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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

HCT-04-CV-CA-0019/2001

DONGO KOCHE SIMON…..……..APPELLANT

VERSUS

MBALE MUNICIPAL COUNCIL…….……RESPONDENT

BEFORE: THE HON. MR. JUSTICE RUGADYA ATWOKI

JUDGEMENT

This is a first appeal. It is from the decision of the Chief Magistrate Mbale, in which he entered judgement for the plaintiff/appellant and awarded him what he called nominal damages of shs 700,000/-, but declined to award him costs of the suit.

The facts from which the suit arose were as follows. In 1993 the defendant Mbale Municipal Council advertised its houses in Namakweke housing estate for sale. Priority was to the sitting tenants to purchase the units they respectively occupied.

The plaintiff was the occupant and sitting tenant of unit C3, while one Norah Kiwonga was the sitting tenant of unit C4. The two units C3 and C4 constituted one semi-detached house. The plaintiff applied for the two units C3 and C4. A sale agreement was executed between the plaintiff and the defendant Council. The plaintiff made full payment for the two units. However, subsequent to this transaction, the defendant offered to sell unit C4 to the sitting tenant therein Norah Kiwonga.

The plaintiff sued the defendant for a declaration that he was the lawful purchaser for value of the whole house comprising units C3 and C4, and that the sale to Norah Kiwonga of unit C4 by the defendant was null and void. He prayed for costs of the suit and any other relief.

The Defendant denied offering the house, unit C4 for sale to the plaintiff and contended that the plaintiff obtained it by fraud. Three issues were framed for determination by the trial court as follows;

(i) Whether there was any contract between the parties for the purchase of the house unit No. C4 Namakwekwe Estate.

(ii) Whether there was fraud on the part of the Plaintiff.

(iii) What remedies, if any, was the Plaintiff entitled to.

At the end of the hearing, the learned Chief Magistrate found in the first issue that there was no contract between the parties for the sale of house C4. In the second issue he found that there was undue influence, though not amounting to fraud. He awarded the plaintiffs the reliefs as above stated.

The plaintiff was dissatisfied with that decision and he filed an appeal to this court. Five grounds were set out in the memorandum of appeal as follows;

1. The learned Chief Magistrate erred both in law and fact in finding that there was no contract between the appellant and the respondent in the purchase of the house C4 Namakweke housing estate.
2. The learned Acting Chief Magistrate erred both in law and fact in finding that there was fraud on part of the appellant when he purchased house No. C4.

3. The learned Acting Chief Magistrate erred both in law and fact in that he did not evaluate the evidence before him correctly hence leading him to come to a wrong conclusion.
4. The award of nominal damages of shs. 700,00/- was wrong in law.
5. The learned Acting Chief Magistrate erred in law when he failed to award costs to the plaintiff even after awarding damages to the plaintiff albeit nominal.

At the time of hearing the appeal, Counsel for the appellant argued grounds 1 and 3 together, and the rest separately.

In the trial court, the Plaintiff adduced evidence to show that on 17/5/94 he made an application to purchase both units C3 and C4 Namakwekwe Estate. By a sale agreement duly executed by the Plaintiff and the defendant on 15/3/96 (exhibit P1) he was allowed to purchase the 2 units and he paid shs 3,396,100/= evidenced by receipts admitted as exhibit P.2.

The defence case, according to DW1 James Wanyenya Masaba the Assistant Town Clerk, was that the defendant Council did not offer the plaintiff the house C4. That he was entitled to purchase unit C3 as a senior driver to the Town Clerk and a sitting tenant of C3.

The witness contended that the plaintiff influenced the Municipal Council cashiers to acknowledge receipt of and receive payments for unit C4 without the approval of the Town Clerk. The Town Clerk admitted that his cashiers were negligent and accepted the payments for C4 without the supporting sale offer, an original allocation letter and a Rent Card or a hand written chit

from one Sodo forwarding him to the Lawyers to sign the Sale Agreement as was the procedure. The Town Clerk said that the defendant Council wrote to the plaintiff nullifying the sale of C4 but the plaintiff rushed to court instead of going for a refund of his money. That in subsequent committee meetings the Council offered the plaintiff and Norah alternative plots but they both refused and each stuck to C4.

I agree with Counsel for the appellant that the notice advertising its houses for sale by the defendant Municipal Council to its tenants was an invitation to treat. It was an invitation to treat by the eligible members of the public to indicate willingness to purchase the houses.

I do not however agree that the invitation was to the whole public. It was open only to those eligible. Eligibility was from being a sitting tenant to the house. According to the Town Clerk of the defendant Council, when the sitting tenant was not interested, willing or able to purchase such a house, the invitation would no longer be open to the eligible public. The property would revert to the Council, which would offer it to any other person.

