THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCCS NO. 112 OF 2014

HON. DAVID PULKOL::PLAINTIFF

VERSUS

HON. AUMA JULIANA MODEST::::::::::::::::::::::::::::::::::DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

JUDGMENT:

The Plaintiff Hon. David Pulkol sued the Defendant Hon. Auma Juliana Modest for a declaration that the Defendant had fundamentally breached a sale agreement they had entered into on the 31st of May 2012 in respect of purchase of land. He also sought an order for refund, general damages, interest on the contract amount at 27% from the date of contract until payment in full. He also prayed for costs.

The background to this action is easily discerned from the pleadings. The Plaintiff decided to venture into buying and selling land. He came into contact with a prospective buyer of land who wanted 12 acres in the central part of Buganda. Scouting around the Plaintiff fell upon the Defendant who was well known to him and she told him that she had 12 acres of land for sale. On the 31st day of May 2012 the Plaintiff and the Defendant entered into an agreement for purchase of 12 acres of land located in Bukimu Bulemezi East Buganda, **Exhibit P.2**.

The Agreement specifically provided that the land was 12 acres and free of encumbrances. The purchase price was agreed at UGX 324,000,000/=. At the signing of the agreement the Plaintiff paid the Defendant UGX 130,000,000/=. The balance of UGX 194,000,000/= was to be paid to the vendor upon the production of the certificate of title in respect of the contract land. It was agreed that the vendor would hand over vacant possession upon receiving the full purchase price. In the same agreement the vendor guaranteed a good impeccable and

unimpeachable title to the property free of encumbrances, third party interests, clogs or disputes.

On the 30th day of June 2012 the Plaintiff paid the remaining UGX 194,000,000/= subsequent to the payment, the Plaintiff carried out a survey and found out that the land was less than the 12 acres and was also encumbered with squatters. The Plaintiff then asked the Defendant to make good the deficit of land or refund its monetary equivalent by the 7th of January 2013. The rectification sought was not done.

Contending that the Defendant had misrepresented the acreage of the land in question the Plaintiff brought this action to enforce a repudiation of the contract.

In her defence, the Defendant denied liability stating that the purchase of land by the Plaintiff was done through his broker William Chemonges. That the agreement for sale of the land to the Plaintiff was entered on the basis of willing buyer willing seller.
She denied ever misrepresenting the acreage. The Defendant further stated that she did not know at the time she purchased the land that it was less by 1.5 acres. That the land was not encumbered and there were no squatters. That she had worked hard to compensate the Plaintiff for the 1.5 acres missing on the title but the land office had frustrated her and she was now ready and willing to give the Plaintiff a certificate of title for 1.5 acres. A copy of the title was presented to Court but still in her own names. She also stated that there was no loss, inconvenience and/or mental anguish suffered by the Plaintiff.

The issues agreed by the parties are;

1. Whether the Defendant is in breach of contract.
2. Remedies.

From the evidence it is not in dispute that the two parties entered into a written agreement whereby the Plaintiff agreed to buy land measuring 12 acres at the purchase price of UGX 324,000,000/=. There is also no dispute that the Plaintiff paid the full purchase price. The foregoing position is well supported by the agreed facts in the Joint Scheduling Memorandum and the evidence of both the Plaintiff and the Defendant.

It is clear also from the evidence on record that the Defendant was to hand over land which was unencumbered. The parties further agreed that the land would be 12 acres in size. The two parties all agreed that in case there was a defect in title or warranty or lack of ownership of the vendor in respect of land being sold, or in case of any dispute or claim by any other party relating to the said land or any part thereof, then the seller would refund to the purchaser the full purchase price at the prevailing market value together with all other costs incurred or incidental thereto.

The Plaintiff claims that the Defendant breached the agreement. Firstly, because there were squatters on the land which was an encumbrance and secondly, because although the Defendant said she was selling 12 acres of land, the property she handed over to the Plaintiff was less by 1.5 acres.

