THE REPUBLIC OF UGANDA

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

CIVIL SUIT NO. 029 OF 2017

PAMELA AKELLO LEERS:: PLAINTIFF

VERSUS

GLADY'S N. BWANIKA:: DEFENDANT

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The plaintiff's case is for recovery of USD 30,000 being the balance on the USD 35,000 as refund and reimbursement for expenses and costs incurred by the plaintiff in entering into of the botched sale agreement dated 17th day April 2014 for sale of land comprised in Kyadondo Block 221 Plot 2188 at Naalyako- Naalya at USD 350,000 which agreement was breached by the Defendant when she failed to pay as per the agreement and later terminated the same sometime in October 2016.

That the Defendant went ahead and paid USD 5,000 on the 22nd day of November, 2016 leaving the balance of USD 30,000 which she promised to pay within a period of 5(five) Months starting from the end of January 2017. But she refused to pay as promised and the Plaintiff filed this suit for recovery of USD 30,000, interest on it and cost of the suit.

The defendant contends that she entered into a purported sale agreement with the plaintiff dated 17th April 2014 to purchase land and a house thereon comprised in Block 221, plot 2188 land at Naalyako (Naalya Estates) measuring approximately 0.039 at a total cost of USD 350,000. The payment was to be done in instalments.

The said agreement established two legal relationships namely; a vendor-purchaser relationship and a landlord-tenant relationship. The defendant paid a commitment fee of USD 7500 in an understanding that the sale and conveyance of the property will be complete upon paying the 1st instalment at a future date. As it were, she did not get money, no deposit was done, and hence no sale and conveyance occurred.

The plaintiff consequently terminated the purported agreement by a notice dated 25/04/2016.By so doing, the plaintiff restituted herself as the legal owner of the property to date and the defendant elected to remain a tenant to date.

The defendant contends that each party was to bear their own costs and as such the claim is illegal, unconscionable and an unjust enrichment. She also contends that there was no sale and conveyance thus no such fee would have been paid to the plaintiff's advocate.

AGREED FACTS

1. The defendant entered into a sale agreement with the plaintiff on the 17th /04/2014 to purchase the plaintiff's residential house comprised in Kyadondo block 221 Plot 2188 at Naalya at a purchase price of USG$ 350,000.

2. The defendant paid a commitment fee of USD$7,500 to the plaintiff in respect to the sale agreement.

3. The defendant paid USD$5,000 being part of the payment of reimbursement of USD$35,000

AGREED ISSUES.

(1) Whether or not the plaintiff is entitled to reimbursement of USD$ 35,000?

(2) What remedies are available to the parties?

At the trial both parties agreed to file witness statements and the plaintiff lead evidence of two witnesses while the defence led only one witness in support of their case.

Representation

The plaintiff was represented by Ndawula Slyvester while the defendant was represented by Kisiki Ben

Whether or not the plaintiff is entitled to reimbursement of USD$ 35,000?

The plaintiff's counsel submitted that the Plaintiff is entitled to a reimbursement of USD 30,000 as a result of the breach of the sale agreement dated 17th/April/2014 by the Defendant.

According to section 61 (1) of the Contracts, Act 2010 it is provided that where there is a breach of the contract, the party who suffers the breach is entitled to receive from the party who breaches the contract, compensation for the loss or damage caused to him or her.

Also section 62 of the Contracts provides that where a contract is breached and a sum is named in the contract as the amount to be paid in case of a breach or where a contract contains any stipulation by way of penalty, the party who complains of the breach is entitled whether or not actual damages or loss is proved to have been caused by the breach to receive from the party who breaches the contract, reasonable compensation.

According to Wikipedia, reimbursement is an act of compensating someone for an out of pocket expense by giving them an amount of amount equal to what was spent.