Evidence that one was a sitting tenant was inter alia, possession of an original letter of allocation for the house and a rent payment card. Upon payment of 30% of the requisite amount, either the Town Clerk or one Paul sodo would issue the payee with a chit. This chit would be presented to the Counsel for the defendant, and an agreement of sale of the house would be executed.

According to the appellant, he was not the sitting tenant of house unit C4. According to the Town Clerk, the appellant was not in possession of an original letter of allocation for house C4, nor was he in possession of a rent payment card in respect of that house C4. The appellant did not deny or controvert this.

There was no dispute that the sitting tenant of house C4 was Norah Kiwongo. There was no evidence that this person Norah Kiwongo was not interested in, declined or failed to purchase house unit C4. In other words, the house did not revert to the defendant Council for offer to any other person including the appellant.

The question then was how the appellant got to pay for the same, and even secure a sale agreement. He testimony in the lower court was that he offered to purchase the unit by offering the purchase price. This was an offer, and once the price was accepted, the contract was completed. It was evidenced by the sale agreement.

It was argued for the appellant that the invitation to treat by the defendant, which gave priority to the sitting tenants did not exclude other members of the public from offering to purchase the same. The plaintiff/appellant testified that he agreed with the sitting tenant Norah Kiwongo that he would purchase unit C4, and he proceeded to do that.

With respect, that was wrong. It was not open to a sitting tenant to constitute herself as the offeror of the house as she had no locus standi to do so. She was a mere tenant in the property, just like the appellant himself, and so had

no capacity to offer the house to him, since she had no house to offer to him in the first place. The purported agreement between Norah Kiwongo the sitting tenant and the appellant, if ever there was such agreement, and I highly doubt that, was of no value or legal effect.

Secondly there was evidence from the Town Clerk that the house unit C4 was offered to and sold to Norah Kiwongo the sitting tenant. That evidence was obviously truthful, because this suit was instituted for among other orders, a declaration that the sale of the house C4 by the defendant to Norah Kiwongo was null and void.

If then the same Norah Kiwongo agreed with and allowed the appellant to purchase the house unit C4, assuming she had the locus to do so, how come that she paid for the same house leading to this dispute. That made the appellant a liar in that respect.

The question remains how the appellant got to pay for the house in spite of the fact that he was not in possession of the requisite qualifications for purchase of such a house, and the defendant Council did not offer him such a house, as there was no rejection of the same by the sitting tenant.

The defendant pleaded that there was fraud on part of the appellant in acquiring the house. The learned trial magistrate found that there was undue influence, not amounting to fraud. The appellant in the 2nd ground of the memorandum of appeal complained that the trial magistrate erred when he found that there was fraud. The trial magistrate stated in paragraph 2 on page 3 of the judgement as follows; 'much as it falls short of fraud, I am of the

considered opinion that the plaintiff exploited the weaknesses in the system and managed to pay for C4 and was allowed to sign the sale agreement without scrutiny of his papers.'

Clearly the magistrate did not make any finding that there was fraud. He stated that there was undue influence, which did not amount to fraud. It was therefore wrong for the appellant to base the 2nd ground of the memorandum of appeal on a non-existent finding. That ground would, for that reason be dismissed.

I will however analyse the evidence and decide whether there indeed was any undue influence in the execution of the sale agreement by the appellant. I will for clarity mention here that at the end of this analysis, I will have dealt with the first three grounds of appeal.

The appellant did not have the pre requisite qualifications to apply for the house. Before the intending purchaser could be accepted to pay, the cashiers had to be satisfied that the applicant had an original letter of allocation of the house intended to be purchased, and a rent payment card. He had none of these. He was not the sitting tenant of that house C4.

He nonetheless proceeded to pay for the house. He paid money to the cashiers of the defendant whom he knew very well. They obviously knew him very well as the driver of their boss, the Town Clerk. He had worked in the Council for more than 30 years. So, even without the requisite documentation, these overwhelmed cashiers accepted appellant's money, for the house.

The Secretary to the Counsel for the defendant testified as DW2. She told court that she accepted appellants' papers even though he lacked the requisite documents. This was contrary to the procedures. He did not have the chit from the Town Clerk or Mr. Sodo as required. The appellant no doubt overwhelmed these secretaries and cashiers to do his bidding. The appellant was a long time worker of the defendant. He was the driver of no less than the chief Executive of the institution, the Town Clerk. He commanded seniority in the Council, having worked there for as many as 40 years.

He was no doubt aware of the procedures of purchasing these houses. He flouted them and used his influence to secure an advantage to get a sale agreement signed. He exploited the weaknesses of the system, which he knew very well to his advantage. I agree with the trial magistrate that the appellant used undue influence to secure the sale to him of the house unit C4.

