3, a tripartite agreement to prove the same. The same tripartite agreement had a signature of receipt of the 1st installment by the 1st defendant.

He pleaded that the transfers were not affected and indeed there is nothing attached to the written statement of defence to show that the transfer was effected.

In my opinion the merits of the case do not matter in establishing whether the cause of action exists in a case. Therefore, the plaintiff enjoyed a right of transfer of property to him as a per PEX3 and the same was breached by the defendants.

It is my finding that a cause of action exists against the 2nd defendant.

- 2. Whether the plaintiff purchased the suit property from the 1st defendant.**
- 3. Whether the defendants breached the terms of the agreement between them and the plaintiff**

Although the parties argued issues 2 and 3 separately, I will resolve them together since they are closely related.

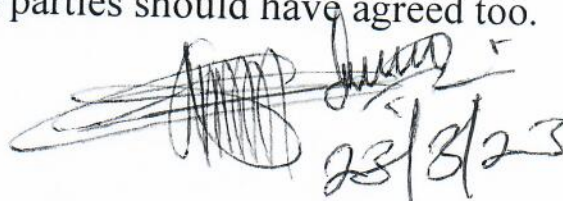
It was the Plaintiff's undisputed evidence that on the 18th day of October 2019, entered into a tripartite agreement for purchase of the suit property with the Defendant. *A copy of this sale agreement was adduced in evidence as exhibit PE3.* However the defendant's argument is that the plaintiff did not furnish consideration for the agreement. Further that the plaintiff pretended to have payed cash and yet the agreement was that monies were to be paid by cheque.

Section 10(1) of the Contracts Acts 2010 defines a contract as;

'an agreement made with a free consent of parties with the capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound'.

In this case, it is not in dispute that the plaintiff entered in an agreement for purchase of land from the defendants as per PE3. The suit property had been earlier sold to the 1st defendant by the 2nd defendant and transfer was not completes by virtue of the PE3 the obligation of the 2nd defendant was to hand over transfer documents at the execution of the said agreement.

The role of court in interpreting contracts/agreements is to give them their true meaning and not to assume what the parties should have agreed too.

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Court in the case of **Stockloser vs. Johnson (1954) 1 ALLER 630**, courts should not be seen to interfere by substituting, according to their individual sense of fairness, terms which are contrary to those agreed upon by the parties. In the textbook *Chitty on Contracts Vol. 1 Para 12-072* at page 72 to the effect that it is not open to court to revise the words used by the parties, or to put on them a meaning other than that which they ordinarily bear, in order to bring them into line with what the court may think that the parties really intended.

I shall now delve in to PE3 to ascertain the terms of the agreements.

According to clause 1 of the agreement, the plaintiff was to pay UGX 120,000,000/=.

Clause, 1.1(i) *I will quote it verbatim.* "An installment of ugx 100,000,000/= to the vendor on the execution by the parties here in of which the vendor by the execution of this agreement acknowledges receipt thereof."

(ii) *Another installment of ugx 20,000,000/= to the vendor at completion of the transfer of tittle to the purchaser.*

Consideration in this agreement was a term which was to be handled in the above manner.

The clause the defendants tend to rely on is clause 5; 4 titled **post contractual obligation**. "The purchaser shall not affect any transfer of

the property intended to any other person until the cheques issued to the vendor have been cashed out and the vendor has received the full consideration for the property.

In the entire contract, this is the only clause that makes mention of a cheque. It is not mention anywhere in a clause that deals with consideration that the purchaser was supposed to pay any instalment by cheque. It was not a term of an agreement until it is passively mentioned in **clause 5;4**

This in its self creates an ambiguity that requires this court to look beyond the agreement as an exception to the parole evidence rule that rejects exstrict evidence as is inadmissible in the existence of the agreement.

In F L Schuler AG v Wickman Machine Tools Sales Limited, [1973] 2 All ER 39, Lord Wilberforce stated:

The general rule is that extrinsic evidence is not admissible for the construction of a written contract; the parties' intentions must be ascertained, on legal principles of construction, from the words they have used unless court is presented with an ambiguity in the agreement before it and until it has become clear that the language the parties actually used creates an ambiguity which cannot be solved otherwise.

Secondly, the court should construe the contract with a businesslike intention or a commercial sense. The case of **Mitsui Construction Co Ltd v Attorney General of Hong Kong, (1986) 33 BLR 14** is instructive

on this point. There Lord Bridge said, “the poorer the quality of the drafting, the less willing the court should be to be driven by semantic niceties to attribute to the parties an improbable and un-businesslike intention, if the language used, whatever it may lack in precision, is reasonably capable of an interpretation which attributes to the parties an intention to make provision for contingencies inherent in the work contracted for on a sensible and businesslike basis.”

In this case, it’s my view that the mode of payment is irrelevant in the business community. Besides it was the evidence of DW1 that the parties had agreed to have the first installment to be paid in cash and that it was instead the plaintiff that preferred an EFT although he led no evidence to show the plaintiff’s intention to use an EFT transaction.

