THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[LAND DIVISION]

CIVIL SUIT NO.682 OF 2018

1. CAMPULINE KATUSIIME MUKISA
2. BUYONDO ROGERS MUKISA::PLAINTIFFS

VERSUS

LUTWAMA HENRY SSALONGO::DEFENDANT

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

The Plaintiffs brought this suit against the Defendant claiming breach of contract by fraudulent misrepresentation, and seeking, inter alia:

1. An order terminating the sale agreement between them and the Defendant in respect of land **comprised in Bulemezi Block 74 Plot 18 at Bungiro** (hereinafter the suit land).

2. An order directing the Defendant to refund the monies paid by them under the said agreement at the current market value of Ushs.20,000,000/- per acre totaling to Ushs.100,000,000/-

3. General damages.

4. Mesne profits

5. Punitive damages
6. Interest on (3) and (5) from the date of filing the suit till full payment.
7. Costs of the suit.

The brief facts of the case are: the Plaintiff bought the suit land, measuring 5 acres, from the Defendant on the 30th September, 2016 at Ushs.30,000,000/-. (*thirty million shillings).* In their written agreement, the Defendant undertook to hand over vacant possession after removing a squatter sitting on one and a half acres of the suit land, so that it remained unencumbered.

The Defendant also handed over duly signed transfer forms together with the certificate of title to enable the Plaintiffs obtain legal interest. On the 16th day of May, 2017, during the process of transfer, the Plaintiffs carried out a search and discovered that the suit land had been caveated by a one Nkata Boniface Waswa on the 6th of September, 2016, before the sale.

The Plaintiffs brought this suit after discovering the caveat and failing to obtain actual possession of the land. They pleaded the following particulars of fraud against the Defendant, thus:

1. Selling of the suit land knowing that the same is encumbered.
2. Selling of the suit land knowing that he cannot pass vacant possession.

In his reply, the Defendant denied all the Plaintiffs' allegations. He pleaded that he only undertook, under the sale agreement, to assist

in the removal of the squatters. Further, that the 1st Plaintiff brought the suit land as was and is after he physically inspected the same and carried out a formal search.

At the hearing, the suit proceeded exparte after the Defendant's failure to turn up. The Plaintiffs led evidence of one witness, the 1st Plaintiff (PW1). Counsel for the Plaintiffs also filed written submissions which I shall consider.

At scheduling, three issues were raised, and Counsel for the Plaintiffs also raised other issues in his submissions, different from these former. I shall, however, amend both versions because, in my view, they shall not aid Court to directly address matter in controversy. Accordingly, the following issues are proposed for determination:

1. Whether the Defendant breached the contract of sale of the suit land with the Plaintiffs.

2. Whether the Plaintiffs are entitled to any remedies?

Resolution of issues:

Issue No.1:

Whether the Defendant breached the contract of sale of the suit land with the Plaintiffs

I shall not labour to reproduce PW1's testimony because it would be a repetition of the factual background above. It is needful, thought, to mention that the following exhibits were adduced in support of her testimony:

1. A copy of the sale agreement, PEXH2.
2. The certificate of title in the Defendant's name, PEXH3.
3. A copy of the transfer form, PEXH4.
4. A copy of the Defendant's national identity card, PEXH5.

To define what constitutes breach of contract, Counsel for the Plaintiffs cited the **Black's Law Dictionary, 5th Edn, at page 171**, and the case of ***Ssempa versus Kambagabire HCCS No.408 of 2014*** which defined it as a situation;

> "*where one or both parties fail to fulfill the obligations imposed by the terms of contract.*"

I agree with this definition. It is not in dispute that there was a contract of sale of the suit land between the Plaintiffs and the Defendant. What now matters is to determine whether the Defendant breached it by failing to do any obligation thereunder.

According to the translated copy of PEXH2, it was stipulated, in relation to the Defendant, *that "there is a tenant and/ or squatter on the said land occupying one and a half acres whom I undertake to remove so that they remain with the land with no encumbrance."* As I revealed in the facts, it is without doubt that the Defendant failed to perform this obligation. Consequently, his conduct amounted to breach of contract. His denial, in the written statement of defence, that he agreed only *"to assist in the removal of the squatters…"* is unacceptable given the unambiguous undertaking he took under the written the contract.

However, I do not find that the selling of the suit land with knowledge of the caveat constituted a breach. It is a fact that the Plaintiffs never carried out a formal search before executing the sale agreement. Had they done this, I believe that they would have discovered that the suit land was encumbered by a caveat and perhaps refrained from purchasing it. There were, thus, negligent. As such, there is no good reason for burdening the Defendant's with their negligence.

