**Muwonge v Musah**

**Division:** Court of Appeal of Uganda at Kampala

**Date of Judgment:** 1 June 2004

**Case Number:** 77/01

**Before:** Engwau, Kitumba and Byamugisha JJA

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**Summarised by:** M Adriko

*[1] Contract – Breach – Determination by the party in breach of contract.*

*[2] Contract – Terms – Incorporation of extraneous matters in the express terms of the contract –*

*Sections 90 and 91 Evidence Act Chapter 6.*

**JUDGMENT**

**ENGWAU JA:** This is an appeal against the judgment and orders of the High Court in High Court civil suit number 559 of 1998 in which the appellant’s suit against the respondent was dismissed with costs and the court ordered that the appellant be refunded his Ug Shs 650 000 paid to the respondent as part payment of the purchase price of land. The brief facts of this case were that on 19 December 1997, the respondent sold his registered land comprised in Kibuga Block 8, plot number 484, to the appellant for an agreed purchase price of UShs 7 000 000. On that day the appellant made part payment of UShs 650 000 to the respondent. The transaction was reduced an informal agreement written by the parties themselves, Exhibit P1. On 29 December 1997 a formal agreement between the parties confirming the same terms was drawn by a firm of advocates, Exhibit P2. In Exhibits P1 and P2 it was specifically agreed that upon a special certificate of title being procured by the respondent, the appellant would pay the remaining balance of UShs 6 350 000 and the appellant would be given vacant possession of the said land and the same would also be transferred into his name. The respondent, at the time, was indebted to the Non-Performing Assets Recovery Trust (NPART) in the sum of UShs 4 000 000. He had mortgaged some property for that loan. The appellant was aware of the respondent’s indebtedness to NPART and, therefore, the need to pay the balance of UShs 6 350 000 to avoid the sale of the respondent’s property worth UShs 200 000 000. Although the appellant was aware of the respondent’s indebtedness and need for payment the balance, this was not one of the terms of the contract for sale of the said land. The respondent, however, wrote Exhibit D2 on 14 May 1998 claiming that the deal between the parties had effectively terminated on 31 January 1998. Apparently that was the date when the respondent sold the land in dispute to a third party, Messrs Goodways Trustees Limited. On 5 May 1998 the appellant on his own procured the requisite special certificate of title, Exhibit P4, without involving the respondent. As a result, the respondent and Messrs Goodways Trustees Limited lodged a caveat on Exhibit P4. Consequently, Messrs Goodways Trustees Limited abandoned its claim over the suit land and vacated the caveat on 18 May 1999. The appellant then withdrew the suit against it, leaving only the respondent with whom it was jointly and severally sued. On 30 March 2001, the appellant’s suit via High Court civil case number 559 of 1998 was dismissed with costs, hence this appeal. The memorandum of appeal contains 6 grounds, namely: 1. T he Learned trial Judge erred in law and fact in that he failed to take into account the provisions of sections 90 and 91 of the Evidence Act (Chapter 43) and/or wrongly relied on matters that were extraneous to the suit of contract. 2. T he Learned trial Judge erred in law and fact in that he wrongly relied on an unpleaded and/or unproved defence, and thereby wrongly dismissed the appellant’s suit. 3. T he Learned trial Judge erred in law and fact in that, having held that the appellant had established his claim, he went on to hold that the respondent was entitled to rescind the contract, thereby contradicting himself and wrongly dismissing the appellant’s suit. 4. T he Learned trial Judge erred in law and fact in that he failed to subject the evidence adduced to an adequate and exhaustive scrutiny, and relied on mere speculation, thereby coming to the wrong conclusion that the appellant was the party in default. 