REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 180 OF 2006

ALI HASSAN OMAR ……..……..…….. PLAINTIFF

V E R S U S

BOARD OF TRUSTEES

NATIONAL SOCIAL SECURITY FUND ……..…….. DEFENDANT

JUDGMENT

1. The Plaintiff has sued Defendant seeking damages for breach of contract. It is Plaintiff's case that on or about November 2004 the parties entered into an agreement for sale. That the Defendants offered the sale of 5 acres to be excised from land known as L.R. No. 4981 Section 1 Mainland North Mombasa which the Plaintiff accepted. A sale agreement dated 25th November 2004 was executed providing amongst other terms that the purchase price was to be Kshs. 12,500,000/-. Plaintiff was to pay 10% of the purchase price on execution of the agreement and 90% was to be paid within 90 days of the date of the agreement. Another term of the agreement was that the Vendor was to hand over possession of the parcel of land to the purchaser on execution of agreement. Plaintiff was, according to agreement to meet the cost of subdivision.

2. The Plaintiff pleaded that the Defendant transferred the property in question to a third party without any notice to Plaintiff. Plaintiff termed Defendant's action as blatant breach of the agreement of sale. Further the Plaintiff pleaded that he had instructed surveyor to excise 5 acres and further to subdivide those 5 acres into 40 sub plots which he proceeded to sell at cost of Kshs. 900,000/- per sub plot. He therefore claimed that he lost expected profit in respect of those sub plots and incurred expenses in respect of legal fees, surveyor's costs and agent's commission.

3. Defendant by its defence admitted that it had entered into the agreement as pleaded in the plaint but denied the claim for lost profit in respect of the sub plots. Defendant further pleaded that prior to entering into sale agreement with Plaintiff it had sold 45 acres of the subject land to 3rd party on the mistaken belief of the actual acreage of the land. Total land of the subject land was believed to be 50 acres whereas it was less than that. Further that the land left over after the sale of the 45 acres to 3rd party was quarry/excavation which was unsaleable.

4. Plaintiff in evidence stated that although he instructed his surveyor to excise the 5 acres out of the subject land the surveyor could not complete the survey work because he found other surveyors doing the survey work. That it was then that he realized that the Defendant had double sold the 5 acres.

5. On being cross examined he stated that he had inspected the 5 acres he was purchasing which he identified by the beacons. He however confirmed that he did not see the title. He however said that Defendant had assured him that the 5 acres existed as a distinct title. Plaintiff did confirm that although the 90 days in which he was required to have paid balance of purchase price had passed by 25th February 2005, he had not fully paid to the Defendant the purchase price. He however stated that the balance of the purchase price was deposited with his Advocate. He did not prove such a deposit. He further stated that although he did not have a deed plan of the 5 acres he proceeded to sell the proposed sub plots to other parties.

6. PW2 was Lawrence Musyoki Isika a land estate agent who was appointed by Plaintiff to sell for him the 5 acres. PW2 said he saw the land. The property was after Mamba Village on Link Road. He obtained from Surveyor the layout of the sub plots. They were Plot No. 1 to 40. He was able to sell the sub plots where the buyers paid 10% of the price and the balance was to be paid on completion of deed plan. The sub plot price ranged between Kshs. 800,000/- and Kshs. 900,000/-. His commission was Kshs. 50,000/- per sub plot. He confirmed that he sold all the sub plots.

7. On cross examination PW2 again reiterated that he sold 40 sub plots. He also stated that Plaintiff paid him for his services. PW2 stated that he was not registered as an Estate Agent.

8. PW3 a Surveyor of 40 years confirmed Plaintiff engaged him to do survey work. Plaintiff required 5 acres to be curved out of a piece of land of 5 acres. The Defendant also confirmed by a letter dated 5th August 2005 that he could proceed with the survey work. He began by preparing a scheme and doing sub division. Plaintiff also requested him to do subdivision of 5 acres into sub plots. He however found another entity, namely Nyali Estate Developers who were also subdividing the same land he had been instructed to subdivide. He referred to his letter addressed to Defendant dated 10th August 2005. By that letter he requested Defendant to get Nyali Estate Developers to surrender its deed plan No. 261039 to Director of Survey for cancellation to enable him (PW3) get new deed plan for the 5 acre plot for Plaintiff. He stated that although he carried out the field work of finding the beacons of 5 acres and also did further subdivision of 37 sub plots he could not get title for Plaintiff because Nyali Developers had carried out survey which included the 5 acres. Also that the Plaintiff failed to produce to him the title document which he needed to complete his work. He however confirmed that the Plaintiff paid him Kshs. 600,000/- for his services.

