

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

CIVIL SUIT NO. 116 OF 2018

CENTENARY RURAL DEVELOPMENT BANK (U) LTD:PLAINTIFF

VERSUS

RICHARD IVAN NANGALAMA T/A SURVESIS:DEFENDANT

BEFORE: HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The plaintiff instituted this suit against the defendants for breach of contract and or professional negligence, and fraud occasioning the loss of more than 101,558,951/= being the amount owed to the plaintiff by the borrowers/mortgagors, general damages, aggravated damages and interest of 25% and costs for the suit.

On 14th October 2011, the plaintiff and defendant executed a retainer agreement and the plaintiff retained and engaged the defendant for payment to act as the plaintiff's surveyor and/or valuer to survey or value properties to borrowers and/or mortgagors and to report to the plaintiff on the condition or status of the properties.

Around May, 2012 David Golola applied for a credit facility from the plaintiff and indicated that he was the registered proprietor of property comprised Plot No. 75 Block 215 Mulamba, Bulemezi, Nakaseke District in the names of David Golola. On the basis of the retainer agreement, the

plaintiff engaged the services of the defendant to survey and value, for the benefit of the plaintiff.

On 18th May, 2012, the defendant purported to inspect, survey and value the property and prepared a survey and valuation report detailing his findings that; the registered proprietor is/was David Golola; the property is/was unencumbered private Mailo situate at Plot No. 75 Block 215 Mulamba, Bulemezi, Nakaseke District; and the land's market value is/was UGX. 200,000,000/= and forced sale value is/was UGX 100,000,000/=.

On the basis of the above reports, the plaintiff assessed and approved Golola David's application for individual loan facility from the plaintiff and pledged the property as security. The said Golola David defaulted on his loan repayment obligations and the outstanding amount due and owing to the plaintiff was UGX 101, 588,951/=. The plaintiff commenced foreclosure proceedings against the said Golola David. Unfortunately, the plaintiff could not proceed with and or conclude the foreclosure process because upon investigation, it was discovered that the survey and valuation report was misleading, incorrect and tainted with fraud. The land was found to be a bushy area with squatters and graveyards.

As a result of the gross negligence of the defendant, the plaintiff was unable to foreclose the security and has suffered and continues to suffer a total loss of more than 101,588,951/=.

The plaintiff lodged a complaint with the Surveyors Registration Board and a Disciplinary Committee was constituted to inquire into the allegations. The defendant was found guilty of exhibiting gross negligence and incompetence in the conduct of professional duties towards the complainant and he was suspended for a period of 15 months.

The defendant in his defence contended that he was contacted by a one Golola David who sought valuation services and he indicated that he wished to have the valuation report to be addressed for his use and Centenary Bank.

The ownership of the land was certified in the statement of search dated 16/05/2012 and addressed to Manager Centenary Bank.

The defendant contended that the valuation report was never the basis of the loan financing and even when it could have been amongst matters examined, the alleged loss does not arise against the defendant. There is not a duty, obligation and or alleged liability to be imputed on the defendant valuation surveyor arising out of a default on loan obligations which the defendant was not a party.

The defendant contends that the service level agreement that was signed with the plaintiff was subject to professional indemnity insurance which insurance contract was notified to the plaintiff. The defendant contends that the allegations of fraud and negligence are misplaced since the defendant was never involved in the application, issuance and utilization as regards the loan facility made by the plaintiff to its client-Golola David.

According to the Joint scheduling memorandum, the parties agreed on the following facts and issue;

Agreed Facts

1. The parties entered into a retainer Agreement on the 14th October, 2011 wherein the defendant was to be engaged as a surveyor and or valuer to survey and value properties belonging to borrowers and or mortgagors and report to the plaintiff on the condition or status of the properties;
2. The defendant surveyed and valued property comprised in Plot No. 75 Block 215 Mulamba, Bulemezi, Nakaseke District in the names of David Golola.
3. On 18th May, 2012 the defendant inspected the property comprised in Plot No. 75 Block 215 Mulamba, Bulemezi, Nakaseke District in the

names of David Golola and prepared a survey and valuation report detailing his findings that;

- a) the registered proprietor is/was David Golola;
- b) the property is/was unencumbered private Mailo situate at Plot No. 75 Block 215 Mulamba, Bulemezi, Nakaseke District; and
- c) the land's market value is/was UGX. 200,000,000/= and forced sale value is/was UGX 100,000,000/=

Agreed Issues

1. *Whether the plaintiff's suit is time-barred by limitation?*
2. *Whether the defendant breached the retainer agreement for the provision of valuation services with the plaintiff?*
3. *Whether the defendant was professionally negligent in carrying out valuation of the subject land?*
4. *Whether the defendant was fraudulent in carrying out the valuation of the subject land?*
5. *What remedies are available?*

The plaintiff was represented by *Patience Akampurira and Joachim Kunta Kinte* of *Kampala Associated Advocates* while the defendant was represented by *Richard Latigo* of *Lex Advocates*

Determination of Issues

The court shall only determine the two issues 2 and 3 which are directly interrelated.

