IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable

Civil Appeal No. 050 of 2019

In the matter between

HELLEN OCHAN **APPELLANT**

And

ODUR WILLIS **RESPONDENT**

Heard: 22 July 2019
Delivered: 29 August 2019

Law of Contract: *—Oral contract — When a contract is not reduced into writing, its character and terms may be inferred from the conduct of the parties, that is contemporaneous with its creation — In claim of unjust enrichment, it is the defendant's gain that is ascertained rather than the plaintiff's loss by the means of objective and subjective evaluation — The remedy for late payment of a monetary claim is ordinarily and award of interest.*

Civil Procedure: *—Cross-examination — an omission or neglect to challenge the evidence in chief on a material or essential point by cross examination would lead to an inference that the evidence is accepted, subject to its being assailed as inherently incredible or possibly untrue -*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellant for specific performance of a contract of sale of a plot land or in the alternative a refund of shs. 3,000,000/= as the cost of the plot and shs. 6,158,000/= as the cost of developments undertaken on the land, general damages for breach of contract, and interest and the costs of the suit.

His claim was that during or around the month of August, 2007 the respondent entered into an oral transaction of purchase of plot 11 Mama Cave Close Road, Layibi Central sub-ward, Gulu municipality, with the appellant. It was agreed that the consideration for the purchase of that plot was to be the respondent's payment of school fees for the appellant's school going children. Pursuant to that agreement, the respondent paid a total of shs. 3,000,000/= in termly instalments. Sometime after payment of the first few instalments, the respondent took possession of the land and constructed a building thereon. On or about 24th November, 2008 the appellant undertook in writing to refund sh. 3,000,000/= the respondent had paid that far whereupon he would vacate the land. The respondent failed to refund the money, hence the suit.

[2] In her defence, the appellant refuted the respondent's claim. She contended that she did not receive any payment of money from the respondent. She only permitted him to put a temporary structure on the plot, for no consideration. She only borrowed some money from the respondent and her attempts to refund it were futile due to the respondent's evasive behaviour. She prayed that the suit be dismissed.

The respondent's evidence in the court below:

[3] P.W.1 Odur Willis Afrikanas testified that during the month of November, 2007 he was approached by a one Grace Odyek together with the appellant. The appellant expressed interest in selling him the land in dispute to enable her raise school fees for her children. Before zeroing onto that land, the appellant first led him to inspect two other plots; one at Pece which was traversed by a road and another at Kirombe which had no access road. He rejected both plots until he was shown the one now in dispute. They agreed upon shs. 3,000,000/= as the purchase price, which he paid in instalments. In December, 2007 he began construction of a building on the plot. Late December that year the appellant changed her mind and offered to refund the purchase price and to compensate

the respondent for the structure he had raised on the land. In February, 2008 she agreed to make that undertaking in writing. An agreement dated 12th April, 2008 was tendered in evidence. The appellant has since then failed to honour the agreement despite the intervention of the L.C officials.

[4] P.W.2 Odur Beatrice, wife to P.W.1 Odur Willis Afrikanas testified that they have since the year 2007 occupied the building they constructed on the bland in dispute. The appellant made a written undertaking to refund the purchase price and their cost of construction but has failed to. P.W.3 Odyek Grace testified that she was approached by the appellant who told her she had some land for sale. She told the appellant that the respondent was interested in purchasing land. Together they uninspected three different plots the appellant was offering for sale until they zeroed down to the one now in dispute. They agreed upon shs. 3,000,000/= as the purchase price. The respondent paid that price in full in three instalments. The appellant postponed the signing of the sale agreement but in the meantime the respondent began construction of a house on the land and upon completion, occupied it with his family. Later the appellant changed her mind and stated that he only borrowed money from the respondent but did not sell him the land. She undertook to refund the money and compensate the respondent for his building. An agreement to that effect was signed.