9. Defence called the Defendant Legal Officer. He confirmed Plaintiff and Defendant entered into agreement whereby Plaintiff agreed to buy from Defendant 5 acres of the subject land. He however stated that the Surveyor engaged by Plaintiff failed to complete his work and thereafter Plaintiff was refunded his deposit by Defendant's Advocates. That the Defendant were unaware of the Plaintiff's intention to further sell sub plots of the 5 acres and therefore Defendants were responsible for any loss Plaintiff incurred thereof. He also denied that Defendant is liable to pay for Plaintiff legal costs. He ended his evidence in chief by seeking the dismissal of Plaintiff's suit.

10. He was cross examined and he stated that the sale to Plaintiff of 5 acres failed because-

> **"… the 5 acres to be sold to Plaintiff was to be excised from a portion of 50 acres so it was realized the portion which remained after sale to the other party. (sic) What remained was on quarry area which Plaintiff was not inclined to take."**

He went on to say that Nyali Developers purchased from Defendant 45 acres, from a total of what they thought was 50 acres. Defendant therefore offered Plaintiff the remaining 5 acres. Subsequently however it transpired that the total acreage was 49.4acres. He said that even as parties exchanged the various correspondences exhibited by Plaintiff the Defendant believed it had 5 acres which could be sold to Plaintiff.

11. I see only two issues presenting themselves for determination in this matter. The first is

whether there was a breach of contract. The second is, if the first issue is in the affirmative, whether Plaintiff is entitled to the claim for damages.

11. On the first issue as correctly pleaded by Plaintiff the parties indeed entered into an agreement whereby Defendant agreed to sell and Plaintiff agreed to buy 5 acres out of the subject property. It is not denied by the Plaintiff that the Defendant had entered into an earlier agreement with an entity called Nyali Estate Developers Ltd over the same subject land. Nyali Estate Developers Ltd had agreed to buy 45 acres of the land. At that time the Defendant believed that after excising 45 acres there would remain 5 acres. The Plaintiff also believed the same because he said that he went on the ground and identified the plot of 5 acres. It is also not now denied by both parties that the acreage that remained after sale of 45 acres was less than 5 acres. It was 4.4 acres. Further, and it was not denied by Plaintiff the 4.4 acres was falling on quarry area which the Plaintiff declined to take. What all the evidence adduced by the parties clearly shows is that both parties were contracting under mutual mistake. The learned author Treitel in the book '**The Law of Contract**' had this to say about such a mistake-

> **"Consent may be nullified if both parties believe the contract is capable of being performed when this is not the case."**

That learned author further stated in that book-

> **"Consent may be nullified if both parties make a fundamental mistake of fact. In such cases, the extreme injustice of holding one of the parties to the contract outweighs the general principle that apparent contracts should be enforced."**

In the circumstances set out above can this Court then find the Defendant was in breach. Breach of contract as aforesaid author stated-

> **"… is committed when a party without lawful excuse fails or refuses to perform what is due from him under the contract or performs defectively or incapacitates himself from performing."**

The Defendant in my view cannot be said to have failed or refused without lawful excuse to perform the contract between it and the Plaintiff. The land that remained 4.4 acres after the first sale was not 5 acres that the Plaintiff agreed to buy. The Defendant's failure therefore to perform its part of the contract had a lawful excuse. Further because the parties were under a mistake that there were 5 acres to sell and buy that mistake vitiated the consent of the parties. It follows that the parties sale agreement dated 25th November 2004 is void. Since it is void the Plaintiff was entitled and indeed did get a refund of the deposit paid to the Defendant. The Defendant is not in breach of the agreement and the Plaintiff therefore is not entitled to his claim for compensation.

12. The second issue is partly dealt with in the discussion above. Moreover however the Plaintiff claimed damages as follows-

> **"PARTICULARS**
>
> **i) Purchase price deposit - Kshs. 1,250,000**
>
> **ii) Surveyor's fees - Kshs. 600,000**
>
> **iii) Subdivision costs - Kshs. 500,000**
>
> **iv) Loss of profit from the Subdivided plots i.e 40 Plots**
>
> **@900,000 each - Kshs. 6,000,000**

v) Property Agent's Commission- Kshs. 2,000,000

vi) Legal costs - <u>Kshs. 3,600,000</u>

TOTAL - Kshs. 43,950,000

13. All the above categories of damages are claims in special damages. Special damages must be specifically pleaded and proved – see the

case **<u>HAHN –VS- SINGH (1985) KLR 716</u>** where the Court stated-

> **"… special damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves."**

14. The claim for the purchase price deposit is not for consideration because the Defendant refunded the Plaintiff the 10% deposit. The other claims from (ii) to (vi) the Plaintiff was required to specifically prove them same. The Surveyor although he gave evidence did not produce a receipt for the alleged payment of Kshs. 600,000/-. Neither were there receipts for all the other claims, not even the alleged legal costs. Those claims would therefore additionally fail for having not been proved.

