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Bob Humphrey Ogwang V Jas Progressive Investments -HCT-00-CC-CS-0747-2004 [2007]  
UGCommC 28 (5 April 2007)

THE REPUBLIC OF UGANDA

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

**HCT-00-CC-CS-0747-2004**

Bob Humphrey Ogwang Plaintiff  
Versus  
Jas Progressive Investments Defendant

**5 April 2007**

**BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE**

**J U D G M E N T:**

The plaintiff's claim against the defendant is for breach of contract, fraudulent misrepresentation, special and general damages, interest and costs of the suit.

From the records, by a sale agreement dated 25/6/2003, the defendant sold to the plaintiff a parcel of land for Shs.15,000,000-. The said agreement is on record as P. Exh. 1. By the same sale agreement, the defendant undertook to sign transfer forms to enable the plaintiff transfer it from the defendant's names and covenanted that the buyer would enjoy quiet possession of the suit property. The defendant further covenanted to indemnify the plaintiff for any loss that the plaintiff would incur as a result of any defect in title or claim from third parties including a refund of the purchase price, interest at commercial rate and all incidental costs arising from such loss. In or about June 2004, the plaintiff was evicted from the suit land under the instructions of a mortgagee, Tropical Africa Bank, after the defendant had defaulted on his mortgage obligations.

It is the plaintiff's case that he was induced to enter into a contract by the fraudulent misrepresentation of the defendant. He holds the defendant responsible for the breach of the contract. In its written statement of defence, the defendant denies existence of the contract. In the alternative, it claims that it (the defendant) deposited its land title known as Kyadondo Block 232 Plot 1496 with the Land agents known as Property Masters for purposes of sub-dividing and sale thereof; that the defendant did not give title for Kyadondo Block 232 Plot 1497 to the said agents as the same was mortgaged with the bank. The defendant therefore denies sale of Plot 1497 or any part thereof to the plaintiff.

There are two issues for determination:

1. Whether the defendant and/or its agent sold the suit property to the plaintiff.
2. Whether the plaintiff is entitled to the remedies sought.

Counsel:

Mr. Moses Adriko for the plaintiff.

Mr. Ambrose Tishekwa for the defendant.

At the scheduling conference held on 16/8/2005, both parties agreed that:

- (a). The defendant was the registered proprietor of Plots 1496 and 1497.
- (b). Twenty (20) Plots at Nambole were advertised by Property Masters for sale in the New Vision of May 6, 2003.
- (c). In advertising the 20 Plots for sale, Property Masters was acting on the instructions of the defendant.
- (d). The plaintiff dealt with Property Masters in respect of acquisition of the suit land.
- (e). The suit property was at the time of the sale subject of a mortgage by the defendant to Tropical Bank.

As to whether the defendant and/or its agent sold the suit property to the plaintiff, the plaintiff led evidence of two witnesses:

The plaintiff himself, Dr. Bob Humphrey Ogwang, and one Mr. Kasulu. First, the evidence of the plaintiff.

He testified that he learnt about sale of plots in Nambole from the New Vision Newspaper of 6/5/2003. The advert is on record as P. Exh. 111. It shows that 20 Plots measuring 25 decimals each were on sale at a cost of Shs.15,000,000- each. It is the plaintiff's evidence that he surveyed the portion with one Walusimbi before making payment of Shs.15m to one Patrick Kasulu of Property Masters. The said Walusimbi did not appear as a witness. However, the plaintiff stated that he effected payment to Mr. Kasulu, the defendant's agent. Proof of payment is reflected in the sale agreement itself. In the agreement, P. Exh. 1, the defendant acknowledges receipt of Shs.15m being consideration for sale of Block 232 Plots 1496 and 1497 at Nambole. From the plaintiff's evidence, he was not present when the defendant's Managing Director, Mohamed Abubaker Mohammed, put his signature on the agreement. However, he says that he subsequently had meetings with him on various occasions at his offices at Hotel Equatoria. It is his evidence that during these meetings, the Managing Director promised to procure a title deed for the suit property to no avail. The plaintiff testified that he commenced construction work on the suit property and he was only informed that the defendant was unable to procure title to the plot almost a year later, in 2004. It was at this time that auctioneers acting for Tropical Africa Bank Ltd went to the plot and threatened to demolish his partially completed buildings. This is when he abandoned the plot and demanded refund of the purchase price and compensation.