The appellant's evidence in the court below:

[5] In her defence, the appellant Hellen Ocan testified that in May, 2007 when she had problems raising school fees for her children, she borrowed money from the respondent. When she obtained the money in 2008 and attempted to pay it back, the respondent refused to receive it. She did not sell him the land in dispute. He only allowed the respondent to construct a temporary structure on the land in consideration of the help he received from him. She was later compelled to sign an agreement by which she undertook to refund the money she had borrowed

from him and compensate him for the building. The respondent vacated the land in 2012 and let it out to tenants.

Judgment of the court below:

[6] Subsequently the court commissioned a valuer to undertake a valuation of the respondent's building existing on the land and he furnished a report stating that it was worth shs. 6,846,200/= In his judgment, the trial Magistrate held that there was a transaction of sale of the land in dispute. Since the respondent indicated that he was no longer interested in possession of the land, court could not order specific performance. Judgement was entered in favour of the respondent. The appellant was ordered to pay shs. 3,000,000/= as refund of the purchase price and interest thereon at the rate of 12% from November, 2007 until payment in full; shs. 6,846,200/= as the value of the building the respondent constructed on the land. The respondent was awarded general damages of shs. 5,000,000/= but was denied interest thereon and on the amount awarded as compensation for the building. He was also denied special damages because he had been residing on the land since the purchase. He was awarded the costs of the suit.

The grounds of appeal:

[7] The appellant was dissatisfied with the decision and appealed to this court on the following grounds, namely;

1. The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby arriving at a wrong conclusion.
2. The learned trial Magistrate erred in law and fact when he held that the appellant pays the respondent the value of the development made on the suit land notwithstanding the fact that the respondent had been in occupation of the suit land from the year 2007 to-date earning from the

rent proceeds of the property, thereby occasioning a miscarriage of justice.

3. The learned trial Magistrate erred in law and fact when he held that the dispute land was sold by the appellant to the respondent whereas not, thereby occasioning a miscarriage of justice.
4. The learned trial Magistrate erred in law and fact when he awarded the respondent shs. 5,000,000/= as general damages, an amount greater than the subject matter of the litigation, thereby occasioning a miscarriage of justice.

Arguments of Counsel for the appellant:

[8] In his submissions, counsel for the appellant argued that the trial Magistrate disregarded the appellant's evidence yet the respondent's evidence had not been discredited by cross-examination. The respondent never tendered in evidence any written agreement as proof of the purported purchase. The respondent and his witnesses contradicted themselves as regards the existence of such an agreement and the circumstances of sale. Despite the fact that the valuer was appointed in the presence of both parties, the actual valuation was undertaken in the absence of the appellant. The trial court ought not to have relied on the outcome of that valuation. The appellant should not have been order to compensate the respondent for his structures on the land since he has been occupying the land from the year 2007 and has also collecting rent from tenants since the year 2012. The respondent did not prove any general damages and the award of shs. 5,000,000/= in that respect occasioned a miscarriage of justice. They prayed that the appeal be allowed.

Arguments of Counsel for the respondent:

[9] In response, counsel for the respondent argued that the first ground of appeal is too general and ought to be struck out. The agreement of 12th April, 2008 by

which the appellant undertook to refund the respondent's purchase price and compensate him for the value of his building was one of the documents admitted in evidence by consent at the scheduling conference. In her defence, the appellant admitted signing that agreement and making that undertaking. The independent valuer that was mutually agreed upon simply ascertained the value of the building. Had the transaction been one of borrowing, the respondent would not have undertaken inspection of the appellant's multiple plots on offer before accepting the one in dispute. It is the appellant who turned elusive and was reluctant to sign the agreement. It is not surprising that she later rescinded the transaction and sought to refund the purchase price, hence the agreement of 12th April, 2008. The trial Magistrate properly directed himself and exercised his discretion appropriately when he warded general damages to the respondent.