Be that as it may it is important to establish if the plaintiff paid the first instalment.

The agreement as per clause 1. (ii) Stated that at execution of the agreement the vendor would have acknowledged receipt of the first installment.

The agreement PE3 is duly signed by the 1st and 2nd defendants the vendor and the chairman. Pw1 confirmed in cross examination that he signed on the agreement believing the lawyer. The above clause is like the fall of the hammer rule in bidding. The moment the 1st defendant and the 2nd defendant signed on the agreement it was deemed executed and acted as

acknowledgement of the first installment. The 1st defendant therefore is estopped from denying receipt of the 1st installment which was a condition for execution of the agreement of purchase of the suit land by the plaintiff.

Further the plaintiff alleges that the 1st defendant wrote behind the agreement and signed acknowledging receipt of 100,000,000/= and balance as 20,000,000/=. The defendant alleged it was forged. The plaintiff led evidence of PW3, a forensic expert who testified that she subjected PE3 (the suit agreement) and PEX12 (the acknowledgement of receipt of 100,000,000) to a forensic test in comparison to the 1st defendant's sample hand writing and signature specimens (PEX13) and confirmed that they had major similarities and belong to the same Author as per her report PE6.

In absence of evidence to the contrary I find that the parties duly executed the agreement of purchase of the suit land and indeed the plaintiff purchased the suit land,

On this issue of breach the plaintiff led evidence that he fulfilled part of his obligation under the agreement as I have found above and that the defendant did not fulfill their obligations under the agreement and therefore guilty of breach..

In the case of *William Kasozi versus DFCU Bank Ltd High Court Civil Suit No.1326 of 2000; Lady Justice C. K. Byamugisha*, while

considering the prerequisites' that must exist in order for a contract to be valid and enforceable went stated that;

“Once a contract is valid; it creates reciprocal rights and obligations between the parties to it. I think it is the law that when a document containing contractual terms is signed, then in the absence of fraud, or misrepresentation the party signing it is bound by its terms”

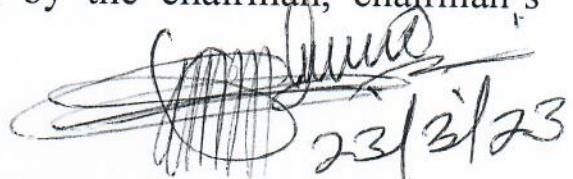
In this case there is no evidence of any vitiating factor to the agreement. It is my finding that the parties entered in to a valid agreement which is enforceable.

Therefore, when one party to a contract fails to perform his or her obligations or performs them in a way that does not correspond with the agreement, the guilty party is said to be in breach of the contract and the innocent party is entitled to a remedy.

In the case of *Ronald Kasibante vs. Shell Uganda Ltd HCCS No.542 of 2006*, breach of contract was defined as;

‘The breaking of the obligation which a contract imposes which confers a right of action for damages on the injured party.’

In the instant case, the defendant's obligation as per **clause 2.1 of the agreement** was to hand over to the purchaser, the original title of the property, a dully signed transfer forms by the chairman, chairman's



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passport photos and chairman's national identity card and all other necessary documents to enable transfer of the certificate of title of the property in to the names of the purchaser.

It is not in dispute that this obligation was not performed by the defendants. Their reasons have already been ruled out by court and therefore are not tenable. They had no justifiable reason not to perform there obligations of the agreement and therefore are in breach.

The 2nd defendants counsel argued that under the above close, the obligation to hand over the relevant documents was for the vendor the 1st defendant and not him.

However I wish to state that the 2nd defendant herein referred to as chairman was not incorporated in the agreement as a puppet or foreseer. If that was the intention he would have been a witness and not a party. However all documents mentioned in **clause 2.1** above were in the names of the 2nd defendant a reason he was added to agreement to perform obligations within his reach.

Besides **clause 2.5** of PE3 complimented **clause 2.1** of the same agreement and created a specific obligation on the 2nd defendant to deliver all necessary documents for transfer to the purchaser at the execution of the agreement. I will quote it verbatim.

*“The chairman shall upon signing on this agreement had over the documents referred to in **clause 2.1** above to the purchaser.*

The 2nd defendant in cross examination as DW2 confirmed that he was under obligation to deliver transfer documents to the purchaser upon signing but he did not because the 1st defendant told him that he had been given cheques but they had not matured.

In the absence of any other evidence, to contradict the plaintiff's evidence, I am in no doubt that the Defendants breached their obligations under the agreement PE3.

This issue is answered in favour of the plaintiff.

ISSUE 2. Remedies available to the parties.