The plaintiff's witness, Patrick Kasulu (PW2), said that he was instructed to sell plots 1496 and 1497. He acknowledges receipt of Shs.15m from the plaintiff, on behalf of the defendant, and says that he actually passed it on to the defendant through its Managing Director, DW1 Mohammed Abubaker Mohammed. He identified P. Exh. 1 as the agreement which contained all the terms and conditions of sale of the suit property. I have addressed my mind to the defence evidence as well. According to DW1 Mohammed Abubaker Mohammed, they appointed PW2 Kasulu as their agent to sell their property at Nambole. The said property was part of the larger property owned by the defendant. He also conceded that he received money from the sale of some of the sub-divided plots.

Although this witness denied receipt of any money from the plaintiff, he testified that he had offered to give the plaintiff another plot to replace the one he had partially developed, which offer the plaintiff rejected.

In my opinion, the defendant's denial of receipt of money from the plaintiff is untenable in view of the sale agreement which DW1 Mohammed personally signed acknowledging receipt of Shs.15m. DW1 Mohammed may not have personally received the money from the plaintiff but their appointed agent, PW2 Kasulu did. An agent is someone who is authorized to act on behalf of another, known as the principal. It is an admitted fact that in advertising the 20 plots for sale, Property Masters was acting on the instructions of the defendant; and, that the plaintiff dealt with Property Masters in respect of the acquisition of the suit property. From the evidence, PW2 Kasulu

had power to make contract on behalf of the defendant. He did make that contract in which he stated that the seller was the owner of land comprised in Block 232 Plots 1496 and 1497 situated at Kireka and Banda (Nambole). The plaintiff stated, and the agreement so indicates, that the Block had been surveyed for purposes of it being sub-divided into several plots. The agreement was given to DW1 Mohammed to sign and he did sign it. If it contained any misdescription of the land the defendant intended to sell, this was a problem between the defendant and its agent, Property Masters. It was no plaintiff's concern. The contract concluded by the agent and the plaintiff became that of the defendant and the plaintiff. It was not the agent's personal contract, the law being that he who does something through another does it himself. There is nothing to show that by the time the plaintiff abandoned the plot and demanded re-imbursement, the defendant had revoked or made any attempt to revoke the authority to Property Masters for allegedly acting in excess of its authority.

In law, a fact is said to be proved when Court is satisfied as to its truth. The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. In the instant case, the plaintiff has alleged breach of contract. The burden rests on him to prove that allegation. He has shown that the transaction between himself and the defendant was reduced into writing. He has exhibited a sale agreement which shows that the property offered to him by the defendant's agent to buy, which property he actually bought, was described to him as "Block 232 Plot 1496 & 1497 Land at Nambole." This is the description that appears in the sale agreement which DW1, the defendant's own Managing Director, personally signed. The said Managing Director also acknowledged receipt of Shs.15,000,000-. He cannot now be heard to say that he did not offer any such land to the plaintiff or that he was never paid. He is estopped by the parol evidence rule, which rule is to the effect that evidence cannot be admitted, (or even if admitted, it cannot be used) to add to, vary or contradict a written instrument. In relation to contract, this rule means that where a contract has been reduced to writing, neither party can rely on evidence of terms to have been agreed, which is extrinsic document, that is, not contained in it. I'm cutely aware that where a dispute arises as to what transpired between the parties, as in the instant suit, evidence can be admitted to show that a written contract has been varied or even rescinded. No such evidence has been adduced by the defendant in the instant suit. In these circumstances, it is immaterial that Mr. Kasulu was not able to place before the Court any document showing that the instructions by the defendant to Property Masters included sale of Plot 1496 as well as 1497. This was not his contract but the defendant's. I would find that the sale agreement, P. Exh. 1, speaks for itself on this point, that is, that the defendant, through its appointed agent, sold the suit property to the plaintiff.

I would, therefore, answer the first issue in the affirmative and I do so.

