



REPUBLIC OF KENYA

IN THE CO-OPERATIVE TRIBUNAL

AT NAIROBI

TRIBUNAL CASE NO. 3 OF 2012

ENOS EDAGO MACHAYO.....1ST CLAIMANT

SAKIBU LUGAIA.....2ND CLAIMANT

VERSUS

TEMBO SACCO LIMITED.....RESPONDENT

JUDGMENT

This is our Judgment in the matter. The Claimants have moved the Tribunal vide the amended statement of Claim dated 21st March, 2016. They are seeking the following reliefs:

- a. A declaration that they are the rightful Allotees and owners of Plot No. 27 being portions of L.R No. 654/52 (Original No. 654/10/2)*
- b. General Damages for breach of Contract;*
- c. Special Damages of Kshs. 600,000.00 for 1st Claimant and Kshs. 1,200,000 for the 2nd Claimant;*
- d. In the alternative, Reinstatement of the suit Plots;*
- e. Costs and interest.*

It is the Claimant's case that they were employees of Kenya Breweries Limited. That the Respondent was set up to take care of the welfare of employees of Kenya Breweries Limited. That the 2nd Claimant retired from Kenya Breweries in the year, 1998. That the 1st Claimant joined the Respondent in the year, 1980 and left it in the year, 1997.

That as members of the Respondent, they contributed shares to it by way of deduction from their salaries. That the Respondent came up with an idea for members to purchase a parcel of land through their shares. That each member would contribute by way of deductions from his/or shares in the Society. That the said parcel of land comprised L.R No. 654/52 (Original No. 654/10/2.) That upon purchase of the said parcel, the Claimants were allotted plot Nos. 27, 415 and 582 respectively. That they were subsequently issued with share certificate Nos. 578, 364 and 482 respectively.

That the above share certificates were issued after completing payment of the purchase price which was a sum of Kshs. 42,000.00 per plot. That the said purchase price was remitted by way of direct deductions from their shares.

That subsequently, the Respondent conducted a survey of the said Plots and identified beacons. That once this was done, the claimants took possession of their respective plots.

That upon taking possession, the Respondent, through the firm of Onsando, Ogonji & Tiego Advocates confirmed that their respective deed plans were ready and had been submitted to the Commissioner of Lands for processing of individual titles. That later July, 2011, the Claimants learnt that the Respondent was not processing the title documents but had instead, fraudulently sold the suit plot to a third party without their knowledge and/or consent. That by then, the Claimants had ceased being members of the Respondent.

During hearing, both claimants testified. The 1st Claimant testified on 19/12/2012 while the 2nd Claimant testified on 13/08/2014. The claimants also called one other witness, a valuer by the name Luke Okeyo Madede. Vide their testimony, the Claimants reiterated the averments above.

On his part, **CW3** testified that he was instructed to undertake valuation of the said parcel of land. That he prepared and submitted a report Ref. No. *esp/Val/2016/012*. That the report documents L.R. NO 654/52 (Original No. 654/10/2), to be situate near Kibos sugar factory in Kisumu.

Upon cross examination, CW3 stated that he did not undertake a search of the property to ascertain its registered proprietors. That the plots were registered in Nairobi. That the claimants were not in possession of the Lease hence he could not do a search. That the claimants showed him the Plots to undertake valuation. That he did not get into the land as it was planted with sugar cane. That he was told that sub-division did not take place. That they had a sub-division scheme plan which was not showing the site. That it was not possible to measure. That his valuation was based on the subject plot and a proposed housing project

Respondents case

The Respondents have opposed the suit by filing an amended Defence dated 5th May, 2016. It also called one witness to testify. Further, it filed documents as follows:

- a. List of documents dated 5th December, 2012; and**
- b. Supplementary list of documents dated 6th May, 2016**

The gist of the Respondent's opposition to the suit is that in May, 2005, its members vide its Annual Delegates Meeting (**AGM**) resolved to purchase land in Kisumu near Kibos area being L.R Nos. 654/52 and 6541A measuring approximately **85** acres. That the said properties were to be amalgamated and subdivided into a housing scheme plots to be sold to members.

That in **February, 1997**, the Respondent sent out a circular to its members inviting them to purchase plots at a cost of Kshs. 42,000 per plot. (exclusive of title deed processing fees). That the total number of plots were **585**. That only **541** members paid up. That the total cash received was Kshs. 22, 722,000.00

That the claimants were allocated Plots 27, 415 and 582 respectively. That at the Respondents **AGM** held on **20/04/2007**, it was agreed to dispose of the suit property and refund members their shares in a pro-rated basis. This was occasioned by the following reasons:

- a. That the suit property (L.R. No. 654/52 and 6541A) had to be amalgamated and then sub-divided into**

plots. That this could not happen as the lease for one of the Plots i.e L.R No.654/52 had expired and could not be renewed; and

b. That the Respondent had already spent Kshs. 17, 272, 700.00 on the suit property as per the audited accounts of 2011 and could not spend more money since its membership dwindled from 1995-2007

During her testimony on 8/09/2015, the Respondents Chief Executive Officer, Lydia Munga reiterate the averments above.