This issue is therefore answered in the positive.

Issue No.2:

Whether the Plaintiffs are entitled to any remedies

The Plaintiffs sought for an order terminating the sale agreement between them and the Defendant in respect of suit land. Whether they are entitled to such order depends on the consequence of the breach. It is plain that the purpose of the above stipulation in the contract was to ensure that the Plaintiffs obtain vacant possession of the suit land from the Defendant, which I believe, is of paramount importance in contracts of this nature. The failure by the Defendant to fulfil his obligation, therefore, negated the whole purpose and intention of parties in entering the contract.

In ***Gas Marketing Limited versus ARCO British Limited and Others 1998] 2 Lloyd's Rep, 209***, the *House of Lords*, persuasively, observed that:

> *"If the provision in an agreement is of fundamental importance then the result either of a failure to perform it (if it is promissory) or of the event not happening or the act not being done (if it is a contingent condition or a condition precedent or a condition subsequent) may be that the contract either never comes into being or terminates. That may be so, whether the parties expressly say so or not.* ***Wickman Machine Tool Sales Ltd. versus L. Schuler A.G. [1974] A.C. 235, 262G*** *per Lord Wilberforce.* To adapt the words of ***Maugham J. in In re Sandwell Park Colliery Company: Field versus The Company [1929] 1 Ch. 277, 282***
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> *"the very existence of the mutual obligations is dependent on the performance of the condition." For completeness I would substitute "performance or fulfilment of the condition" for "performance of the condition."*

Likewise in this case, I believe that contract between the Plaintiffs and the Defendant terminated following the latter's failure to deliver vacant possession. Consequently, the Plaintiffs are entitled to treat the contract as having ended, as per Section 35 of the Contracts Act, 2010. The Court finds no reason, therefore, for denying them this order.

The Plaintiffs also sought for compensation in form of a refund of the monies paid by them to the Defendant at the current market value of Ushs.20,000,000/- (*twenty million shillings)* per an acre,

totaling to Ushs.100,000,000/- (*one hundred million shillings)*. This claim was ably supported by their Counsel in his submissions.

According to Section 65(1) of the Contracts Act, 2010, it is provided that where there is a breach of contract, the party who suffers the breach is entitled to receive from the party who breaches it, compensation for any loss or damage caused to him or her. Counsel for the Plaintiffs bolstered this provision by citing the case of ***Photo Production Ltd versus Securico Transport ltd [1980] A.C. 827*** wherein it was observed that breach of a legal obligation triggers compensation from the guilty to the innocent party.

Further, under Section 65(2) of the Contracts Act, 2010, compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. Simply put, compensation can only be claimed where the loss is reasonably viewed to have resulted naturally from the breach, or where the losses resulting from breach ought to reasonably have been contemplated of by the parties when forming the contract. See ***Hadley versus Baxendale (1854) 9 Exch 341***.

With the guidance of the above authorities, I do not agree that the Plaintiffs are entitled to Ushs.100,000,000/- (*one hundred million shillings)* as a compensation for the breach. This is arguably because aforesaid sum constitutes a remote and indirect loss. It could not, therefore, have been within the contemplation of the parties when forming the contract.

Since the Plaintiffs are claiming a refund of monies, which is strictly special damages, it is my view that they are only entitled to monies paid under the contract. Accordingly, I find that the Plaintiffs are entitled to Ushs.30,000,000/- (*thirty million shillings).*

Turning now to the claim of general damages. As I understand, general damages are such as the law would presume to be a direct natural or probable consequence of the act complained of. In reaching the quantum of general damages, the Court considers the nature of harm, the value of the subject matter, and the economic inconvenience that the injured party may have been put through. As submitted by Counsel for the Plaintiffs, inconvenience need not be proved but can be inferred. (He referred me to ***Kibimba Rice Ltd versus Umar Salim, S.C.C.A. No. 17 of 1992)***. See also ***Uganda Commercial Bank versus Kigozi [2002] 1 EA 305, Charles Acire versus M. Engola, H.C.C.S. No. 143 of 1993*****,** for propositions on general damages.

In this case, as Counsel submitted, it is natural to presume that the Plaintiffs have been inconvenienced by the Defendant's failure of duty. That it would be unjust if Court does not grant the general damages for this inconvenience. He, thus, suggested that Ushs.30,000,000/- (*thirty million shillings)* be granted as general damages.