Whether the defendant breached the retainer agreement for the provision of valuation services with the plaintiff?

Whether the defendant was professionally negligent in carrying out valuation of the subject land?

The plaintiff's counsel submitted that the plaintiff assessed and approved the loan facility of David Golola, based on the survey and valuation report presented by the defendant. The borrower eventually defaulted on his loan obligation and at the material time the outstanding amount due and owing was UGX. 101,558,951. Upon default the plaintiff commenced foreclosure proceedings against the borrower and mortgaged property, however, the could not conclude the foreclosure proceedings because upon investigation it was noticed that the report prepared by the defendant was misleading.

When the plaintiff's officials visited the suit property and in total contrast with the earlier report submitted by the defendant, it was discovered that the land was a bushy area with squatters and graveyards. This was in breach of the terms of the retainer agreement.

The defendant had an obligation under clause 2 of the retainer agreement to disclose on the face of the report submitted to the bank in ordinary plain English the presence of anything on the property that may affect the marketability or market value of the property being pledged Specifically clause (2(i)) and (vii) set out existence of squatters and graveyards and tombstones as things the defendant ought to have set out in his report. The failure or omission by the defendant to disclose the existence of squatters and graveyards on the property was in breach of the retainer agreement.

The plaintiff further submitted that the defendant was professionally negligent in carrying out valuation of property comprised in Plot No. 75 Block 215 Mulamba Bulemeezi. For a party to succeed in negligence, the plaintiff ought to prove that the defendant owed him a duty of care, and the defendant breached that duty of care and the plaintiff suffered a loss.

The plaintiff appointed the defendant as a professional valuer vide a retained agreement dated 24th October 2011. Under the said agreement, the defendant was to offer valuation/survey works on properties being offered to the plaintiff by customers as security for (intended) investments by the bank.

The agreement also provided that the defendant would carry out professional valuations and surveys of properties offered to the bank as security to include opening boundaries and confirm that they correspond with the dimensions of the security being pledged to the bank. The defendant was expected to make disclosures of anything that may affect the marketability or market value of the property being pledged and specifically existence of squatters; and graveyards and tombstones.

The defendant purported to have surveyed and valued the subject property and generated a report which never indicated that there are any squatters or graveyards. When the plaintiff tried to foreclose and sell the mortgaged property they were confronted by the LC 1 chairperson and squatters and also discovered that the land had graveyard. This has affected the recovery of the loan.

The plaintiff submitted that the defendant owed the plaintiff a duty to professionally survey and value property intended as security. The defendant's failure to disclose such material facts have an impact on the marketability and market value of the property was a reach of the duty of care owed to the plaintiff and the plaintiff suffered loss as a result of the breach of the duty of care.

The defendant's counsel submitted that for this court to reach a finding that the defendant's report was misleading, incorrect and or tainted with fraud the fact of breach would be expected that the plaintiff would adduce evidence to contradict the defendant's report and such report should have been made by another valuation surveyor. He contended that there was no 2nd valuation report conducted by the bank officials to prove evidence of squatters and graveyards. Therefore, according to counsel, the breach has not been proved against the defendant.

The defendant further submitted that the issue of professional negligence must follow from the determination of whether there was breach which in counsel's view was not proved in accordance with the position in

Nankabirwa Irene v Umeme Limited HCCS No. 310 of 2016 and also in the English Court in *Strover v Harrington [1988] Ch 390* held that a surveyor must not act in a way in which no surveyor of ordinary skill would be guilty of, if acting with ordinary care. In other words, a valuation surveyor's works should be judged against the standard of the average-skilled surveyor or industry standards.

The defence counsel further submitted that the plaintiff had already prosecuted a complaint of professional negligence against the defendant before the Surveyors Registration Board and the defendant was suspended for 15 months. The decision of the board was overturned on appeal in *Richard Muganti v Surveyors Registration Board* where inter alia, the court faulted the Board for poorly evaluating the evidence and reaching a decision without basis-that the defendant was professionally negligent yet there was no alternative evidence to contradict the defendant's valuation report.

Analysis

This case involves contractual obligations which result in creation of a duty of care towards the parties and thus shaping the scope of negligence and the ambit of duty of care. Ascertaining the intention of the of the contracting parties is crucial for determining whether a duty of care in negligence should arise in a particular case.

