



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL CASE NO. 4 OF 2018

(FORMERLY NAIROBI ELC CASE NO. 1126 OF 2016)

MIKOOH EXQUISITE LIMITED..... PLAINTIFF

VERSUS

SIMPLE HOMES DEVELOPMENT

CONSORTIUM LIMITED.....1ST DEFENDANT

LILLIAN WANRUKWARO.....2ND DEFENDANT

SIMPLE HOMES COOPERATIVE SOCIETY LIMIT...3RD DEFENDANT

JUDGEMENT

Introduction

The Plaintiff in this matter instituted the suit by a Plaint dated 14th September 2016 at the Environment and Land Court in Nairobi. The Plaintiff was represented by the firm of Kihara and Wyne advocates led by Dr. Mutuma while the Defendants were represented by Kairu Mbuthia and Kiingati Advocates. By the end of the Pre-Trial processes, the court noted that the Defendants had failed to comply with Order 11 of the Civil Procedure Rules, 2010 despite being given adequate time to do so. Citing failure by the Defendants to instruct them, the Defendants advocates ceased acting on their behalf. The suit was transferred to Kajiado within the jurisdiction of this court. No other firm came on record for the Defendants despite them being informed of the existence of this matter by way of substituted service. Consequently, in line with Order 12 Rule 2 of the Civil Procedure Rules, the Plaintiff's case proceeded undefended.

The Plaintiff's case was argued through an Amended Plaint dated 12th April 2018. Additionally, the Plaintiff called 3 witnesses, Kenrick Maina Miako, Eunice Mpenda and Isaac Gabriel Wango Opondo. Their testimonies mirrored the averments in their witness statements all dated 18th June 2018 and filed on even date. Further reliance was placed on documentary evidence availed by the Plaintiff.

At the close of the Plaintiff's case, Counsel for the Plaintiff filed submissions dated 20th July 2018.

The Plaintiff's Case

The Plaintiff is a Limited Liability Company duly incorporated under the provisions of the Companies Act, Cap 486 laws Kenya (now repealed).

The 1st Defendant is a Limited Liability Company duly incorporated under the provisions of the Companies Act, Cap 486 laws Kenya (now repealed). The 2nd Defendant is the Chief Executive Officer of the 1st Defendant while the 3rd Defendant is a Cooperative Society duly registered under the Societies Act.

The Plaintiff is the owner of two adjacent pieces of land known as L.R. No KJD/OLEKASASI/1441 and KJD/OLEKASASI/1442 where it was in the process of developing it by erecting apartments known as La Casa Luxury Apartments. The Defendants were employed as agents of the Plaintiff with specific instructions to market for sale the apartments erected on the said piece of land.

According to the Plaintiff, using the purported success of previous development namely Apex Residence, the 1st and 2nd Defendants misrepresented to the Plaintiff that the 3rd Defendant had ready members to buy out all their available units as they were not able to meet the demand of their members and that they had already sold out all the units of a development in Kitengela called Apex Residence. The 1st and

2nd Defendants planned to sell the Plaintiff's project in a similar fashion.

According to the Plaintiff, the particulars of misrepresentation were that the Defendants misrepresented themselves by stating that they operated a legitimate sales and marketing Home Ownership Company and Cooperative; that the Defendants had ready buyers for the Plaintiff's development namely Juja South Estate; that the buyers would pay 5% of the purchase price of the units and the 3rd Defendant would pay the remaining 95%; that the buyers would be introduced to the Plaintiff upon signing the agreement and finally that the monies collected would be released as soon as the Plaintiff signed the agreement.

The Plaintiff averred that on the basis of the foregoing representations, on or about the 30th of May, 2016, it entered into an agreement for the sale and marketing of La Casa Luxury Apartments with the 1st Defendant. Pursuant to the said agreement, the 1st Defendant through the 2nd Defendant promised to finance the Plaintiff's development through the 3rd Defendant's Home Purchase Plan model.

According to the Plaintiff, the 1st and 2nd Defendants used the Plaintiff's development in a marketing campaign to ask prospective purchasers to make bookings on the development by paying deposits to secure units in the said development.

The Plaintiff averred that it found out that contrary to the Defendants assertions, they had not successfully marketed or sold a single unit in the said development. As such, the Defendants made these representations fraudulently and either well knowing that they were false and untrue or recklessly not caring whether they were true or false. The Plaintiff averred that together with other developers, they issued a notice to the public informing them that they had terminated the services of the 1st Defendant.

