THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT-00-CC-CS-0954 OF 2004

ESTHER SEMPEBWA ::::::::::::::::::::::::: PLAINTIFF

VERSUS

THE NON PERFORMING ASSETS RECOVERY TRUST ::::::::::::::::: DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

The plaintiff claim against the defendant is for a declaration that the defendant breached the contract it made with her; special and general damages for misrepresentation; an order of specific performance; interest and costs of the suit.

From the evidence, the defendant advertised property described as Block 194 Plots 44 and 45 land at Kungu for sale. The advert appeared in Monitor Newspaper. The property was described to have on it a four bed room house with servants quarters and a coffee/banana plantation all on one acre. On

the basis of that advert, the plaintiff made a search in the Land Registry. She was satisfied about the existence of the property and put in her bid accordingly. The bid was successful. The defendant then handed over to her the certificate of Title in respect of Plot 45. To-date she is yet to get the one for Plot 44.

After the purchase, the plaintiff discovered that the four bed-roomed house described in the advert was out side Plots 44 and 45. It is on Plot 117 which she had not bought. She allegedly bought that one as well from the owner. She now wants to recover Shs.26m being the alleged cost of that additional property.

The defendant accepts that the bit about the four bed-roomed house on the advertised property was a misrepresentation but an innocent one. It disputes the alleged purchase of Plot 117 by the plaintiff.

At the hearing, the parties agreed that:

1. The sale of land constituted a contract between the plaintiff and the defendant.
2. The house was found on Plot 117, not 44 or 45 as advertised.

The following issues are for determination:

1. Whether the defendant's conduct in failing or refusing to hand over title for Plot 44 amounts to breach of contract.

2. Whether the improper description of the property in the advert amounts to a misrepresentation.

3. Whether the plaintiff had an obligation to make proper inquiries regarding the land before purchase.

4. Remedies, if any.

<u>Counsel:</u>

Mr. Muwanga Sebina for the plaintiff.

Mr. Peter Nkurunziza for the defendant.

Both counsel agreed to file written submissions, counsel for the plaintiff by 3/5/2006, that of the defendant by 17/5/2006 and any reply by plaintiff's counsel by 24/5/2006. Learned counsel for the plaintiff defaulted. This judgment is therefore without his in-put by way of submissions.

As to whether the defendant's conduct in failing or refusing to hand over title to Plot 44 amounts to breach of contract, it is an agreed fact that the sale of Plot 44 constituted a contract. The plaintiff gave evidence of completing the purchase formalities on her part. She went to Ministry of Lands to make a search and she was satisfied that the property had indeed been mortgaged to UCB. It has been argued by the defendant that the plaintiff did not request to see the Duplicate Certificate of Title from the defendant and only responded to the advertisement. That there is no evidence to show that the

availability of the duplicate certificate of title was a term and condition of the sale.

I have considered this argument. It is unfortunate that the plaintiff's counsel has not addressed me on it as well. Be that as it may, the plaintiff was dealing with registered property. It was so advertised and when she went to the Land Office for a search, she was able to ascertain the registration and the fact that it had been mortgaged. The mortgage transaction itself presupposed the depositing of the certificate (duplicate) of title with the mortgagee, Uganda Commercial Bank. When the right under that transaction was assigned to the defendant, the assumption is that the duplicate certificate of title was or would equally be conveyed to the defendant. By the time the property was put up for sale, the defendant ought to have ascertained or was under duty to ascertain the whereabouts of the duplicate certificate. It is true that the Registration of Titles Act provides for the Registrar to issue a Special Certificate of Title where the duplicate cannot be found or is destroyed or obliterated. The law therefore recognizes that the duplicate certificate may not be available so that in such cases a Special one may issue. However, in the situation such as the one described by the plaintiff, in the absence of any word from the defendant prior to the sale that the duplicate certificate of title in respect of Plot 44 was unavailable, this being registered land, the plaintiff was entitled to assume its availability. It is immaterial that she did not ask to see it first before submitting the bid. The existence of the same was in my judgment an

implied term of the contract. As Lord Wright observed in **LUXOR –VS- COOPER [1941] 1 ALL. ER 33:**

> *"……… there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicated that 'it goes without saying', some term not expressed, but necessary, to give the transaction such business efficacy as the parties have intended ……. The implication must arise inevitably to give effect to the intention of the parties."*

The concept of the 'officious by stander' is not a new one. It was introduced by MacKinnon L.J. in **Shirlaw –Vs- Southern Foundries [1939] 2 ALL. ER 113** when he said (about Courts implying a term):

> *"Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying. Thus, if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common: 'Oh, of course!' At least it is true, I think, that if a term were never implied by a judge unless it could pass that test, he could not be held to be wrong."*

I agree.