The main issue that may arise in both circumstances is whether the contractual terms affect the issue of whether a duty of care exists; and if so, the scope of the duty of care? There can be concurrent liability in both contract and tort; that is, a contracting party can choose to sue another in either contract or tort provided he can establish the requisite elements for each cause of action. *See Henderson v Merret Syndicates Ltd [1995] 2 AC 145; Nava Bharat (Singapore) Pte Ltd v Straits Law Practice LLC [2015]*

The contractual terms might, for example, exclude a contracting party's liability in the event of an action in the tort of negligence by the other party.

A plaintiff may choose to sue in contract rather than in tort depending on the interpretation and the rules of construction of contracts.

In the context of professional work, there is generally an implied term that the professional will exercise care and skill in the provision of services unless this is modified by the express contractual terms. There is no specific tortious duty to advise as tortious duties are imposed by general law, in contrast to contractual duties which may be specifically agreed to by the contracting parties. A duty of care in the tort of negligence is a 'broad duty to take such care as is reasonable in the circumstances'. The contractual duties as agreed by parties may on their own give rise to the corresponding tortious duty of care in negligence. However, this duty of care is nevertheless subject to the contrary intention of the contracting parties if any to negate the duty of care. *See Go Dante Yap v Bank Austria Creditanstalt AG [2011] 4 SLR 559; James Andrew Robinson v P E Jones (Contractors) Ltd [2011] EWCA Civ 9 at [79]*

By virtue of the written retainer agreement, there was an express contractual duty to provide professional valuations and surveys of property offered to the bank as securities on a case by case basis. The Valuers/Surveyors Retainer Agreement un clause 2 provided specifically as follows;

It is hereby agreed that the valuer shall disclose on the face of the report submitted to the Bank in ordinary English (that is non-technical language) the presence of any of the following, among other things, on the property that may affect the marketability or market value of the property being pledged or pledged;

- i) Existence of squatters*
- vii) Grave yards and tombstones*

Clause 4 provided for a duty of care;

The Valuer/Surveyor shall abide by the highest professional standards in conducting the valuations/surveys and will exercise due diligence, reasonable skill and care and independence in performance of their obligations under this agreement.

PROVIDED AND IT IS HEREBY AGREED that in the event that material facts arise after the bank has already made an investment decision which issues should

have been raised by the valuer/surveyor, then the valuer/surveyor SHALL be held liable and if the bank incurs any loss resultant therefrom, the valuer/surveyor shall indemnify the Bank.

The retainer agreement provided for express terms of the contract which expected the defendant to exercise care and skill in the provision of valuation and survey services to the plaintiff. The defendant ought to have known that the failure to reasonable care in making his valuation and survey report to the bank could result in the plaintiff failing to recover its investment or loan advanced and thus making a loss.

The test of whether an act amounts to professional negligence is that of the standard of an ordinary skilled man exercising and professing to have that specialty skill. Where you get a situation which involves the use of some special skill or competence, the test as to whether there has been negligence or not is not the test of the man on top of the Clapman omnibus, because he has not got that skill. The standard of care is that 'reasonably expected of a reasonably competent professional with respect to a particular field'. That is, a specialist must exercise the ordinary skills of his specialty. *See Maynard v West Midlands regional Health Authority [1984] 1 WLR 634; Yeo Peng Hock Henry v Pai Lily [2001] 3 SLR(R) 555*

It is very true that the facts of the present case provided for both contractual and tortious obligations and the plaintiff was at liberty to pursue both or one of them. The plaintiff chose to pursue both and was then liable to the challenges embedded in both contract and tort. One of the practical reasons for concurrent liability in tort and contract is due to the different standards for contractual and tortious claims such as voluntary assumption of responsibility.

All systems of law which recognize a law of contract and a law of tort (or delict) have to solve the problem of the possibility of concurrent claims arising breach of duty under the two rubrics of the law. Although, there are variants, broadly speaking, two possible solutions present themselves; either to insist that the claimant should

pursue his remedy in contract alone, or to allow him to choose which remedy he prefers. See See Henderson v Merret Syndicates Ltd [1994] 3 All ER 506; Hajara Farms Ltd Societe Generale SG-SSB [2012] 43 GMJ 97 SC.

The plaintiff's claim for professional negligence against the defendant appears to have been dealt with in the case of *Richard Muganti v Surveyors Registration Board Miscellaneous Appeal No. 03 of 2017* where the court overturned the decision of the Disciplinary Committee of the Surveyors Registration Board suspending the defendant for 15 months for professional negligence. This court would decline to interrogate the liability in negligence against the defendant and the best way to challenge the decision would have been to appeal against the decision of court then.