It is the Plaintiff's case that while it had not received any sums from the Defendants as purported payments from prospective buyers of the said development, it had instead suffered and continues to suffer immense reputational damage as a result of the actions of the 1st and 2nd Defendant. Additionally, these actions of the Defendants have exposed the Plaintiff to litigation from members of the public that had paid deposits to the Defendants towards the purchase of the units available in the development. It was further averred that the Defendants had purported to unilaterally terminate the contract without any reference to the Plaintiff.

According to the Plaintiff, the particulars of breach of contract by the Defendants included purporting to unilaterally terminate the contract without any reference to the Plaintiff, failing to market the Plaintiff's development as stipulated in the contract between the parties and failing to remit and/or account to the Plaintiff for all the monies had and received from the potential buyers of the Plaintiff's development. It was averred that this breach by the Defendants had caused the Plaintiff to suffer loss and damage to its reputation in addition to losing business.

On the basis of the reasons enumerated above, the plaintiff prayed for judgement in its favour for: Rescission of the said contract; Punitive damages for misrepresentation; An order for taking of accounts as against the defendants; An order to the effect that the Defendants remit to the Plaintiff all monies received in connection with the subject of the contract and Costs of this suit.

Plaintiff's Submissions

Counsel for the Plaintiff Dr. Mutuma formulated four issues for determination by this court to wit:

- a. Whether the Defendants fraudulently induced the Plaintiff into a contractual relationship.*
- b. Whether the Defendants breached the fiduciary duty owed to the plaintiff*
- c. Whether the 2nd Defendant is personally liable despite being a director in the 1st Defendant Company.*
- d. Whether the Plaintiff suffered damages on account of this misrepresentation and the ensuing fiduciary relationship.*

On the first issue of whether the Defendants fraudulently induced the Plaintiff into a contractual relationship, reiterating the circumstances of the case that amounted to the alleged misrepresentation, advocate for the Plaintiff submitted that the Defendants through untruths and bare lies knowingly led the Plaintiff to believe that they had ready buyers for their Development (La Casa Luxury Apartments). As a result, the Plaintiff was induced to enter into the agreement dated 30th May 2016. The Defendants actions were based on the intent to use the Plaintiff's Development to lend credibility to their scheme to defraud the public into depositing monies with them. Counsel cited **Wise v Fuller, 29 N. J. Eq. 262** for a definition of fraudulent misrepresentation.

Turning to the issue of whether the Defendants breached the fiduciary duty owed to the plaintiff, it was submitted that common law prescribes fiduciary responsibilities and duties to an agent including rendering and keeping proper accounts, paying sums received on behalf of the principal and exercising reasonable care in carrying out work. Such duties are founded on the bedrock of trust that the agent will not conduct himself in a manner that brings disrepute on the principal. By using the Plaintiff's Development to lure the unsuspecting public into depositing money with them under the impression that they were booking an apartment in the Plaintiff's Development, the Defendants abused this trust and breached these fiduciary duties placed upon them. It was further submitted that the Defendant breached the duty to exercise reasonable care and skill especially where the image of the Plaintiff was concerned with utmost impunity occasioning mistrust by the public and diminished reputation of the Plaintiff and its development.

On whether the 2nd Defendant ought to be held personally liable, Counsel submitted that using her capacity as a director of the 1st Respondent and official of the 3rd Respondent, the 2nd Respondent brokered the contract between the Plaintiff and the 1st Defendant. She then proceeded to recruit members into the 3rd Defendant Society and was the official spokesperson for the 1st and 3rd Defendants.

Counsel contended that although the general rule is that an agent of a disclosed principal cannot be held personally liable, there are exceptions to misrule. One such exception is said to arise when fraud and deceit are alleged. The 2nd Defendant was a critical actor participating in acts of fraud or collusion, misrepresentation and deceit. She is the one who approached the Plaintiff and made all the necessary representations fully aware that they were false and with the purpose of using the Plaintiff's development to defraud the public. According to counsel, the 2nd Defendant used the corporate face of the 1st Defendant Company to shield her identity in the fraud committed against the Plaintiff. As such, the 2nd Defendant ought not be afforded the benefit of the corporate veil with which to hide behind. In support of this submission, Counsel placed reliance on **Jones & Another v Upmana Another 119621 W.LR 833, Standard Chartered Bank v Pakistan National Shipping Corporation (2002) UKHL 43 and National Social Security Fund Board of Trustees v Ankhan Holdings & 2 Others.**

Regarding the issue of entitlement to damages, Counsel for the Plaintiff submitted that the Plaintiff was entitled to punitive damages as the Defendants' actions of using the Plaintiff's Development to defraud the public were calculated to give them material benefit and this was a valid basis upon which a claim for exemplary damages could be premised as set out in **Rookes vs Bernard.**

Further reliance was placed on the fact that by virtue of the negative association of its Development with the Defendants, the Plaintiff lost prospective purchasers. Their name was as soiled making it harder to sell the property impacting the Plaintiff's ability to break even on its enormous capital investment.

