REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 91 OF 2015

PETER UMBUKU MUYAKA.....PLAINTIFF

VERSUS

HENRY SITATI MMBASU .....DEFENDANT

(*from the judgment and decree of T.K. Kwambai, R.M, in Butali PMC Civil case No. 109 of 2012 delivered on 19/11/2015*)

J U D G M E N T.

1. The respondent herein had sued the appellant in the lower court vide a plaint dated 12th September, 2012 seeking the following reliefs:-

a. General damages for breach of contract.

b. Special damages Kshs. 34,500/=.

c. Interest from 21/1/11 till payment in full.

d. Costs of the suit.

2. The claim was denied by the appellant who before the suit was filed had paid the principal sum of Kshs. 150,000/= to the respondent's advocates. On the 15th November, 2012 the parties had recorded a consent that the principal sum of Kshs. 150,000/= be deposited in a fixed account in the joint names of the advocates on record pending the hearing and determination of the suit. After a full hearing of the case, the trial magistrate entered judgment for the respondent as follows:-

a. The deposited sum held in the joint accounts of counsels on record shall be paid out to the plaintiff(respondent) forthwith.

b. General damages Kshs. 50,000/=.

c. Special damages Kshs. 13,000/=.

d. Costs and interest.

e. Interest on special damages shall run from the date of filing suit.

3. The appellant/ defendant was aggrieved by the judgment and filed the instant appeal principally on the grounds that:-

1. The learned trial magistrate erred both in law and fact in holding that it is the appellant who committed breach of contract while it was the other way round.

2. The learned trial magistrate erred both in law and fact in awarding general damages to the respondent when the respondent did not adduce any evidence to prove that he suffered any general damages for breach of contract.

Case for respondent-

4.The respondent had entered into a contract of sale of land agreement with the appellant wherein the appellant was to sell him 0.5 acres of land to be excised from land parcel S/ Kabras/ Bushu/944 at a consideration of Kshs. 150,000/= . The respondent paid the money. He occupied the land. He engaged the services of a surveyor to survey the land. He paid the surveyor a total of Kshs. 15000/=. He started to

work on the land. Thereafter the appellant kicked him out of the land. He demanded for refund of the purchase price, survey fees of Kshs. 15,000/= and legal fees of Kshs. 12,000/=. The appellant refunded Kshs. 155,000/=,that excluded survey charges and the legal costs incurred. The respondent then filed the suit.

Case for appellant-

5. The appellant admitted that he had sold land to the respondent. However that the land belonged to his brother and was subject to a succession cause. The respondent occupied the portion of 0.5 acres that he had bought. He ploughed it once. The respondent was to give him Kshs. 10,000/= for survey. He paid Kshs. 5000/= for survey but did not pay the balance. Later the respondent demanded for refund of his money. He refunded Kshs. 155,000/= that comprised of the purchase price of Kshs. 150,000/= and the survey fees of Kshs. 5,000/-.

6. The appellant contended that it is the respondent who was in breach of the agreement as he is the one who demanded for refund yet the land was available. He denied that he is the one who refused to give the respondent his portion. He denied that he was liable for the claim of special damages as claimed by the respondent.

Judgment of the trial magistrate-

7. The trial magistrate found that the respondent had proved that he had paid survey fees totalling to Kshs. 13,000/= which were proved by production of receipts.

8. The magistrate found that the agreement between the parties was entered into on 21/1/2011. That the demand notice to the appellant was issued on 12/7/12 which was one- and -a half years after the sale agreement was entered into. The magistrate then concluded that due to the time-lapse after the sale, the respondent must have been frustrated by the appellant in being denied possession of the land thereby leading to the respondent demanding for the refund of the purchase price. The magistrate concluded that it is the appellant who was in breach of the contract.

9. The magistrate found that the respondent was entitled to be paid general demages for breach of contract. That the respondent intended to use the land for farming. That the respondent could make profits of Kshs. 10,000/= per annum from the farming of the land. He had not used the land for 5 years from the time the agreement was entered into. His loss in the 5 years was therefore Kshs. 50,000/= (i.e 10,000 x 5). He awarded Kshs. 50,000/= in general damages.