In Hodgins *Law of Contract in East Africa* at page 12, it is stated that a contract is formed by an offer of one person, which is accepted by another. Both parties must have legal capacity to contract, and must intend that their behaviour will result in a legal contract. There must be consideration.

The burden was on the plaintiff/appellant to prove on a balance of probabilities that he was freely entered into a contract with the defendant fore the purchase of unit C4. There had to be a meeting of the minds. According to Sheridan J., in *Shah v. Attorney General* [1969] EA 261, in order to show that consideration was bad, one had to show that there was

something amounting to undue influence. In my opinion the contract of sale that was concluded did not meet the intentions of both parties. The appellant purported to accept and pay for that which the defendant Council did not offer. There was no consensus ad idem.

It was clear from the evidence of the Assistant Town Clerk that the Council policy was to give priority to its sitting tenants. The Plaintiff told lies to court that Norah Kiwongo had no interest in the unit before he paid. When Norah expressed interest and paid for unit C4 the plaintiff insisted that she had no legal interest in the unit. Yet he knew fully that she was the sitting tenant.

The Town Clerk wrote to him explaining that his payment for C4 was in error and offered other plots, but the plaintiff insisted on specific performance. He was aware that he did not have the requisite papers upon which he would have been given priority to purchase C4.

He was an insider and used his position to influence unauthorised payments contrary to the council procedures and policy. In *John Katarikawe v. William Katwiremu & Anor* (1977) HCB 187, it was held that dishonest dealing in the land would amount to fraud. In this case there was obvious dishonest dealing in the suit property by the appellant, which the learned trial magistrate held to amount to undue influence. I respectfully agree. I therefore find, as did the learned Chief Magistrate that there was no contract between the appellant and the defendant. I am not satisfied that the trial magistrate failed to analyse the evidence and that he thereby came to a

wrong decision, which caused a miscarriage of justice. That disposes of the first three grounds of appeal.

The 4th ground of appeal was that the award of nominal damages to the plaintiff/appellant was bad in law. Nominal damages are awarded where the action was a proper one by the plaintiff, but he has not suffered any actual damage, and does not desire any monetary benefit from the action. The fact that he has established his right or cleared his character is to be seen as adequate. *Odgers on Pleadings and Practice* 22nd Ed. Chap.21 page 302.

I agree with Counsel for the appellant that it was not open to the learned Chief Magistrate to make an award of damages to the plaintiff, once he held that there was no contract between the plaintiff and the defendant, nominal or otherwise. *Njereketa v. Director of Medical Services* [1950] EA 60. By making the finding that there was no contract between the parties, the court in effect held that the plaintiff brought upon himself whatever befell him. He was therefore not entitled to any form of compensation by way of damages, nominal or otherwise from the defendant.

Equally important in this aspect, there was no claim for damages in the plaintiff's pleadings. The court awarded to him that which he did not ask court to do. It was therefore not entirely out of turn, though I must admit it is extremely rare if a little surprising that his Counsel found fault with the trial court for making such an award to the plaintiff. I will accordingly allow that ground of appeal, and disallow the award of what the Chief Magistrate referred to as nominal damages. I was not persuaded that I should retain that award under the prayer of 'any other relief'.

The last ground of appeal was the refusal by the Chief Magistrate to award the appellant costs of the suit. The court gave reasons for its decision in these words. 'Since it is the plaintiff who refused a negotiated settlement outside Court for no good reason, I decline to award him costs of the suit. Each party was in the wrong to a given extent and shall bear own costs. I so order in the interest of Justice.'

Under S. 27 of the Civil Procedure Act, award of costs is at the discretion of the court, but the discretion must be exercised judicially. The learned trial Magistrate observed that there was an attempt to settle this matter out of court, but the plaintiff refused. An offer was made to him for an alternative plot, considering that he was never a sitting tenant in house unit C4, and errors had been made regarding the payment for that house, which errors were in large measure attributable to him. But according to the Town Clerk, the offer was rejected, and the plaintiff instead 'rushed' to court.

On the other hand, the court observed that the defendant Council was not entirely blameless. They allowed their cashiers to accept money from the plaintiff, when they knew or ought to have known that he was not the sitting tenant of unit C4, thereby giving him false hope that he had lawfully purchased the unit C4.

For those reasons the court of first instance in its discretion decided that each party was to a certain extent not free from blame. The court decided that each party should meet its own costs. I found that court exercised the discretion judicially. I did not find any reasons to interfere with that exercise of discretion. That ground therefore fails.

This appeal therefore fails. As I decided earlier, the award of nominal damages was awarded in error. It is accordingly struck out. The other orders of the trial court are undisturbed. The respondent shall have the costs of this appeal.

RUGADYA ATWOKI

JUDGE

25/05/2005.

Order: The Registrar of the court shall deliver this judgement to the parties.

RUGADYA ATWOKI

JUDGE

25/05/2005.