5. T he Learned trial Judge erred in law and fact in that he misdirected himself about the nature and extent of the appellant’s loss and the value of the suit land. 6. T he Learned trial Judge erred in law and fact in that he proceeded to determine an issue which had been expressly abandoned by the appellant, along with the prayers based thereon. Mr *Tibaijuka*, learned counsel for appellant, argued grounds 1, 3 and 5 separately and grounds 2, 4 and 6 together. Mr *Kuguminkiriza* learned counsel for the respondent, followed the same order and I shall follow the same. On the first ground, the complaint is that the suit land was the subject of a written contract comprised in two documents, to wit, Exhibits P1 and P2. It was the contention of counsel for the appellant that in determining which of the two parties was in breach of that contract, the Learned trial Judge should have considered the terms of the contract, particularly the time when the balance was payable under the contract. He argued that the Learned trial Judge instead relied on extraneous matters in complete disregard of the express terms of the contract. Counsel submitted that the trial Judge relied on the admission of the appellant that he (the appellant) was aware of the respondent’s indebtedness to NPART in the sum of UShs 4 000 000. He then concluded that the respondent was entitled to rescind the contract to redeem his property worth UShs 200 000 000 since the appellant had failed to pay the balance to rescue the respondent. Learned counsel contended that the respondent’s indebtedness to NPART and the alleged deadline of 14 February 1998 by which it was supposed to be settled, do not feature anywhere in the express terms of the contract. What features in the express terms of the contract, according to counsel, is that the appellant was supposed to pay the balance of UShs 6 350 000 after the respondent had procured a special certificate of title. The appellant would then be given possession of the suit land, and the same would be transferred into his names. In counsel’s view, the Learned trial Judge was wrong when he based his decision on a debt between the respondent and NPART which was not an express term of the contract. He relied on the provisions of section 91 and 92 of the Evidence Act and the case of *Osman v Mulangira* Supreme Court civil case number 38 of 1995 (UR). Mr *Kuguminkiriza*, learned counsel for the respondent, does not agree that the Learned trial Judge failed to take into account the provisions of section 91 and 92 of the Evidence Act and/or wrongly relied on matters that were extraneous to the suit contract. Counsel conceded that Exhibits P1 and P2 are the two documents that formed the contract. He, however, submitted that in determining which of the two parties was in breach of the contract, the Court had to look at the evidence as a whole including the express terms in Exhibits P1 and P2 and other evidence that was available to the Court in the suit. In counsel’s view, the issue of the respondent being indebted to NPART formed part of the evidence that was adduced in Court. He pointed out, for example, during cross-examination, the appellant admitted thus: “Musonge told me he had pledged property to NPART. He asked me to advance him money to offset the NPART debt. I did not advance him any money”. Counsel submitted, therefore, that, that piece of evidence was not an extraneous matter as if formed part of the evidence that was assembled before court. Learned counsel further submitted that since both parties were aware of NPART debt, it was not necessary to put it in an agreement of sale. According to counsel, the appellant was aware of it and that was why he admitted it. In counsel’s view, the Learned trial Judge was right to hold thus: “It is more likely in the circumstances that he failed to meet the deadline for payment of UShs 4 000 000, which the defendant needed for NPART debt and consequently the defendant decided to sell the property to the second defendant. I do find, therefore, that the first defendant was entitled to rescind the contract since the plaintiff had failed to meet his part of the bargain”. Mr *Kuguminkiriza* then submitted that the Learned trial Judge was right to rely on the issue of NPART because he was not adding to or varying the terms of the contract as the evidence was given by the appellant himself in Court. As regards the case of *Osman* (*supra*) Mr *Kuguminkiriza* submitted that the case is distinguishable from the present one. In that case the balance of the purchase price was to be paid by instalments on specific dates. In the present case, counsel submitted that no specified date for payment of the balance was indicated. In the premises, *Osman*’s case is not applicable to the present one. In the result, the first ground should be dismissed. As the first appellate court, it is our duty to re-appraise the evidence as a whole and subject it to fresh scrutiny and reach our conclusions. See rule 29(1)(*a*) of the Rules of this Court; *Pandya v Republic* [1957] EA 336; *Charles B Bitwire v Uganda* Supreme Court civil case number 23 of 1995 and *Kifamunte Henry v Uganda* Supreme Court civil case number 10 of 1995. Having done that, the central issue, in my view, for determination in the first ground of this appeal is which of the two parties was in breach of the contract? An answer to that pertinent question, in my view, lies