The sale agreement which was breached and terminated by the Defendant provided for a refund/ reimbursement of USD 35,000 to be paid by the Defendant to the Plaintiff in case of failure to hounour her obligations under it. The Defendant pursuant to that above clause in the agreement paid USD 5,000 on the 22nd/ Nov/2016 leaving a balance of USD 30,000 and undertook to pay the same within a period of 5 (five) months.

It was counsel's submission that the agreement was drafted by the law firm of Messers Kimanje Nsibambi Advocates who represented the Plaintiff, this fact is admitted by the Defendant and she also confirmed that PW2 acted as the agent of Plaintiff. This confirms that the Plaintiff incurred expenses/ costs when entering into this Agreement with the Defendant, which the Defendant must refund/ reimburse as provided for in Section 62 of the Contracts, 2010 since the Defendant agreed to pay these costs/ expenses in case of failure/ breach of the above agreement.

The defendant's counsel submitted the plaintiff is not entitled to reimbursement of USD $30,000 because she did not discharge her burden of proving the same. The burden of proof is at all times on the party who alleges a claim on balance of probabilities as per **Sections 101, 102, 103 and 104 of the Evidence Act cap 6.** The plaintiff's failure to appear in court casts a strong doubt on the claim on a reasonable hypothesis of the facts. She did not discharge her burden of proving any of the facts in her plaint nor did any of her witnesses do so. We are guided by the persuasive reasoning of **Hon Justice Stephen Mubiru in Olanya James v Ociti Tom & 3 others Civil Appeal No.0064 of 2017** who stated that,

"*The question as to whether the plaintiff has discharged the burden of proof on a balance of probabilities depends not on a mechanical quantitative balancing out of the pans of the scale of probabilities but, firstly, on a qualitative assessment of the truth and/or inherent probabilities of evidence of the witnesses and, secondly an ascertainment of which of the two versions is more probable. The enquiry is two fold; there has to be a finding on the credibility of the witnesses and there has to be balancing of the probabilities. Application of Judicial experience requires the court to reject factual allegations if the hypothesis put forward to account for the proved facts is in itself extremely improbable. The Court may reject any hypothesis in absence of evidence supporting it. When the law requires proof of any fact, the Court must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of mere mechanical comparisons of probabilities independent of any belief in its reality….*

It's the law of evidence that the party who bears the burden must produce evidence to satisfy it, or his or her case is lost. The probabilities must be high enough to warrant a definite inference that the allegation are true. In a civil suit, when the evidence establishes conflicting versions of equal degrees of probability, where the probabilities are equal so that the choice between them is mere matter of conjecture, the burden of proof is not discharged… The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the trier of fact may reasonably be satisfied… The law does not authorize Court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or others." (P.6,7).

Applying the above excerpt, the plaintiff filed this suit for conjecture and guesses. These are simply mechanical comparisons on baseless allegation with no proof payment to guide Court on a definite conclusion as to the existence of the allegation. There is no valid agreement of sale of the said property to give rise to the claim. Failure to adduce acknowledgement of payment of $35000 was confirmed by PW1 and PW2 in during cross examinations. Besides, there was no sale and conveyance of the property and thus no such payments accrued. The only consideration that was received was USD $7,500 as a commitment fee.

The agreement was to commence upon payment of the 1st deposit of 100,000 USD which was not done. Thus the defendant did not get any interest in the property and the property is still registered in the plaintiff's name hence the doctrine of restitution. She can sell the same to another person as she wishes. Had the 100,000 USD been deposited by the defendant, the defendant would have acquired an interest in the property and the plaintiff would have been entitled to the balance, and only then would the defendant be in breach.

More so**,** even if the sale or conveyance had taken place, **clause 10 of the said agreement (PE1), shows that t**he plaintiff was responsible to pay her legal, brokerage fees and disbursements to her lawyers. The same was confirmed by her own Lawyer PW2 in cross examination as per paragraph 18 of his witness statement. He had no instructions to act on behalf of the defendant.