15. The Estate Agent who gave evidence as PW2 in answer to a question of the Court stated that he was not registered as an Estate Agent as required by the Estate Agents Act Cap 533 and in particular Section 18(1). That Section provides-

> **"After the expiration of six months from the commencement of this Act or such further period as the Minister may, by notice in the Gazette, allow either generally or in respect of any particular person or class of persons:-**

a. **No individual shall practice as an estate agent unless he is a registered estate agent.**

b. **No partnership shall practice as an estate agent unless all of the partners whose activities include the doing of acts by way of such practice are registered as estate agents,**

c. **No body corporate shall practice as an estate agent unless all of the directors thereof whose duties include the doing of acts by way of such practice are registered estate agents.**

d. **Any person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding 20,000 shillings or to imprisonment for a term not exceeding two years or to both."**

PW2's appointment by Plaintiff to carry out the work of Estate Agent contravened the provisions of the above Section. The Court of Appeal in the case **<u>CIVIL APPEAL NO. 14 OF 2005 MAPIS INVESTMENT (K) TD –VS- KENYA RAILWAYS CORPORATION</u>** consideration a contract to do the work of Estate Agent with a person not registered as per Section 18(1) had this to say-

> **"After careful consideration we have decided that it is clear from the evidence before the Superior Court and the provisions of Section 18 of Cap 533 that, if the contract alleged by Mapis and Mr. Shompa to exist, did in fact exist, the conduct of Mr. Shompa and the appellant company was in breach of express provisions of the statute and illegal. In view of this we are not prepared to countenance the award of a further**

sum of Kshs. 17.5 million plus interest at 34% to the appellant as claimed in the memorandum of appeal read with the plaint."

The Court of Appeal termed that contract with a person not registered as per Section 18(1) as illegal and unenforceable. The Court of Appeal in the above case referred to the case **SCOTT**

–VS- BROWN, DOERING, McNAB & CO (3), (1892)2 QB 724 Lindley LJ at page 728 as follows-

"Ex turpi causa non oritur action. This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him."

16. In addition the Plaintiff when he submitted in evidence Plaintiff's exhibit 6(a) to (d) undertook to pay stamp duty. At the time of writing this judgment Plaintiff has not presented agreement marked as Plaintiff Exhibit 6(a) to (d) whose stamp duty has been paid. Section 19(1) of the Stamp Duty Act Cap 480 provides-

"(1) Subject to the provisions of subsection (3) of this section and to the provisions of Sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except-

a. **in criminal proceedings; and**
b. **in civil proceedings by a collector to recover stamp duty, unless it is duly stamped."**

Plaintiff was given opportunity on 14th July 2009 to have the agreement stamped but to date he has failed to have the same stamped. The holding of the case **DARSHAN SHAH –VS- ROOPMAN (K) LTD & 3 OTHERS (2005)eKLR** had this to say-

"Under the Stamp Duty Act Section 19, in civil cases only, a party wishing to claim expenses paid to him under the Special damages claim and on proof of such claim must have complied with the Stamp Duty Act. The revenue stamp on such receipt should have been issued. Where this has not been complied with by the person issuing the said receipt, Section 20 requires that such person do proceed to the collector of stamp duty to assess the penalty required to be paid for failing to comply."

17. The claim therefore for loss of profit additionally fails for the above stated reason.

18. Further even if the Court would have awarded damages to Plaintiff the damages would have been assessed as the difference between the value of the property at the time of the agreement and its value at the date of filing the suit. Plaintiff did not present a valuation of the 5 acres and accordingly even if the Court would have found the Plaintiff was entitled to damages the Court would not have been in position to assess the damages for lack of such valuation.

19. In the end the Plaintiff's case must and does fail for the reasons stated above and Plaintiff's case is hereby dismissed with costs to the Defendant.

Judgment by:

MARY KASANGO

JUDGE

DATED and DELIVERED at MOMBASA this 20TH day of FEBRUARY, 2014.

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JUDGE