This Court is of course cutely aware that it must be very cautious in its approach to implying additional terms into the contract before it. However, from the circumstances as explained by the parties, it is only the defendant who was better placed to advise the plaintiff on the absence of the certificate of title and leave her to decide whether or not to go ahead with the bid. The defendant breached that duty of disclosure. In the absence of any express provision as to the time within which the duplicate certificate of title would be availed to her, the presumption is that it had to be done within a reasonable time. The advert appeared in the Monitor Newspaper of 24th February, 2003. Soon thereafter the parties concluded the deal. Up to the time when the suit was filed on 2/12/2004, close to 2 years after the sale, the defendant had not provided the duplicate certificate of title. The notice to issue a special certificate of title was not filed till 19th December, 2005 and as I write the judgment, she has not got it. In all these circumstances, I'm unable to accept the defendant's argument that there has been no failure or refusal by the defendant to deliver the certificate of Title to the plaintiff. A delay of over three years cannot by any standard be said to be a reasonable one.

The Law divides terms into 'conditions' and 'warranties'. Whether a term is a condition or a warranty becomes important if, like in the instant case, something goes wrong so that there is a breach of the contract. In the

circumstances of this case, the implied term as to the existence of the duplicate certificate of title was a warranty, a less vital term which, if broken, the injured party, will still have to go on with the contract, Like the plaintiff has done in this case, but may be compensated for that breach by an award of damages.

For the reasons I have advanced above, I would answer the first issue in the affirmative and I do so.

As to whether the improper description of the property in the advert amounts to a misrepresentation it is trite that a representation is not a term, but a statement of fact made by one party, to the other, during their preliminary negotiations, which was intended to induce the other party, to enter into the contract and which did so induce the other party, to enter into that contract. A misrepresentation is therefore a representation which is false. Misrepresentation manifests itself in three shapes: it may be fraudulent, negligent or innocent.

It is conceded by the defendant that the advert which described the land as having a four bed room house and servants quarters was a statement of fact and was intended to attract purchasers including the plaintiff who did act on it. The plaintiff appearing as PW1 said that she was attracted by the advert

in the form it was. In view of the concession that this amounted to a misrepresentation, I have no reason to decide otherwise.

The second issue is therefore also answered in the affirmative.

As to whether the plaintiff had an obligation to make proper inquiries regarding the land before purchase, I think this goes without saying. Where the property is developed, a purchaser of such land would be expected to make proper enquiries, especially as regards the boundaries. In **Prajapat –Vs- Ashok Cotton Co. Ltd [1964] EA 309** a case gratefully drawn to my attention by counsel for the defendant, the Court cited with approval dicta in **Terrene Ltd –Vs- Nelso [1937] 3 All E.R. 739:**

> *"In the ordinary case (of a sale of real estates) a purchaser has to go for information from the vendor but bearing in mind the principle of caveat emptor, he is bound to make proper inquiries for himself ……………"*

I agree.

In a country like ours characterized by fake certificates of title or prospects of 'buying air', it is necessary and actually incumbent upon the prospective buyer to make his/her own inquiries, for example by arranging a survey, and generally heed the maxim **caveat emptor** – 'let the buyer beware.'

PW1 testified that she never inspected the site of Plots 44 and 45 and did not know where the property was by the time she concluded the deal with the defendant. In my judgment she earns no credit for that. Since the property was developed and being occupied by people, if she had taken the bother to inspect it before concluding the deal, she would, in my view, have discovered at the preliminary stage of the negotiations the fact that the advert was not accurate about the house and servants quarters being on the advertised property. I would answer the 3rd issue in the affirmative and I do so.

As to the remedies, if any, she has first and foremost, claimed special damages of Shs.26m. This claim is founded on her averment that having failed to find the house on Plot 45 she was forced to buy Plot 117 on which the house is. She stated in her evidence that she had paid Shs.25m for the suit property. By implication, this was the fair value of the property if the description of it in the advert had been accurate. As it has now turned out, it was not accurate.

The defendant pleaded in its written statement of defence and gave evidence to that effect through its Legal Officer, DW1 Kwikiriza that it did not knowingly misrepresent to the plaintiff that the house was on Plot 44 and 45; that it was labouring under an innocent mistake as to the facts arising out a Valuation Report, D. Exh. 1. I accept that defence. However, the mere acceptance of it itself does not wash away the sin. Through that innocent misrepresentation, the plaintiff suffered a loss. Neither party has given me a