on the express terms of both parties as stated in Exhibits P1 and P2 as well as other evidence adduced during the trial. It is not in dispute that both parties had expressly stated in Exhibits P1 and P2 that the balance of the purchase price, UShs 6 350 000 would be paid to the respondent upon him procuring a special certificate of title. According to pleadings and the evidence of the appellant, PW1 that special certificate of title, annexture C, was obtained on 5 May 1998 by the appellant in the names of the respondent, though the responsibility to do so was squarely on the respondent. During the hearing of the suit, the appellant admitted that the respondent was indebted to NPART. He learnt of NPART debt with the respondent on 19 December 1997 the very day he deposited UShs 650 000. He also went to NPART and learnt that the respondent had mortgaged land with them. This is what the appellant said during re-examination: “I learnt of Musonge’s NPART debt when I paid the deposit of UShs 650 000. I went to NPART and I learnt that he had mortgaged land with them. NPART is not mentioned in the memorandum of sale”. Besides, during cross-examination, the appellant stated thus: “Musonge told me he had pledged property to NPART. He asked me to advance him money to offset the NPART debt. I did not advance him any money”. The next question is: Can all the above evidence of admission by the appellant be considered alongside the express terms stipulated in Exhibits P1 and P2? An answer to that question, in my view, lies on the provisions of section 91 and 92 of the Evidence Act which read as follow: “91. When the terms of a contract or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which may matter is required by law to be reduced to the form of a document, no evidence, except as mentioned in section 79, shall be given in proof of the terms of that contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinabove before contained”. “92 When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduce to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms; but: ( *a*) a ny fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law; ( *b*) the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this paragraph applies, the Court shall have regard to the degree of formality of the document; ( *c*) the existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved; ( *d*) the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition or property may be proved, except in cases in which that contract, grant or disposition of property is by law requited to be in writing or has been registered according to the law in force for the time being as to the registration of documents; ( *e*) a ny usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved it the annexing of the incident would not be repugnant to, or inconsistent with, the express terms of the contract; ( *f*) any fact may be proved which shows in what manner the language of a document is related to existing facts”. Clearly, the above provisions of section 91 and 92 of the Evidence Act, including the exceptions in section 92, do not allow the admission of evidence adduced by PW1 during both cross-examination and re-examination as part of the express terms stipulated in Exhibits P1 and P2 by both the appellant and respondent. The admissibility of that evidence would, in my view, contradict, vary, add to or subtract from the terms expressly stated in Exhibits P1 and P2. The procurement of a special certificate of title was a condition precedent before the appellant could pay the balance of the purchase price of UShs 6 350 000 to the respondent. As both parties did not specify a date on which to pay that balance of the purchase price that alone distinguishes the present case from the case of *Shariff Osman* (*supra*) where instalments were supposed to be paid on specific dates. It is also clear from the written statement of defence that the respondent never pleaded any oral agreement relating to NPART debt nor did he adduce any evidence to that effect. I would, therefore, agree with counsel for the appellant that by relying on the NPART issue, the Learned Judge, with due respect, had relied on an extraneous matter to the contract. The appellant, in my view, was and is no a party in default. He procured the special certificate of title on 5 May 1998 although he was not duty bound to do so and he issued a cheque for the balance of the purchase price which was rejected by the respondent. The first ground alone in my view, disposes off this appeal and I need not consider the remaining grounds of appeal. In the result, I would allow the appeal and grant the appellant the reliefs sought in the High Court with costs here and in the Court below.