I do agree with Counsel for the Plaintiffs that the Plaintiffs are entitled to general damages. I am, though, mindful that these are

awarded not to punish the wrong party, but restore the innocent party in a position he or she would have been had the damage not occurred. *See* ***Uganda Commercial bank versus Kigozi [2002] 1 EA 305, Charles Acire versus M. Engola, H.C.C.S. No. 143 of 1993, and Kibimba Rice Ltd versus Umar Salim, S.C.C.A. No. 17 of 1992*****.** This being the case, I believe that the proposed amount is excessive and awarding it amount to a punishment. In my estimation, I believe that Ushs.15,000,000/- (*fifteen million shillings)* is a proper figure to be awarded to the Plaintiffs as general damages, given the circumstances.

As regards mesne profits, I do not think these are recoverable in the circumstances. Counsel for the Plaintiffs ably cited Section 2 of the Civil Procedure Act Cap 7 which I believe only entitles one to recover such, if he or she was denied possession of the land. In this case, the Plaintiffs having chosen to rescind the contract; I fail to see how they would be entitled to possession of the suit land.

On punitive damages, I also do not believe that these are recoverable. As I understand, these damages are only recoverable where there is oppressive, arbitrary or unconstitutional action by the servants of the government and, secondly, where the Defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the Plaintiff. *See* ***Fredrick J.K Zaabwe versus Orient Bank Ltd and 5 Others S.C.C.A.***

No.4 of 2006**.** None of the circumstances appear in this case, having ruled out fraud.

Regarding interest, it is trite that this is discretional. See. Section 26(2) of the Civil Procedure Act Cap 71. According to (*Kasule J.A.*), in ***Uganda Revenue Authority versus Wanume David Kitamirike CACA No. 43 of 2010***, the aforesaid section allows Court to award interest adjudged on the principal sum from any period prior to the institution of the suit, or from the date of filing the suit to the date of the decree, or on the aggregate sum adjudged from date of decree to date of payment in full. The burden is on the party claiming interest to plead and adduce some evidence entitling it to interest. Regarding interest on pecuniary damages, ***Lord Denning in Hambutt's Plasticine Ltd. versus Wayne Tank & Pump Co. Ltd [1970]1 QB 447,*** observed that:

> *"An award of interest is discretionary. It seems to me that the basis of an award of interest is that the Defendant has kept the Plaintiff out of his money; and the Defendant has had the use of it himself. So he ought to compensate the Plaintiff accordingly."*

In this case, the Defendant kept the Plaintiffs out of the monies paid under the contract which he put to his use. It is, thus, appropriate that Court awards interest at a rate of 8% (*eight percent)* per annum on the monies paid under the contract from the date of institution of the suit until full payment.

As regards general damages, these were only ascertained at trial. It would be, thus, erroneous to suppose that the Plaintiffs have ever been deprived of the use of these monies. Court is, however, cognizant of the possibility of late payment of these monies by the Defendant, which might constitute a deprivation of use. As *Bashaija J.,* stated in ***Kakubhai Mohanlal versus Warid Telecom Uganda HCCS No. 224 of 2011*:**

> *"A just and reasonable interest rate, in my view, is one that would keep the awarded amount cushioned against the ever rising inflation and drastic depreciation of the currency. A Plaintiff ought to be entitled to such a rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against any economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due."*

Accordingly, I find that the Plaintiffs are entitled to interest at a rate of 12% (*twelve percent)* per annum on general damages from the date of judgment until payment in full.

Lastly on costs, the Plaintiffs having succeeded in this suit, I find no good reason for denying them costs.

Ultimately, judgment is entered in favour of the Plaintiffs in the following terms:

1. The sale agreement between them and the Defendant in respect of land comprised in Bulemezi Block 74 Plot 18 at Bungiro is hereby terminated.

2. The Defendant shall refund Ushs.30,000,000/- (*thirty million shillings only)* as monies paid under the said agreement, with interest at a rate of 8% (*eight percent)* per annum from the date of institution of the suit until payment in full.

3. The Defendant shall pay Ushs.15,000,000/- (*fifteen million shillings only)* to the Plaintiffs as general damages, with interest at a rate of 12% (*twelve percent)* per annum from the date of judgment until payment in full.

4. The Defendant shall pay the Plaintiffs the costs of this suit.

I so order.

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Henry I. Kawesa

JUDGE

04/06/20

Right of Appeal explained.

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Henry I. Kawesa

JUDGE

04/06/20

04/06/20:

Mr. Muhangi George for the Plaintiff.

Matter proceeded *ex-parte.*

It's for Judgment. I am ready for the same.

Court:

Judgment delivered to the above Advocates.

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Henry I. Kawesa

JUDGE

04/06/20