Submissions -

10. The advocates for the appellant, **Momanyi Manyoni & Co. Advocates** submitted that the respondent filed the case after his counsel received the entire principal sum of Kshs. 155,000/=. Further that the principal sum was deposited in an interest earning account vide the consent dated 4/10/2012 and hence the interest will compensate for the loss the respondent will have incurred.

11. That the award of Kshs. 50,000/= in general damages has no legal basis .That the amount of Khs. 13,000/= was not paid to the appellant but to a surveyor and hence the respondent was not entitled to claim the same from the appellant but from the surveyor.

12. Further that it is the respondent who committed breach of contract by calling for a refund of the purchase price through the demand notice of his advocate. That the appellant did not owe the respondent any money when the respondent filed the suit.

13. The advocates for the respondent, **Shibanda Wilunda & Associates Advocates**, submitted that the appellant admitted that the parties were supposed to share the survey fees. That the appellant refused to part with his share of the survey fees. That the appellant refused to grant actual possession and ownership of the land to the respondent. That it is therefore the appellant who was in breach of the contract. That the trial court was therefore right in holding that it is the appellant who was in breach of the contract.

14. The advocates submitted that the award of Kshs. 50,000/= in general damages was proper as the appellant had refused the respondent to farm the land after receiving payment for the land. The respondent had intended to used the land for farming. The assessment of general damages at Kshs. 10,000/= per annum was proper considering the inconvenience occasioned to the respondent.

15. The advocates submitted that the refund by the appellant did not include compensation for special and general damages. Therefore that the trial court was right in dismissing the defence.

Determination

16. This is a first appeal. It is the duty of a first appellate court to re- appraise and re-analyse the evidence on record and arrive at its own conclusion and give reasons either way – see **Sumaria and Another Vs Allied Industries Limited (2007) 2 KLR. T**he court has also to appreciate that in the discharge of its aforesaid mandate the court should be slow in moving to interfere with a finding of fact by a trial court unless it was based on no evidence, it was based on a misapprehension of the evidence or the judge had been shown demonstrably to have acted on wrong principle in reaching the finding he did –see **Musera Vs Mwechelesi & another (2007) 2KLR 159.**

17. The questions that were before the trial court were basically three:

1. Who between the parties was in breach of contract.

2. Whether the respondent paid survey fees.

3. Whether the respondent was entitled to the claim for general and special damages and if so, how much.

18. The agreement between the parties stated as follows in paragraph 9 (a):

> **" The seller pledges that he will never in his life change his mind after selling this land to the buyer and if he does so he should be prosecuted in a court of law and meet all the costs of the case".**

The parties therefore covenanted that if any of them breached the contract the other party was at liberty to file a suit where upon the guilty party was to bear the costs of the case. The parties therefore contemplated that there was a possibility of one of them breaching the contract.

19. The appellant says that it is the respondent who was in breach of the contract because the respondent failed to pay the balance of demarcation fees of Kshs. 5000/=. The respondent on the other hand says that it is the appellant who breached the contract when after putting him in possession thereof prevented him from farming the land.

20. The respondent stated that he ploughed the land twice with a tractor but did not plant the land as the appellant threatened him that if he stepped onto the land he will lose his life.

21. The respondent's father DW2 testified that after the sale agreement the respondent went and ploughed the land twice but thereafter the appellant denied the respondent access to the land and planted sugarcane on the land. He said that the respondent did not farm the land. Similar evidence was adduced by the respondent's witness No. 3.

22. The appellant stated in cross -examination that the respondent hired a tractor and ploughed the land once though he did not do any planting on the land. He said that he, the appellant, planted on the land after this matter was filed in court. The appellant though did not state why the respondent failed to plant on the land even after using money to plough the land. The only conclusion is that the appellant is the one who prevented the respondent from planting on the land. There was thereby evidence that the appellant refused to give vacant possession of the land after the sale even after allowing the respondent to plough the land. The appellant was therefore the one who was in breach of the contract. Failure to give vacant possession was a fundamental breach of the contract, breach of which entitled the respondent to rescind the contract. I agree with the trial magistrate that it is the appellant who frustrated the contract by not giving vacant possession to the respondent.