**BYAMUGISHA JA:** I had the benefit of reading in draft form the lead judgment prepared by Engwau JA. I agree with him that this appeal ought to succeed. However, I have my own remarks to make. The appellant and the respondent herein, entered into a sale agreement on the 29December 1997 (Exhibit P2). It was for the sale of land comprised in Kibuga block 8 plot number 484 at Mengo Estate in Kampala District. The consideration was UShs 7 million and the appellant paid a deposit of UShs 650 000. The balance of the purchase price was to be paid after a Special Certificate of Title have been issued and an instrument of transfer had been executed in favour of the appellant. The Special Certificate of Title was procured on or about the 5 May 1998 or thereabouts. On the 11 May 1998, the appellant drew a cheque in favour of the respondent for the balance of the purchase price. The respondent rejected the cheque allegedly because the appellant was in breach of the agreement of paying the balance of the purchase price by the 31 January 1998. Consequently, the appellant filed a suit against the respondent claiming a number of reliefs as contained in the plaint. Before the hearing of the suit commenced, the appellant discovered that the respondent had re-sold the land to a third party – Messrs Goodways Trustees Ltd who had in turn lodged a caveat on the property. Consequently an amended plaint was filed which averred fraud against both defendants. On the 18 May 1999 the second defendant abandoned its claim over the suit property and removed its caveat. The suit against it was withdrawn by consent of both counsel and the allegations of fraud were abandoned. The respondent in his written statement of defence filed on 1 July 1998 averred that he was under pressure from NPART to settle a Uganda Commercial Bank loan. He further averred that the appellant interfered with the process of procuring the Special Certificate of Title. In paragraph 8 he averred that the memorandum of sale was repudiated due to the appellant’s own conduct. At the trial, the following were the agreed issues: 1. W hether the plaintiff or the defendant beached the contract for the sale of land in issue. 2. W hether the plaintiff is entitled to the remedies prayed for. The trial Judge found that the appellant was in breach of the agreement of sale and he dismissed the suit hence the instant appeal. The memorandum of appeal contains the following grounds: 1. T he Learned trial Judge erred in law and fact in that he failed to take into account the provisions of sections 91 and 92 of the Evidence Act and/or wrongly relied on matters that were extraneous to the suit contract 2. T he Learned trial Judge erred in law and fact in that he wrongly relied on an unpleaded and/or unproved defence, and thereby wrongly dismissed the plaintiff’s suit. 3. T he Learned trial Judge erred in law and in fact, having held that the plaintiff had established his claim, he went on to hold that the respondent was entitled to rescind the contract, thereby contradicting himself and wrongly dismissed the plaintiff’s suit. 4. T he Learned trial Judge erred in law and in fact in that he failed to subject the evidence adduced to adequate and exhaustive scrutiny, and relied on mere speculation, thereby coming to the wrong conclusion that the appellant was the party in default. 5. T he Learned trial Judge erred in law and in fact that he misdirected himself about the nature and extent of the appellant’s loss and the value of the suit land. 6. T he Learned trial Judge erred in law and in fact that he proceeded to determine an issue, which had been expressly abandoned by the appellant, along with the prayers, based thereon. It was proposed to ask the Court for the following orders: (i) Allowing the appeal. ( ii) Setting aside the judgment and orders of the High Court and substituting thereof an order allowing the appellant’s suit against the respondent. (iii) Granting the appellant all the remedies prayed for in his submissions in the High Court. Both counsel filed written submissions. From the submissions filed and on perusal of the evidence and the pleadings as a whole, I think one main issue emerged that is whether the trial Judge was right to rely on the respondent’s alleged indebtedness to NPART (Non-Performing Assets Recovery Trust) instead of relying of the terms of the sale agreement. In submitting on this issue, Mr *Tibaijuka*, learned counsel for the appellant, complained that the trial Judge placed too much reliance on extraneous matters and disregarded the terms of the contract. He relied on different passages in the judgment to illustrate this point. He pointed out that the provisions of sections 91 and 92 of the Evidence Act were applicable to the facts of this appeal. Mr *Kugumikiriza*, for the respondent supported the findings of the trial Judge. He stated that the appellant was aware of the respondent’s indebtedness to NPART and he stated so in cross-examination. In order to resolve the issue at hand, regard must be had to the provisions of the law that were cited by counsel for the appellant and then determine whether they apply to the instant case. Section 91 states as follows: “When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence, except as mentioned in section 79, shall be given in proof of the terms of that contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained”. The substance of this section is that a contract in a form of a document, and any other matter that the law requires to be reduced in a form of a document has to be proved by the production of the document itself and that no extrinsic or parole evidence shall be given to prove