Based on the foregoing, Counsel urged this court to express its utmost displeasure with the conduct of the Defendant and prescribe the sum of Kshs. 25,000,000 punitive damages to take into account not only the opportunity costs incurred by the Plaintiff as a result of the Defendant's deliberate fraudulent intent but the Defendant's intent to enrich themselves from the public at the expense of the Plaintiff.

Advocate for the Plaintiff went on to submit that the Defendant's duty to account for all the money and property received on behalf of the Principal and to keep proper accounts was breached. As such, the court ought to make an order for taking of accounts as against the defendants and an order to the effect that the Defendants remit to the Plaintiff all monies received in connection with the subject of the contract and Costs of this suit.

In conclusion, Counsel submitted that the Defendants had no intention to sell the Plaintiff's development and instead they lured the Plaintiff into a contract upon false misrepresentations that they could sell its Development and used the Plaintiff's Development to collect money from the public; monies which they have refused to account. Accordingly, Counsel urged the court to grant the prayers sought in the Amended Plaintiff and punitive damages amounting to Kshs. 25,000,000 in favour of the Plaintiff.

Analysis and Determinations

I have dutifully considered the length and breadth of the Plaintiff's case as presented through the pleadings and humble submissions of Counsel. To my mind, the issues this court has to address itself to are as set out below:

e. Whether the Defendants induced the Plaintiff into a contractual relationship through fraudulent misrepresentation

f. If (a) is found in the affirmative, whether in the circumstances, the court ought to grant the reliefs sought by the Plaintiff

Allegations of fraudulent misrepresentation are at the heart of the dispute between the parties to this suit. Before going any further, I find it prudent to ascertain what amounts to fraudulent misrepresentation as well as the prevailing circumstances upon which the Plaintiff's claim for fraudulent misrepresentation is premised.

From the outset, I find it necessary to remind myself that it is trite that he who alleges, must prove. For the Plaintiff in this suit to be successful, its allegations of fraudulent misrepresentation must be corroborated by way of cogent evidence. In **Selina Mecca Wekesa v Kennedy Ellam Wekesa & 7 others [2014] eKLR** the court cited the decision by Amin J in **Koinange and 13 others vs. Koinange [1968] KLR 23 or [2008] KLR (Gender & family) 649**, where it was held that:

"(i). It is a well-established rule of evidence that whosoever asserts a fact is under an obligation to prove it in order to succeed. The party alleging fraud in this case the Plaintiffs had the burden of proving it and they had to discharge that burden."

If the foregoing is not instructive enough, it must be stated that given the weight carried by allegations of fraud, courts have ruled that the standard of proof ought to be higher than on a balance of probabilities. In **David Mburu Kamau V National Industrial Credit Bank Civil Suit 253 of 2007 [2010] eKLR** Maraga J (as he then was) held that:

"The standard of proof in cases of fraud is more than a mere balance of probabilities. As was stated by the Court of Appeal in R. G. Patel vs Lalji Makanji [1957] EA 314 at page 317 par. F: -

"Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."

Black's Law Dictionary 7th edition defines fraud as; ***"A knowing misrepresentation of the truth or concealment of material fact to induce another to act to his detriment. Unconscionable dealing; especially in contract law, the unconscious use of the power arising out of the parties' relative position and resulting in an unconscionable bargain- fraudulent."***

As was established in **Derry vs Peek (1889) 14 App Case 337**, fraud is proven when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth or (3) recklessly careless whether it be true or not.

Therefore, in the instant case I will examine whether representations were made; if those representations were false; did the defendant know that the representations were false or that the defendant made the statements recklessly without knowledge of their truth; that the fraudulent misrepresentations were made with the intention that the Plaintiff rely on them; that the Plaintiff did rely on the fraudulent misrepresentations and crucially that the Plaintiff suffered harm as a result of the fraudulent misrepresentation.