As to whether the plaintiff is entitled to the remedies sought, there is evidence that while the plaintiff was waiting for the certificate of title in respect of the suit property, he started developing it. He did so until he was stopped by auctioneers acting for Tropical Africa Bank Ltd. It is an admitted fact that the suit property was at the time of the sale subject of a mortgage by the defendant to Tropical Africa Bank. Neither the defendant nor its agent has refunded the money paid by the plaintiff or compensated him for his loss. He has prayed to Court for Shs.53,300,000- being special damages. Of this amount, Shs.15,000,000- is particularized as the purchase price. He is entitled to the refund of the Shs.15m as money paid for consideration which has wholly failed. This amount is accordingly decreed to him.

The remaining amount in the sum of Shs.38,300,000- is particularized as the increase in the value of the land: Shs.6,000,000=; the buildings on site: Shs.20,000,000; and disturbance allowance of 30%: Shs.12,300,000=.

The rule has long been established that special damages must be pleaded and strictly proved by the party claiming them, if they are to be awarded. The particulars of special damages were enumerated in a report prepared by M/S Ideal Surveyors Valuers and Real Estate Management Consultants

which was tendered in evidence as P. Exh. 11 at the scheduling stage. At the hearing, the plaintiff did not lead evidence of the authors of that report. In view of the plaintiff's omission and/or failure to lead evidence of the people who authored the report to substantiate the claims, Court cannot say that the plaintiff has discharged the burden placed on him by the law of evidence. I would accordingly disallow the plaintiff's claim in the sum of Shs.38,300,000=for not being proved to the satisfaction of the Court.

As regards general damages, these are what may be presumed by law to be a necessary result of the harm alleged and proved. The plaintiff may not prove that he has suffered general damages. It is enough if he shows that the defendant owed him a duty of care which he breached. He has indicated that he wanted land to buy and he bought the suit property. Unknown to him, part of the land he bought was at the time of the sale subject of a mortgage by the defendant to a bank. The bank later realised its security when the defendant failed to meet the mortgage obligations. I hasten to add that from the evidence, the mortgage was in respect of Plot 1497. The plaintiff has since abandoned the whole project.

I have considered the defence evidence that when the plaintiff had just started clearing the land, before construction, the defendant's Managing Director went to him and told him not to go ahead with the construction. The plaintiff denies it. He testified that the Managing Director kept promising to process the title in his favour until the defendant's lawyers alerted him that the land he had bought was subject of a mortgage by the seller to a bank. From the evidence, by the time the auctioneers moved in to stop him from further construction, he had put up the ill-fated structures. In my view, the plaintiff's version is more credible than that of the defendant. This is because, in my view, assuming that the construction was noticed by the defendant long before the buildings had reached where the plaintiff left them, or the agent had without authority included Plot 1497 in the sale agreement, the defendants had all the means at their disposal to stop the construction before the plaintiff did any work on the land. They didn't.

I have considered the defence submissions regarding the plaintiff's alleged lack of diligence that led him to incur the loss he suffered.

In ***Prajapat –Vs- Ashok Cotton Co. Ltd [1964] E.A. 309***, the Court observed, and I agree, that in cases of sale of land, 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. In my view, the plaintiff cannot be faulted for making a search in respect of Plot 1496 alone. I would agree, considering the notorious rampant forgeries in land transactions in this country, that it was necessary and actually incumbent upon the plaintiff to make his own inquiries and generally heed the maxim caveat emptor (let buyer be ware). However, in my view, since the Plots were being re-sub-divided, in the absence of any evidence that the plaintiff was, before the sale, alerted about Plot 1497 being subject of a mortgage by the defendant to the bank, he did what he could diligently have done in the circumstances. Having said so, believing as I do that the plaintiff was induced to buy the suit property by an advert which the defendant caused to be placed in News papers; and, recognizing that the plaintiff's claim for special damages as estimated by a valuer has been disallowed for reasons stated herein above; and, making due allowance to the plaintiff's own failure to mitigate his loss by rejecting the offer of an alternative Plot elsewhere, I consider a sum of Shs.12,000,000= (twelve million only) adequate compensation for the breach of contract and the attendant loss suffered by him. It is awarded to him. Both awards shall attract interest at the commercial rate of 23% per annum from the date of judgment till payment in full.

The plaintiff shall also have the costs of the suit.

In the result, judgment is entered for the plaintiff against the defendant in the following terms:

- (a). Special damages: Shs.15,000,000-.
- (b). General damages: Shs.12,000,000-.
- (c). Interest on (a) and (b) above at the rate of 23% per annum from the date of judgment till payment in full.
- (d). Costs of the suit.