its contents. The rule is sometimes based on the “best evidence” principle sometimes on the doctrine of estoppel and sometimes on substantive law. The contract for the sale of land was produced in court as Exhibit P2. Both parties signed it on the 29 December 1997. Paragraph 5 of the agreement provided for the mode of paying the purchase price. It stated as follows: “(*a*) The purchaser has paid to the vendor the sum of UShs 650 000 (UShs six hundred fifty thousand) on or before the execution of these presents receipt whereof the vendor does hereby acknowledge. (*b*) The purchaser will pay to the vendor the balance of the purchase price being the sum of UShs 6 350 000 *after* the *Special Ccertificate of Title* which is now in process of preparation is *issued* and an instrument of *transfer* of the property is duly executed in favour of the purchaser”. (emphasis supplied) The agreement did not mention the debt of NPART and the matter was not raised in the written statement of defence. Therefore, the issue is whether the admission of parole evidence and its reliance by the trial Judge contravened the provisions of section 92 (*supra*) which partly reads as follows: “When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document have been proved according to the last section, no evidence of any other agreement or statement shall be admitted, as between the parties to any such instrument or their representative in interest, for the purpose of contradicting, varying, adding to, or subtracting from its terms: but: (*a*) ... (*b*) the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this paragraph applies, the Court shall have regard to the degree of formality of the document; (*c*) the existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation any such contract, grant or disposition of property, may be proved. (*d*) ... (*e*) ... ” The rationale for the exclusion rule is stated by Phipson on Evidence (14 ed) at 1019 paragraph 37-12 to be: “that when the parties have deliberately put their agreement into writing, it is conclusively presumed between themselves and their privies that they intend the writing to form a full and final settlement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith or treacherous memory”. In the case of *Jinabhai and Co Ltd v Eustace Sisal Estate Ltd* [1967] EA 153 Spry JA at 160 stated the general rule of exclusion in these words: “It is a general rule of interpretation that where there is an express provision in a contract, the Court will not imply any provision relating to the same subject matter”. In the case of *Turner v Forwood* [1951] 1 All ER 746 Denning LJ at 749 said: “The rule excluding parole evidence only applies when the parties set down in writing the terms agreed”. When the language used in a document and the terms are clear and unambiguous, the duty of the Court is to give effect to the meaning of the words used. There is a presumption that when parties put what they have agreed upon in writing, they are bound or intended to be bound by it. Therefore the terms agreed upon should be protected from unwarranted disputes and alterations. The presumption can be rebutted in circumstances set out under the section. In the instant case, no evidence was led by the respondent to show the exception set out under the section. The respondent’s letter of 14 May 1998 (Exhibit D2) set out what I would consider to be conditions precedent. They were: 1. T hat the appellant commissioned his lawyer Mr Kulumba-Kiyingi to ensure that the duplicate title deed is processed and released before 30 January 1998. 2. T hat the appellant was permitted to buy the property by NPART provided he paid UShs 4 million before 14 February 1998 to enable the respondent to redeem his property, which was due for auctioning on 14 February. 3. T hat on 22 February he called the respondent to express his disappointment with his lawyer who had not taken practical steps in performing his obligation. 4. T hat on 4 February the appellant rang the respondent stating that he had failed to raise 4 million shillings. 5. T hat on 12 February the appellant attempted to ring the respondent who told him that the deal was terminated on 31 January 1998 and he (appellant) should come and collect his deposit. At the trial, the appellant admitted that he knew about the respondent’s debt with NPART. He denied that he agreed to advance any money to the respondent. As I stated earlier, the respondent in his written statement of defence filed on 1 July 1998, did not raise the matters he raised in his letter of 14 May. This letter was written and probably backdated, after the appellant had tendered a cheque for the balance of the purchase price. I think, with the greatest respect, the Learned trial Judge was wrong to rely on the respondent’s indebtedness to NPART to find that the appellant was in breach of the terms of the sale agreement. That piece of evidence varied and contradicted the clear terms of what the parties had agreed upon in writing. I do not think the respondent would have kept quiet, if indeed the appellant had breached the terms of any oral agreement. The letter itself is full of contradictions. It states that the appellant was required to pay 4 million shillings by 14 February and at the same time, it states that the agreement was terminated on the 30 January 1998. These matters were not raised in the pleadings and the Learned trial Judge did not address his mind to them. I would allow the appeal in the terms proposed by Engwau JA.

Kitumba JA concurred in the judgment of Engwau JA.

For the appellant:

*Tibaijuka* instructed by *Tibaijuka and Co*

For the respondent:

*Kuguminkiriza*