In a bid to prove that there were squatters on the land, the Plaintiff testified that there were many squatters and other people claiming interest on the said land. That he brought this situation to the attention of the Defendant but the Defendant did nothing to resolve the matter. Further, that his Advocates wrote letters to the Defendant asking her to sort out the issue of squatters but she did not respond.

The Plaintiff called two witnesses whom he claimed were squatters. One of the witnesses PW.2 Yusuf Mulumba who was a resident in the area where the land was had in his evidence in chief stated that the Defendant was aware of his status as a squatter on that land. He alleged that the Defendant had never compensated them for their crops but when he was subjected to cross-examination this same witness denied being on the land in question. He said he had seen the Defendant in their village but did not know her well. Further that he had never conducted any negotiations with her and that their talk lasted only five minutes. He stated; *"I do not have a kibanja on Hon. Auma's land. I have a kibanja on Geofrey's land. I have crops on Geofrey's land."*

PW.3 Benard Kabanza who was also called by the Plaintiff had also in his evidence in chief stated that he had rejected the Defendant's offer of giving him title on a piece of land in exchange of his kibanja. During cross-examination he also changed and said he did not know the Defendant and that the land he was staying on was given to him by one Geofrey five years ago. That it was Geofrey who was the holder of title. The fact that the land title was in Geofrey's name on its own indicates that they were not squatting on the Defendant's land.

The evidence of PW.2 and PW.3 throws in doubt the Plaintiff's assertion that there were squatters on the property.
I therefore do not find that there were squatters on the property.

The other complaint by the Plaintiff was that the property/land was not 12 acres as had been represented by the Defendant. The Plaintiff stated that the agreement was for the purchase of 12 acres but when he cross checked he found that the land was less by 1.5 acres.

That the land was less than 1.5 acres was conceded to by the Defendant. In her testimony she said; *"the land I sold is less by 1.5 acres."* That she had bought it as 12 acres and that she had promised to compensate to add to the land to make 12 acres. She said she discovered that it was less by 1.5 acres in 2013. That since she discovered and was willing to give him more land, his repudiation of the contract was unjustified.

That there was a breach of contract is not in doubt. It was her duty before selling the land to find out how much land she owned. It was agreed that the land would be 12 acres and anything less even by a decimal amounted to breach because the payment would be for 12 acres. The Defendant in her testimony said she did everything possible to ensure that the Plaintiff got his remaining 1.5 acres but these were several years from June 2012 to 2017 when she got the title in her names long after the filing of the suit.

The Plaintiff's reasons for purchase of the land was to also sell to a buyer who was already in existence. In his testimony the Plaintiff stated that as a result of the breach he had made a demand to the Defendant to rectify the anomalies by availing the balance of the land or its monetary equivalent failure of which he would rescind the contract. This ultimatum would come to pass on 23rd December 2013 a year from the time he had paid the money. That the reason for obtaining the land had been a commercial venture and because that one had now passed he was no longer interested in the land.

The breach occurred in 2012 the Plaintiff made demands and close to two years later in 2014 is when he filed the suit. It is not until 2017 that the Defendant now comes up with a title in her names which she wanted to pass over to the Plaintiff. The Plaintiff contends that the intention of entering into the contract had expired. In my view, a stretch of almost 6 years is

too long for one to wait especially in circumstances where the purpose of buying the land was for a rapid economic return.

For those reasons, I find that the Plaintiff was given less than what he had bargained for and to rectify the wrong done by the Defendant took so long that the Plaintiff was justified in rescinding the agreement and demanding for a refund in the circumstances.

Turning to the remedies the Plaintiff sought a declaration that the Defendant had fundamentally breached the contract she entered into with the Plaintiff entitling him to rescind the contract.

It has been found herein above that the agreement they entered into was for 12 acres. Further that the land was found to be less than 12 acres. That the chance which was given to the Defendant to rectify the deficiency in the area of the land was not fulfilled.