The effects of breach of contract vary, depending on the seriousness of the breach and also on how the innocent party decides to react towards the breach. In this case, the Plaintiff being the innocent party sought for the following remedies;

1) Specific performance of the agreement of sale between the Plaintiff and the Defendant dated the 19th day of April 2013. The remedy of specific performance is provided for under Section 64 of the Contract Act which states;

'64. Right to specific performance;

i) *Where a party to a contract, is in breach, the other party may obtain an order of Court requiring the party in breach to specifically perform his/her promise her under the contract.*

- ii) *A party is entitled to specific performance of a contract where ;*
- a) *It is not possible for a person against whom a claim is made, to perform the contract.*
 - b) *The specific performance will produce hardships which would not have resulted if there was no specific performance.*
 - c) *The rights of a third party acquired in good faith would be infringed by the specific performance.*
 - d) *Specific performance would occasion hardship to a person against who a claim is made, out of proportion to the benefit likely to be gained by the claimant;*
 - e) *The person against whom the claim is made is at the entitled, although in breach to terminate the contract; or*
 - f) *The claimant committed a fundamental breach of his or her obligations under the contract, but in cases where the breach is not fundamental, specific performance is available to him or her subject to his or her paying compensation for the breach.*

From the evidence on record, the Defendants are in breach of the sale agreement PE3. There is no justification why the Defendant has failed to fulfill her part of the bargain under the contract, I find no reason why this court should not order the Defendants to specifically perform their obligations under the contract. And I so order..

1. An order for *mesne profit*

The Plaintiff sought for mesne profits arguing that the defendants had tenants on the suit land paying UGX 800,000/= for 3 houses each.

Section 2(m) of the Civil Procedure Act (Cap.71) defines *mesne profits* as;

‘..... those profits which the person in wrongful possession of the property actually received or might, with ordinary diligence have received from it, together with the interest on those profits, but shall not include profits due to improvements made by the person in wrongful possession’.

In the case of; **George Kasedde Mukasa versus Emmanuel Wambedde & 4 Ors, High Court Civil Suit No. 459 of 1998, Mukiibi J. stated,**

‘and correctly so in my view, as follows; it is settled law that wrongful possession of the Defendant is the very essence of a claim for mesne profits’.

In *Elliott versus Boynton [1924] 1 Ch. 236 [CA] Warrington, L.J., at page 250* said;

'now damages by way of mesne profits are awarded in cases where the Defendant has wrongfully withheld possession of the land from the Plaintiff.

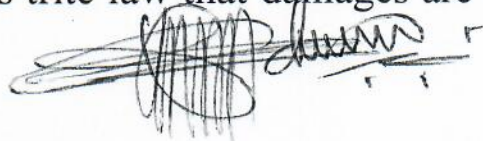
In *Busiro Coffee Farmers & Dealers Ltd versus Tom Kayongo & 2 Others HCCS NO. 532/92*, it was held by this Court that;

'where a Defendant remains in wrongful possession, he is liable to pay mesne profits to the person entitled to possession., hence for a claim of mesne profits accrue, a Defendant must be in wrongful possession of the suit property as against the Plaintiff and deriving profits from the property'

Applying these principles to the instant case, there was no evidence led by the plaintiff to show that the defendants were indeed collecting rent or deriving profit from the suit land beyond there pleadings. In the circumstances of this case, it would not be appropriate to grant this remedy to the Plaintiff.

2. The Plaintiff sought for General damages for breach of contract.

Black's Law Dictionary 9th Edn at page 445 defines damages as the sum of money which a person wronged is entitled to receive from the wrong doer as compensation for the wrong. It is trite law that damages are the



direct probable consequence off the act complained of. Ref: *Storms versus Hutchison (1905) AC 515.*

In the case of *Assist (U) Ltd. versus Italian Asphalt and Haulage & Anor, HCCS No. 1291 of 1999 at 35* it was held that;

‘the consequences could be loss of profit, physical, inconvenience, mental distress, pain and suffering’.

In *Haji Asuman Mutekanga versus Equator Growers (U) Ltd. SCCA NO. 7 of 1995, Oder JSC (RIP),* held that;

‘With regard to proof, general damages in a breach of contract are what a Court (or jury) may award when the Court cannot point out any measure by which they are to be assessed, except in the opinion and judgment of a reasonable man’.

Taking into account the economic value of the property and the time it has taken the Plaintiff to successfully pursue his rights from 2019 when the parties entered the understanding together with him

The general inconvenience occasioned to the Plaintiff, a figure of UGX shs.20, 000,000/- million (*twenty million only*) would be fair and adequate against both defendants.

3. The Plaintiff sought for the costs of the suit.

Section 27 of the Civil Procedure Act provides that;

'Costs are discretion of the Court of Judge. Subsection (2) of the Act provides that the costs of any action, cause or other matter or issue shall follow the event unless the Court or Judge shall for good reasons otherwise order.

In the instant case, the Plaintiff being the successful party is awarded the costs of the suit and Judgment is accordingly entered for the Plaintiff with the following orders.

1. The plaintiff purchased the suit land.
2. The defendants breached the terms of the agreement between them and the plaintiff.
3. An order of specific performance is issued against the defendants to hand over duly executed transfer documents to the plaintiff and receive his balance of 20,000,000/=.
4. An order for mesne profits is not granted.
5. The plaintiff is awarded UGX 20,000,000/- against both defendants equally.
6. Costs of the suit are awarded to the plaintiff.


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TADEO ASIIMWE

JUDGE

23/03/2023.