A preliminary issue arises regarding the liability of the Defendants. From the evidence at hand, the 1st Defendant is a duly registered company and the 3rd Defendant is a duly registered Co-Operative Society. The 2nd Defendant on the other hand is said to be a Chief Executive Officer of the 1st Defendant. The Plaintiff has sought to have the 2nd Defendant liable for the actions taken by the 1st Respondent taking the position that in instances of fraud, the agent may be deemed personally liable for fraud perpetrated by the Principal. On this I agree with the Plaintiff. Should the 1st Defendant be held liable for its alleged acts, the 2nd Defendant too will be found personally liable. My position echoes that taken by Ochieng J in **National Social Security Fund Board of Trustees v Ankhan Holdings & 2 Others Civil Case 268 of 2004(2006) eKLR**:

“While liability in tort may not necessarily be equated to liability arising from contract, I nonetheless hold the view that there is room for the applicable principles being applied to both categories of claim. In the case of STANDARD CHARTERED BANK V. PAKISTAN NATIONAL SHIPPING CORPORATION [2002] UKHL 43, Lord Hoffman said:

“And just as an agent can contract on behalf of another without incurring personal liability, so an agent can assume responsibility on behalf of another for the purposes of the Hedley Byrne rule without assuming personal responsibility. Their Lordships decided that on the facts of the case, the agent had not assumed any personal responsibility. This reasoning cannot in my opinion apply to liability for fraud. No one can escape liability for his fraud by saying “I wish to make it clear that I am committing this fraud on behalf of someone else, and I am not to be personally liable” Sir Anthony Evans framed the question ((2000)) 1 Lloyd’s Rep. 218, 230) as being “whether the Director may be held liable for the company’s tort.” But Mr. Mehta was not being sued for the company’s tort. He was being sued for his own tort and all the elements of that tort were proved against him. Having put the question in the same way he did, Sir Anthony answered it by saying that the fact that Mr. Mehra was a director did not in itself make him liable. That of course is true. He is liable not because he was a director but because he committed a fraud.”

I am convinced that there is a cause of action against the 2nd and 3rd defendants, not because they were directors of the 1st defendant, but because they may be committed acts of false misrepresentation or of fraud, on the plaintiff. If the plaintiff may prove its claims against the said two defendants, they may well be found liable personally.”

Turning to the 3rd Defendant, I find that no nexus has been established between the Plaintiff’s claim and the 3rd Defendant. The 3rd Defendant was not a party to the agreement which the Plaintiff alleges it was fraudulently induced to enter. As such, I cannot find any wrongdoing on the part of the 3rd Defendant.

The Plaintiff’s gravamen is that the following representations made by the 1st Respondent through the 2nd Respondent were false: that they operated a legitimate sales and marketing Home Ownership Company and Cooperative; that the Defendants had ready buyers for the Plaintiff’s development namely Juja South Estate; that the buyers would pay 5% of the purchase price of the units and the 3rd Defendant would pay the remaining 95%; that the buyers would be introduced to the Plaintiff upon signing the agreement and finally that the monies collected would be released as soon as the Plaintiff signed the agreement.

Even if this court was inclined to believe that the Defendants uttered false statements which the Plaintiff relied upon in entering an agreement with the 1st Defendant, the evidence on the record does not show that the Defendants accrued any material benefits as a result of their alleged fraud and neither does it support the notion that the Plaintiff suffered any damage as a result of the Defendant’s misstatements.

No evidence has been put forth in support of the claim that the 1st defendant took money on behalf of the Plaintiff and failed to account for it. The Plaintiff has not placed before the court the particulars of the persons who have made such payments to the 1st Defendant and the details of such payments. In fact, the only evidence in relation to this assertion is the testimony of the 3rd Plaintiff Witness who admitted to having paid money to the 1st Defendant but which monies were refunded.

There is no evidence regarding members of the public from whom the 1st Defendant is said to have been soliciting money using the Plaintiff’s housing project. The Plaintiff had also contended that the Defendants had exposed it to litigation from the public who had made payments to the Defendants. This allegation is not supported by the evidence on the record.

The Plaintiff further alleged that association with the 1st Defendant diminished its reputation and led to loss of business without supporting evidence showing they had suffered any actual loss that is directly attributable to the Defendant’s actions.

The Plaintiffs have not proven that the Defendants gained any material benefit. The 3rd Plaintiff Witness testified in getting his money back. No other evidence was adduced to show that anyone had actually paid deposits to the 1st Defendant. Given the standard of proof expected in this matter, I am not convinced by the Plaintiff’s unbacked assertions.