23. The respondent produced two receipts Pex2 and 3 totalling to Kshs. 13000/= paid to Geomatics Land Surveyors as survey fees. A land Surveyor DW3 identified the said receipts to have been issued by their office. The respondent had thereby proved that he had paid survey fees towards sub -division of his parcel of land.

24. The appellant contended that the respondent should only have paid money to the surveyor after he , the appellant , had obtained title to the land . In a breach of contract a party may recover damages that naturally flow from the signing of the contract . In the case of Perpetua **Atieno Vs Louis Onyango Otieno(2013) eKLR**, the court of Appeal set out the type and measure of damages recoverable by a purchaser upon breach of contract by a seller of land . The court held that:

> **"Where it is the vendor who wrongfully refuses to complete the measure of damages is similarly, the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor. These damages include the return of any deposit paid by the purchaser with interest, together with expenses which he has incurred in investigating title, and other expenses within the contemplation of the parties, and also, where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price, damages for loss of bargain ……."**

25. The agreement between the parties, PEX1, did not limit the respondent in paying survey fees until after the appellant had obtained title to the land. The survey could have been done at the same time when the appellant was surveying the whole parcel. The survey fees was paid in pursuance to the sale agreement. The payment flowed from the agreement. As the appellant is the one who frustrated the contract, the money was recoverable from him. The award for Kshs 13,000/- is thereby upheld.

26. The respondent filed the case in the lower court claiming general and special damages for breach of contract. The principal amount of Kshs. 150,000/= was paid before the matter was filed in court. The trial magistrate awarded Kshs. 50,000/= in general damages for breach of contract. The award was based on the opinion of the magistrate as to what he thought the respondent could have been making in profit for the period of 5 years that he was denied occupation of the land.

27. As a general rule general damages are not recoverable in cases of alleged breach of contract-see Court of Appeal decision in **Kenya Tourism Development Corporation Vs Sundowner Lodge Ltd 2018 eKLR.** The reason for such was explained by the court in the case of **Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd (2015)eKLR** as follows:

> ***"The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This is principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009]eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004]eKLR). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004]eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved***

(see Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR) and Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR))".

28. The general damages awarded by the trial court in this case were in the nature of special damages that were neither pleaded, quantified nor proved. The award of Kshs. 50,000/= was therefore wrongly awarded.

29. A claimant for general damages for breach of contract who does not prove that he suffered loss is all the same entitled to damages, though nominal. In the Anson's Law of Contract, 28th Edition at pg 589 and 590 the law is stated to be that:-

> " **Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal".**

30. The Halsbury's Laws of England, Third Edition vol. II, defines nominal damages as follows:

> " 388. **Where a plaintiff whose rights have been infringed has not in fact sustained any actual damage therefrom , or fails to prove that he has; or although the plaintiff has sustained actual damage, the damage arises not from the defendant's wrongful act, but from the conduct of the plaintiff himself; or the plaintiff is not concerned to raise the question of actual loss , but brings his action simply with the view of establishing his right, the damages which he is entitled to receive are called nominal… Thus in actions for breach of contract nominal damages are recoverable although no actual damage can be proved".**

31. In **Kinakie Co-operative Society Vs Green Hotel (1988) KLR 242**, the court of Appeal held that where damages are at large and cannot be quantified, the court may have to assess damages upon some conventional yardstick. But if a specific loss is to be compensated and the party was given a chance to prove the loss and did not he cannot have more than nominal damages – See **Nyamogo & Nyamogo Advocates Vs Barclays Bank of Kenya Limited (2015) eKLR.**

32. In this case the appellant sold land to the respondent. The appellant thereafter breached the contract and refunded the purchase price. The respondent was unable to prove the loss that he suffered. He was nevertheless entitled to an award of nominal damages. I award him nominal damages in the sum of Kshs. 20,000/=.

In the foregoing the award for general damages made by the lower court is set aside and replaced with a nominal award of Kshs. 20,000/=. The other prayers are to remain as ordered by the trial court. Each party to bear its own costs of the appeal.

Delivered, dated and signed at Kakamega this 25th day of October, 2018.

J. NJAGI

JUDGE

In the presence of :

No appearance……for appellant

No appearance ……..……for respondent

George ……court assistant

Parties :

Appellant……..

Respondent…….