Duties of a first appellate court:

[10] It the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

[11] The appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities

materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

The first ground of appeal is struck out for being too general:

[12] I find the first ground of appeal to be too general that it offends the provisions of Order 43 r (1) and (2) of *The Civil Procedure Rules* which require a memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against. Every memorandum of appeal is required to set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative, and the grounds should be numbered consecutively. Properly framed grounds of appeal should specifically point out errors observed in the course of the trial, including the decision, which the appellant believes occasioned a miscarriage of justice. Appellate courts frown upon the practice of advocates setting out general grounds of appeal that allow them to go on a general fishing expedition at the hearing of the appeal hoping to get something they themselves do not know. Such grounds have been struck out numerous times (see for example *Katumba Byaruhanga v. Edward Kyewalabye Musoke, C.A. Civil Appeal No. 2 of 1998; (1999) KALR 621*; *Attorney General v. Florence Baliraine, CA. Civil Appeal No. 79 of 2003*). The ground is accordingly struck out.

Third Ground of appeal

[13] As regards the third ground of appeal, the trial Magistrate is faulted for having found that the dispute land was sold by the appellant to the respondent whereas not. The trial court had to determine whether the transaction between the two parties was a sale of land, as contended by the respondent, or un-secured borrowing, as contended by the appellant. This transaction was not witnessed in writing but both parties acknowledged that they had a dealing involving the

appellant receiving money from the respondent, in order to alleviate her school fees challenge.

[14] When a contract is not reduced into writing, its character and terms may be inferred from the conduct of the parties, that is contemporaneous with its creation. A critical analysis of the parties' conduct may provide the court with an objective inference of the parties' intent. A course of performance or course of dealing between the parties is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement. A course of performance is a sequence of conduct concerning a transaction between the parties to it that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct. It is a sequence of conduct between the parties to a particular transaction that exists if: (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

[15] It is common ground between the parties that the appellant needed money for school fees and that the money provided by the respondent to the appellant was for that purpose. It was the respondent's testimony that Before zeroing onto that land, the appellant first led him to inspect two other plots; one at Pece which was traversed by a road and another at Kirombe which had no access road. He rejected both plots until he was shown the one now in dispute. The respondent was never cross-examined on this aspect of his testimony. It is trite that an omission or neglect to challenge the evidence in chief on a material or essential point by cross examination would lead to an inference that the evidence is accepted, subject to its being assailed as inherently incredible or possibly untrue (see *Habre International Co. Ltd v. Kasam and others [1999] 1 EA 115; Pioneer Construction Co. Ltd v. British American Tobacco HCCS. No. 209 of 2008; R v*

Hart (1932) 23 Cr App R 202 and *James Sawoabiri and another v. Uganda, S.C. Criminal Appeal No. 5 of 1990*).

[16] Whereas the appellant contended that she obtained an un-secured loan from the respondent, the fact that the "borrowing" was preceded by an inspection of three different plots of land belonging to the appellant, is more consistent with a sale or secured loan than unsecured borrowing. There would not have been any need of such an inspection if the loan were to be an un-secured one. Furthermore, it is after the "borrowing" that the respondent began construction of a building on the land. The appellant explained that she permitted him to do that because he had been kind to her and helped to lend her money yet he had been evicted from his former residence by his landlord. This version is not only implausible but also was a departure from her defence in which she had stated that she had allowed him to construct on the land for no consideration. Therefore the course of performance of the transaction between the parties between May, 2007 and April 2008 when fairly regarded, established the fact of sale of the land by the appellant to the respondent as being the common basis of understanding. The agreement of 12th April, 2008 was accordingly a rescission of the sale rather than un undertaking to re-pay a loan. The trial court therefore came to the correct conclusion and this ground accordingly fails.

2nd Ground of appeal

[17] As regards the second ground of appeal, the trial Magistrate is faulted for having ordered the appellant to pay the respondent the value of the development made on the suit land, notwithstanding the fact that the respondent had been in occupation of the suit land from the year 2007 to-date earning from the rent proceeds of the property. In the law of contract law, unjust enrichment occurs when one person is enriched at the expense of another in circumstances that the law considers to be unjust. Where an individual is unjustly enriched, the law imposes an obligation upon the recipient to make restitution. Liability for an

unjust enrichment arises irrespective of wrongdoing on the part of the recipient. The defendant is ordered to pay the money value of the benefit received.