In light of the conclusions I have drawn in the preceding analysis, I must, with respect, disagree with the submissions of Counsel for the Plaintiff. My position is that taken in its entirety, the Plaintiff’s case is one based on numerous mere allegations without proof. I therefore

find and hold that on the basis of the evidence on the record, the Plaintiff has failed to meet the standard of proof requisite to maintain a claim of fraudulent misrepresentation against the Defendants.

Having dispensed with the crux of the attendant suit, I am now left to ponder whether the Plaintiff ought to benefit from the reliefs sought. My point of departure, as expected, is the prayer for punitive damages to the tune of Ksh. 25,000,000. This court can do no better than to follow the approach taken by Serгон J in **Moses Gakuru Thuo & Another V Kenya National Assurance Co. (2001) Ltd & Another Civil Case 142 of 2005 [2011] eKLR** where my colleague, relying on **Chitty On Contract 28th Edition Vo. 1 at pages 363-364**, succinctly laid out the principles to be considered in a claim for damages for fraudulent misrepresentation as below:

“Measure of Damages for fraudulent misrepresentation:

The proper measure of damages for fraudulent misrepresentation was discussed by the Court of appeal in Doyle =Vs= Olby (Ironmongers) Ltd [1969] 2 QB 158 - . It was held that damages for fraud were not the same as damages for breach of contract in that they were not designed to place the innocent party in the position he would have been in if the representation had been true, but to put him in the position he would have been in if the representation had not been made... This means that where a person is induced by fraud to buy some property, the proper measure of damages is prima facie the difference between the price paid and the fair value of the property. In Doyle =Vs= Olby (Ironmongers) Ltd. It was held that in cases of fraud the plaintiff was entitled to damages for any such loss which flowed from the defendant’s fraud, even if the loss could not have been foreseen by the latter. Thus, the claimant may recover not only the difference between the price and the value of what he received but also the expenditure wasted in reliance on the contract and compensation for other opportunities passed over in reliance on it.

In Smith New Court Securities Ltd =Vs= Scimgeour Vickers (Asset Management) Ltd [1997] A.C. 254 at p. 63. Lord Brown Wilkinson described Doyle =Vs= Olby (Ironmongers) Ltd as restating the law correctly. He stated principles applicable in assessing damages where a party has been induced by a fraudulent misrepresentation to buy property as follows:

- (1) “The defendant is bound to make reparation for all the damage directly flowing from the transaction.***
- (2) Although such damage need not have been foreseeable, it must have been directly caused by the transaction;***
- (3) In assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction;***
- (4) As a general rule, the benefits received by him include the market value of the property acquired at the date of the transaction; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered;***
- (5) Although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property;***
- (6) In addition, the plaintiff is entitled to recover consequential losses caused by the transaction;***
- (7) The plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud.”***

Bearing in mind that Plaintiff can recover all loss including consequential loss directly flowing from the transaction to put them in the position they would have been in had the representation not been made by the 1st Defendant.

I now turn to the facts of the case. The Plaintiff prays for punitive damages amounting to Ksh 25,000,000. However, as has already been established, the Plaintiff did not put forth any evidence to show that it had incurred any losses as a result of the actions of the Defendants. To be clear, in the instant case, it was the Plaintiff’s prerogative to show the court that it had incurred actual loss directly resulting from its association with the Defendants. This has not been done to the acceptable standard or at all. As such, the Plaintiff’s prayer for punitive damages cannot be sustained.

It is the Plaintiff’s evidence that the Agreement dated 30th May 2016 has in effect been terminated by both parties albeit at different times. There has been no further performance by either party and as such the court orders the Agreement dated 30th May 2016 rescinded.

The court declines to grant an order for taking of accounts as against the defendants and an order to the effect that the Defendants remit to the Plaintiff all monies received in connection with the subject of the contract for the reasons enumerated elsewhere in this judgement and specifically because no evidence was advanced to show that the Defendants were holding on to any monies received on behalf of and due to the Plaintiff. Drawing from my conclusions above, on the matter of costs, it is directed that each party shall bear their own. In the upshot, the suit by the Plaintiff fails and hereby stands dismissed with no orders to costs.

Dated, Signed and Delivered at Kajiado this 23rd day of January 2019

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R. NYAKUNDI

JUDGE

Representation

Ms. Rimunya for Mr. Mutuma for the Plaintiff