Issues for determination

We have framed the following issues for determination:

1. Whether the Respondent fraudulently and/or illegally sold the Claimants plots of land;
2. Whether the Respondent breached the contract of sale when it sold the said plots of land;
3. Whether the Claimants are entitled to special and general damages; and
4. Who should meet the costs of the suit

Fraud

The Claimants have accused the Respondents of fraudulently selling their plots to a third party. They contend that they had fully paid up for the plots and were only waiting for individual titles to be issued. To their surprise, they contend that they learnt in July, 2011 that the plots had been sold off to a third party. This begs the question; what constitutes fraud" The court brought out its definition in the **Black's Law Dictionary** in the case of *Kibiro Wagoro Makumi-vs-Francis Nduati Machria & Another* [2018] eKLR as follows:

"Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from Negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of Equity, properly includes all acts, omissions, and concealments which involve a breach of a legal or equitable duty, trust of confidence, justly reposed and are injurious to another, or by which an undue and unconscientious advantage is taken of another."

For a claim of fraud to succeed, it must be specifically pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. This was the holding in the *Kibiro Wagoro* case above. The court cited with approval the writings at page 427 of *Bullen & Leake & Jacobs, precedent of pleadings 13th Edition*. The said writing quoted with approval the cases of *Wallingford-vs- mutual Society* (1880) 5 App. Case 685 at 697, 701, 709, *Garden Neptune-vs-Occident* [1989] 1 Lloyd's Rep. 305, 308, *Lawrence-vs- Lord Norreys* (1880) 15 App and *Davy-vs-Garrett* (1878) 7 ch.D. 473 at 489 where it is stated that that:

"Where fraud is intended to be charged, there must be clear and distinct allegation of fraud upon the pleadings and though it is not necessarily that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that fraud was the cause of the loss complained of. It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved. General allegations, however strong may be the words in which they

are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice.”

The question arises as to whether the claimants have proved the allegation of fraud to the standard set out above. Our answer is in the negative. Contrary to the contention that the suit plots were unlawfully sold to a third party, it is manifest that the Respondent held its 35th AGM on 20th April, 2007 and passed a resolution to sell the entire parcel comprising the suit plots. We have perused the minutes of the said meeting contained in the Respondents list of documents dated 3rd December, 2007. The pertinent part of Min 03/2007 reads as follows:

“The Treasurer informed the delegates of the additional costs incurred over and above the Kshs. 42,000.00 initially paid for the purchase of the plots. He further explained about the financial implication of the said plots if the society continued maintaining them with regard to the present position. Mr Dick Amlo (former CMC) said that a refund of the Kshs. 42, 000.00 to the owners was mandatory. The treasurer informed the delegates that should the members opt for the society to go ahead and process individual titles, then they would have to pay an additional Kshs. 28,000.00 per plot. After much deliberations, the chairman asked that the matter be put to vote to which the delegates concurred. The ministry officials acted as returning officers and results we as follows:

-8 voted against

-53 voted for sale

The CMC was therefore mandated to commence with the sale process. This was proposed by Mr. Jacob Mulanda and seconded by Mr. Dickson Muhia.”

The claimants have not contested the legality of the said meeting. They have neither contested the above resolutions. We therefore find that their claim of fraud is unfounded and dismiss it accordingly.

Breach of contract

It is the claimant’s case that vide a letter of offer dated 9th September, 1997, the Respondent invited them for a balloting exercise which was scheduled for 20th September, 1997. That they participated in the Ballot exercise and applied for purchase of plots. That their applications were successful and that they were subsequently allotted plot No.s 27, 415 and 582 respectively. That subsequently, share certificate Nos. 578, 364 and 482 respectively. That they subsequently paid up for the plots by way of deduction from their shares.

That the above action constituted elements of a valid contract and that any failure by a party to complete its part of the bargain constituted a breach of the contract. That the Respondent indeed breached the contract by frustrating issuance of titles.

On its part, the Respondent has admitted to the existence of the transactions but has denied ever breaching any contract. It contends its delegates passed a resolution to change the course of the project vide its 35th AGM held on 20th April, 2007. That vide the said resolution, members would be refunded their purchase price as the project was no longer tenable.

We have appreciated the evidence on record. We underscore the fact that the impugned transactions arose as a result of decisions of the members of the Respondent to acquire the suit property. That decisions of the Respondent are made by the delegates through an AGM. That on 20th April, the Respondent passed a resolution to abandon the project and refund members their deposits. That the said decision is binding on all members, whether past or present. As a result, the issue of strict application of contract law and principles does not arise. To this end, we find that the Respondent did not breach any contract at all. The Claimants claim for breach of contract therefore fails.

Damages

Having failed to prove breach of contract, the claim for special and general damages equally fail.

Conclusion

The upshot of the foregoing is that we find no merit on the Claimants claim hereby dismiss them with no Orders as to costs.

Read and delivered in an open court this **23rd** day o **January**, 2020

In the presence of :-

Claimant: Mr. Iumba - claimant

Respondent: absent

Court Assistant: C. Maina

Hon. B. Kimemia - **Chairman** **Signed**

Hon. F. Terer - **Deputy Chairman** **Signed**

P. Swanya - **Member** **Signed**



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