In light annexure PE2 exhibit (payment plan) the same is voidable as far as **section 19(2) of the Contracts Act, No.7 of 2010** is concerned. This section prohibits enforcement of agreements whose objects are unlawful and no suit can be entertained to enforce the same. As seen from the foregoing submission, the $35000 was not paid at all. It's a fictitious payment and even if it had been paid, it's illegal and unlawful to the extent that the plaintiff never received $350,000 from which the 10% legal, brokerage and disbursements to the PW2 was to be paid. The payment is unconscionable. Furthermore, the defendant contends that the payment of the USD$5000 was paid in error to a one Jimmy Awanga the plaintiff's lawyer and "purported agent" as per paragraph 20 of her witness statement resulting into a **Fraudulent Misrepresentation by PW2. Misreprestation was defined in Francis Paul v Namwandu Muteranwa Civil No.20 of 2014 to mean,**

"Unintentionally or sometimes negligently a false representation made verbally, by conduct, or some times by non-disclosure or concealment and often for the purpose of deceiving, defrauding or causing another to rely on it detrimentally."(P.3)

PW2 fraudulently misrepresented the defendant when he told her that the payment plan (PE2) was part of the deposit to the purchase price. The defendant did not in any way intend to pay $5000 as part of the $35000 as reimbursements under Clause 7 of PE1 as her understanding was that each party was to bear its own costs. A payment plan ought to fulfill the tenets of a valid contract under the Law. PE 2 emanates from PE1 and clause 8 of the same provides that PE1 contains the entire agreement and any amendment of the same ought to be writing and signed by both parties to PE1. The agreement in question (PE2) is signed by the defendant and one Jimmy Awanga who was not party to PE1. Thus this agreement cannot be relied upon by the plaintiff because she was not party to it. Each party under PE1 were to bear its own costs.

It is the evidence of PW1 that the legal fees were paid to their lawyer. Thus the agreement with the defendant did not include paying plaintiff's legal fees because the plaintiff's lawyers did not have any legal relationship with the defendant.

More so, it is clear from the evidence at trial that the botched land sale agreement was a memorandum of understanding with the option of codifying into a binding upon deposit of the first instalment as per the defendant's witness statement, paragraphs 9, 10 and 11. During cross examination, the defendant agreed to have signed the agreement (PE1) but she did not understand the legal implications of the same. She trusted PW2 who told her that it was fine as a legal technical person though representing the plaintiff. She believed him as a lay person not technical in legal matters. She was not legally represented and her understanding was that a sale could occur at a future date agreeable between the parties when she deposits the 1st instalment as per her witness statement when read as a whole.

Notable though is that in contractual obligations, contracts are interpreted strictly against the maker or draftsman in as far as the ambiguities in such documents are interpreted and construed hence **the contra proforentum rule as per Justice Madrama's in Nagoya Co. ltd v The Registered Trustees of Kampala Archdiocese, Civil Suit No. 707 of 2015**. His Lordship while resolving the matter in favour of the defendant due to the ambiguities of the document drafted by the plaintiff thus stated,

"In interpreting documents, ambiguities are to be construed unfavorably to the drafter…The effect of this rule is that, where, as in this case, the contractual language is capable of two alternative interpretations, then it must be construed against the party which drafted the contract. PE1 was drafted by the plaintiff's lawyers and it is attempting to use the said ambiguity in its favour to the detriment of the defendant…" (P.8)

His Lordship then concluded that,

"*The loss which the plaintiff claims to have incurred was self-inflicted and must lie where it has fallen." (P.8)*

We wholly associate our submissions with his Lordships reasoning persuasively that PE1 in this case too was drafted by PW2, the plaintiff's lawyer and in light of clauses 7, 8 and 10 of the said PE1, the ambiguity thereof should be resolved in

favour of the defendant. The claim by the plaintiff herein is self-inflicted and the damage should fall on her hence the ***latin maxim "damnum sentit dominus" meaning that the damage falls on the owner.***

By the time PW2 drafted Clause 10 of the agreement, Clause 7 was still fresh in his mind and thus the intention is derived from the preciseness, unambiguous and unequivocal language used in clause 10 that costs regarding the transaction were to be borne individually by all parties. For this reason, clause 8 allows severability of clause 7 which is unenforceable against the defendant in the circumstances. As such the plaintiff is not entitled to the refund of the fees she is claiming because the fees claimed ought to have been borne by her. The claim is an unjust enrichment on the part of the plaintiff. The plaintiff has also not provided any proof that this money was ever paid. Parties in Examination in chief, cross examination and reexamination all agreed that each party was to bear its own costs.