[18] In the instant case, without any justifiable cause, the appellant sought to rescind a contract of sale of land where the respondent had, on faith of the purchase, established a home. This was in fact a repudiatory breach, by which the oral contract which had come into existence, was put to an end and discharged unilaterally by the appellant. She was bound to retain the respondent's building as a result and benefit of the repudiatory breach. Where the benefit conferred does not consist of money, the material worth of the defendant's benefit remains the basis in evaluating an award of restitution as the defendant's enrichment in such cases would rarely be equal to the plaintiff's expense. It is the defendant's gain that is ascertained rather than the plaintiff's loss by the means of objective and subjective evaluation (see *Benedetti v. Sawiris [2013] 4 All ER 253; [2013] 3 WLR 351; [2014] AC 938* and *McDonald v. Coys of Kensington [2004] 1 WLR 2775*). Such enrichment is to be valued at the date on which it was received (see *BP Exploration Co (Libya) Ltd v. Hunt (No 2) [1979] 1 WLR 783*). The questions to be explored are; (1) has the defendant been enriched?; (2) Was the enrichment at the expense of the plaintiff?; (3) Was the enrichment unjust? and (4) are there any defences available? The actual value the benefit has to the defendant is identified and valued.

[19] The starting point in valuing the enrichment is the objective market value, or market price, of the property obtained. The test is "the price which a reasonable person in the defendant's position would have had to pay for the property." On that approach, although a court must ignore a defendant's "generous or parsimonious personality," it can take into account "conditions increasing or decreasing the objective value of the benefit to any reasonable person in the same (unusual) position" as the defendant. For example, the court may take into account the plaintiff's superior bargaining power if it would have enabled him to obtain a price better than the market price.

[20] Unjust enrichment is grounded in corrective justice and suggests that the object of the remedy in a case such as this is to correct the injustice arising from the defendant's receipt of the plaintiff's property on a basis which was not fulfilled. In the instant case the valuation undertaken during the progression of the trial placed the market value of the building at shs. 6,846,200/= After the respondent had adduced evidence of the objective value of the benefit which the appellant received, the burden of proof fell upon the appellant to prove that she did not subjectively value the benefit at all, or that the respondent had valued it at more than the market price. The appellant was unable to prove that this valuation was at more than the market value of the building. In the circumstances, the unjust enrichment arising from the appellant's receipt of the respondent's building could only be corrected by requiring the appellant to pay the respondent the monetary value of that building, thereby restoring both parties, so far as a monetary award could do so, to their previous positions. The trial court therefore came to the correct conclusion and this ground accordingly fails.

Fourth Ground of appeal

[21] As regards the fourth ground of appeal, the trial Magistrate is faulted for having awarded the respondent shs. 5,000,000/= as general damages, an amount greater than the subject matter of the litigation. By the agreement of 12th April, 2008 the appellant undertook to refund the respondent's purchase price and to compensate him for his building. This constituted an acceptance by the respondent, of the appellant's repudiatory breach. From that date the amount became a debt recoverable. The parties though did not specify the date when the refund would be due. The general rule is that time is not the essence of the contract until the manifesting of the intention of the parties about such aspect. However, even if the terms and conditions do not make time of the essence, if payment is late against what court considers to be within a reasonable period,

lateness may subject the breaching party to an award of interest as a result of the lateness.

[22] The court could include simple interest in its judgment. The court also has a power to decide whether run an interest to a part or all of a sum. It could also award interest if the debt is paid after proceedings for its recovery have been instituted but before the judgment. Since the respondent was still in possession of the building, an award of general damages was unfounded. The remedy for late payment of a monetary claim is ordinarily and award of interest. The interest awarded should run from 12th April, 2008 when the agreement for refund was made. Having awarded the respondent interest on his monetary claim, the trial court erred in awarding him general damages as well. For that reason this ground of appeal succeeds and the award of shs, 5,000,000/= is set aside. Save for this and the adjustment in the effective date for the award of interest, the rest of the decision upheld.

Order :

[23] In the final result, In the final result, the appeal succeeds only in part. The appellant is accordingly entitled to only half of the costs of the appeal.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Oroya and Co. Advocates

For the respondent : M/s Oyet and Co. Advocates