report as to how much the property was worth without the component of the house and the servants quarters. But it is fair to say that without those developments, the plaintiff must be deemed to have bought the equivalent of an undeveloped Plot. I would put its value at Shs.10,000,000- (ten million only). The issue of the alleged purchase of Plot 117 by the plaintiff is still shrouded in uncertainty. The vendor was never called to testify nor was any witness to the agreement. But the plaintiff tendered P. Exh. 111, a purported Sale Agreement between herself and one Namuli. The said Namuli is stated in the said document to be the registered proprietor of Block 194 Plot 117. The Certificate of Title which the plaintiff's counsel has submitted to Court indicating that Plot 117 is now Plot 370 perhaps after some sub-division, indicates Catherine Namuli as the Administrator of the estate of the late George William Kiwanuka. She was entered on the certificate of title on 30/4/2004 through instrument No. KLA 259495. An Administrator of an estate is not necessarily the owner of such property, unless of course he/she is the sole beneficiary of the estate. There is no evidence on record that she is the sole beneficiary of the estate to raise the inference that she could pass an impeachable title. And while the purported sale between the plaintiff and Namuli is said to have taken place on 17/6/2003, Namuli's interest was registered on 30/4/2004, implying that the Agreement tells a lie about the registered proprietorship. There is on record a letter, D. Exh. 11, indicating that the plaintiff's claim to Plot 117 is not free of challenge. In all these circumstances, it cannot be said that the plaintiff has proved her claim of

Shs.26m against the defendant. Special damages must not only be pleaded but also strictly proved. This the plaintiff has not done to the satisfaction of Court. She should therefore be contented with an award of general damages.

Relying on **Prajapat –Vs- Ashok Cotton Co. Ltd,** supra, where it was held that if a representation made proves to be wrong but was made in good faith and innocently the purchaser has no claim to damages, counsel for the defendant has invited me not to consider the plaintiff for any general damages at all.

I have considered that submission. The absence of the plaintiff's submissions has made my task a lot harder. Be that as it is, I have already stated what a misrepresentation is and the manner in which it ordinarily manifests itself. To say that a misrepresentation has been made fraudulently is a very serious allegation and the clearest of proof is required. In the leading case of **Derry –Vs- Peek (1889) 14 App. Cases 337** Lord Herschell said:

> *"……. Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false."*

I don't consider the plaintiff's evidence in this case to offer the clearest proof of what is required in an allegation of fraud.

Negligent misrepresentation occurs when the party, gets the matter wrong because he has not bothered to look into it properly. Considering the manner of the assignment of the debt to the defendant, I'm inclined to the view that this is not a case of negligent misrepresentation.

Innocent misrepresentation takes place where the party, acting in good faith, just slips up. I'm sure this is what happened in the instant case.

I understand the law to be that any form of misrepresentation will allow the injured party, to rescind (cancel) the contract, provided that restitutio in integrum is still possible. That simply involves putting both sides back in the position where they were before the contract was made. This does not appear to be the plaintiff's desire in this case. It would appear that restitutio in integrum is no longer possible in this case. She has preferred to go on with the contract and recover damages to compensate her. She has in effect affirmed the contract. I have considered the position in **Prajapat,** supra. In my view it no longer represents good law. In **Gosling –Vs Anderson (1972) Times 7 February 1972,** Lord Denning M.R. (R.I.P) pointed out that before 1967 (and the Prajapat case was before 1967), the plaintiff would have been without any remedy unless she had been able to prove fraud. Instead a retired school mistress was awarded damages for innocent misrepresentation that the flat she was buying had planning permission for a garage. I'm persuaded by the reasoning in that case. I think the possible

course in a case such as this must depend on the nature of the misrepresentation. Believing as I do that she was induced to buy the suit property herein because of an advert that showed that there was a house and servants quarters on it; and trusting that the purchase price of Shs.25m was arrived at on a mistake of fact; and recognising the fact that the plaintiff's claim for special damages has been disallowed on account of lack of concrete proof that she bought that house on Plot 117, I consider a sum of Shs.17,000,000- (seventeen million shillings only) adequate compensation for the innocent misrepresentation, the breach of contract, and the attendant loss suffered by the plaintiff. In arriving at this figure, I have considered the amount paid by the plaintiff for the suit property, and the approximate value of Shs.10,000,000- which I have put to an undeveloped plot. The balance (Shs.15,000,000-) is what I have considered to be the would have been value of the developments and Shs.2,000,000- the attendant loss occasioned by the breach. I decree the amount to her. This award shall attract interest at the rate of 25% per annum from the date of judgment till payment in full.

As regards the Certificate of Title in respect of Plot 44, Court is satisfied that the defendant is in the process of obtaining a Special Certificate of Title. It has no power over that process. It must await the issuance by the Commissioner for Land Registration. I have already ruled that its provision was an implied term of the contract. For the avoidance of the doubts and

lest the defendant reneges on its promise to provide the same, I hold that the defendant is legally obliged to provide the same to her.

As regards costs, the usual result is that the loser pays the winner's costs. This practice is of course subject to the Court's discretion. I have considered the fact that this was an innocent misrepresentation and what has been awarded to the plaintiff as general damages. The defendant's effort has in my view achieved partial success, which I assess at 20%. I would therefore award 80% of the costs of the suit to the plaintiff and I order so.

Yorokamu Bamwine
J U D G E
07/06/2006

7/6/2006

Mr. Muwanga Sebina for plaintiff.

Plaintiff present.

Mr. Hatanga Erick for the defendant.

Court: Judgment delivered.

Yorokamu Bamwine
J U D G E
7/6/2006