The defendant avers further that she did not at any time terminate PE1 illegally. PE1 was terminated by the plaintiff through her lawyer Jimmy Awanga in conformity with Clause 2 of the agreement, that in case the defendant failed to pay the purchase price, she would remain a tenant. She has since paid all her tenancy fees since then.

In conclusion, the plaintiff is not entitled to reimbursement of United States Dollars Thirty Thousand (USD $30,000) because she did not discharge her burden of proving the same and should be dismissed

Determination

The plaintiff entered into an agreement of sale of a house and the said contract contained a clause for payment of costs. Paragraph 7.3(ii) provided as follows;

"*Additional costs would also require to be reimbursed to cover the costs incurred by the vendor as a result of initiating and terminating the transaction. Specifically, these costs include USD $35,000 being property brokerage and legal fees, as well as reasonable travel expenses proof of which shall be required*"

The plaintiff's witnesses testified that the contract did not take off since the defendant never paid any amount as purchase price. The rider clause 7.3 provides;

In the event that the purchaser fails to meet her obligations under this Agreement, specifically in connection with the purchase price in accordance with clause 2.0 of this agreement, the vendors shall be at liberty at any time thereafter upon one months' notice to terminate this Sale agreement and regard the tenant as tenant of the property from the date of occupation of the property.

It can deduced from the above clause, under interpretation of this contract the said clause could only be invoked after the defendant had made a part payment. It was basically providing for how to deal with money received as part-payment and the defendant fails to pay the next instalment or final instalment.

In the case of ***Wells vs Devani 2019, UKSC 4,*** Lord Briggs observed that;

"Lawyers frequently speak of the interpretation of contracts (as a preliminary to the implication of terms) as if it is concerned exclusively with the words used expressly, either orally or in writing, by the parties. And so, very often, it is. But there are occasions, particularly in relation to contracts of a simple, frequently used type, such as contracts of sale, where the context in which the words are used, and the conduct of the parties at the time when the contract is made, tells you as much, or even more, about the essential terms of the bargain than do the words themselves.

In ***Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*** **[2015] UKSC 72; [2016] AC 742**, the Supreme Court made clear that (i) construing the words the parties have used in their contract and (ii) implying terms into the contract, involve determining the scope and meaning of the contract; but construing the words used and implying additional words are different processes governed by different rules. In most cases, it is only after the process of construing the express words of an agreement is complete that the issue of whether a term is to be implied falls to be considered. Importantly for present purposes, Lord Neuberger also made clear (at paras 23 and 24) that a term will

only be implied where it is necessary to give the contract business efficacy or it would be so obvious that "it goes without saying.

If the said clause is interpreted independently it would not make sense and would be an absurdity. If a party failed to even pay any single installment to effectuate the contract then it would be outrageous to invoke the clause for payment of the alleged additional costs.

Secondly, the plaintiff had a duty to prove his claim for additional costs in order to become entitled to the same. It was not God given that the plaintiff becomes entitled to free money and yet the transaction had not gone through.

The plaintiff has failed to adduce any evidence for the alleged additional costs and both witnesses who testified did not have any single document to prove the payment for the legal fees and brokerage fees as contended in the plaint.

This issue is resolved in the negative. This case is dismissed with no order as to costs.

Dated, signed and delivered be email and whatsApp at Kampala this 22nd day of May 2020

SSEKAANA MUSA
JUDGE