On those grounds Court finds that the Defendant committed a fundamental breach justifying the Plaintiff to rescind the contract.
The other remedy sought was an order for refund of the purchase price. The Plaintiff having justifiably rescinded the contract he is entitled to a refund of the entire consideration he paid to the Defendant.

Turning to general damages it is a settled position of the law that these are awarded at the discretion of the Court and are presumed to be the natural and probable consequences of the Defendant's act or omission; ***James Fredrick Nsubuga vs Attorney General HCCS No. 13 of 1993.***
A Plaintiff who suffers damage due to the wrongful act of the Defendant must be put in a position he or she would have been in had she or he not suffered the wrong and when assessing the quantum of damages, Courts are guided by the value of the subject matter, the economic inconveniences that a party may have been put through and the nature and extent of the breach; ***Kibimba Rice Ltd vs Umar Salim SCCA No. 17 of 1993, Uganda Commercial Bank vs Kigozi [2002] 1 EA 305.***

In this case, Counsel for the Plaintiff submitted that the Plaintiff be awarded general damages of UGX. 200,000,000/=. Considering that the Plaintiff was deprived of the land he had purchased, deprived of making profit from the money he would have obtained from his

commercial venture once he sold the property together with the pain and anguish he must have gone through as he saw the desired commercial venture caving in and taking into consideration of inflation, I find a sum of UGX. 30,000,000/= as general damages appropriate. It is so awarded.

As for interest, the Plaintiff prayed for interest on the contract amount at a commercial rate of 27% from 31st May 2012 till payment in full and interest on all other monetary awards at Court rate.

It is trite that interest is awarded at the discretion of Court, but like all discretions it must be exercised judiciously taking into account all circumstances of the case; ***Uganda Revenue Authority vs Stephen Mabosi SCCA No, 1 of 1996***. It is important to note that an award of interest is discretionary and its basis is that the Defendant has kept the Plaintiff ought of the use of his money, had use of it himself, so he ought to compensate the Plaintiff accordingly; ***Harbutts Plasticine Ltd vs Wyne Tank & Pump Co. Ltd [1970] 1 ChB447***.

It is without doubt that the Defendant kept the Plaintiff out of the use of his money. The Plaintiff's Advocates came up with submissions that he had borrowed money from the bank. Parties are bound by their pleadings, the Plaintiff in this case never pleaded the issue of borrowing money to purchase the land in his Plaint. These submissions which were brought by the Plaintiff in a supplementary witness statement came late in time and it would be unfair to hold them against the Defendant who was not given a chance to rebut these claims in her Written Statement of Defence.

Counsel for the Plaintiff did not show Court any circumstances that would justify an award of 27% on the claims. I find this rate overly high. Nonetheless, the Plaintiff must have obtained such money from the bank and if not from the bank he was nonetheless deprived of its use.

Having considered all circumstances of the case, I find an interest rate of 18% per annum on the contract sum from date of filing being 18th February 2014 till payment in full appropriate. It is so awarded.

As for general damages interest is awarded at 6% per annum from date of judgment till payment in full.

The Plaintiff is also entitled to costs of the suit.

In conclusion judgment is entered in favour of the Plaintiff against the Defendant in the following terms;

a) That the Defendant has fundamentally breached the sale contract she entered with the Plaintiff on the 31st May, 2012 entitling the Plaintiff to rescind the contract.

b) The Defendant refunds UGX. 324,000,000/= being the entire consideration paid to her.

c) The Defendant pays general damages of UGX. 30,000,000/=

d) Interest on (b) at 18 % per annum from date from 18th February 2014 till payment in full and interest on (c) at 6% per annum from date of judgment till payment in full.

e) Costs of the suit.

Dated at Kampala this 23rd day of August 2019

HON. JUSTICE DAVID WANGUTUSI

JUDGE