Breach of Retainer Agreement

The plaintiff challenged the defendant's actions for breach of Contract-Retainer Agreement by contending that the defendant's valuation and survey report did not address the specific issues on squatters and grave yards.

The defendant had an obligation under clause 2 of the retainer agreement to disclose on the face of the report submitted to the bank in ordinary plain English the presence of anything on the property that may affect the marketability or market value of the property being pledged Specifically clause (2(i)) and (vii) set out existence of squatters and graveyards and tombstones as things the defendant ought to have set out in his report. The failure or omission by the defendant to disclose the existence of squatters and graveyards on the property was in breach of the retainer agreement.

Contracts are voluntarily entered into based on the consent of the contracting parties. In this manner, the contract creates rights and imposes corresponding obligations for the contracting parties. The content of the contract is agreed upon by the contracting parties depending on their relative bargaining power.

The court must treat as sacrosanct the terms of an agreement freely entered into by the parties. This is because parties to a contract enjoy their freedom to contract on their own terms as long as the same is lawful. The terms of the contract between the parties are clothed with some degree of sanctity and if any question should arise with regard to the contract, the terms in any document which constitute the contract are invariably the guide to its interpretation.

When the parties enter into a contract, they are bound by the terms of the contract as set out by them. It is not the business of the court to rewrite a contract for the parties. The court, however, has a duty to construe the surrounding circumstances including written or oral statements so as to discover the intention of the parties. *See Soft Sheen Carson v William Fugar [2014] 79 GMJ 162 C.A*

The cardinal principal of construction of a document, the agreement of the parties, is for the court to an interpretation which is consistent with the object of the entire document. The principle of *pacta sunt servanda* means the agreement of a party to a contract which is not fraudulent is to be observed

The plaintiff entered into a contract titled Retainer agreement and they specifically agreed on what the defendant was expected to do and what was to be included in the report once assigned any work.

In a general a breach of contract will have occurred if a party to the contract without lawful excuse fails to perform his contractual obligations. Since performance of contractual obligations must be precise, any derogation from the full and precise performance, if proved to be the case by the contractual promise, would amount to a breach.

The plaintiff has shown that the defendant breached the contract when they availed a report which was in breach of the retainer agreement. The report did not specifically mention the would be grounds that affects the marketability and market value of the land under mortgage such as

squatters and graveyards and tombstones. The retainer agreement provided as follows; *to disclose on the face of the report submitted to the bank in ordinary plain English the presence of anything on the property that may affect the marketability or market value of the property being pledged Specifically clause (2(i)) and (vii) set out existence of squatters and graveyards and tombstones*

The plaintiff has discharged his burden of proving that there has been a breach of contract.

The plaintiff's witness PWI states that when the plaintiff's officials visited the suit land, it was discovered to be in total contrast with the earlier report submitted by the defendant to the plaintiff. The property pledged by Golola David was actually a bushy area with squatters and graveyard. The plaintiff had relied on this valuation and survey report of the defendant to extend the credit facility to the borrower.

The defendant's report fell short of the terms of the retainer agreement between the plaintiff and defendant to the extent of failing to report on the true status of the land. The valuation report PEx 2 indicates under clause 6 Development; *The plot is currently undeveloped. Remarks; The property is suitable for farming and the topography is gently sloping. Immediate neighbourhood is characterized by vacant land and low cost houses.*

The report further noted Developments and other Features as follows; *The plot is currently developed with a boy's quarter, pit latrine, kitchen and a pine plantation. Its neighbourhood comprises of vacant plots and scattered residential houses of low and middle income value.*

The defence does not provide any meaningful answer to the allegations of the said breach of the retainer agreement and specifically on the land being encumbered with squatters and there being a graveyard. The defence witness DW1 seems to infer that the land was visited by the bank as well being advancing the loan.

If one of the parties to a contract breaches an obligation which the contract imposes, that party is in breach of contract. The breach may consist in the

non-performance of the relevant obligation, or its performance in a manner or at a time which fails to comply with the requirements of the contract. The defendant's breach of the contract goes to the root of the contract and thus a condition which repudiated the contract at once. The breach of the terms of the retainer agreement was fundamental and affected the very substance of the contract and had a far reaching effect to the plaintiff's transaction which involved lending money to a one Golola David. *See Stanbic Bank Uganda Limited v Hajj Yahaya Sekalega T/A Sekalega Enterprises HCCS No. 185 of 2009; Ronald Kasibante v Shell (U) Ltd, HCCS No. 542 of 2006; [2008]ULR 690*

This court finds that the defendant was in breach of the retainer agreement for the provision of valuation services with the plaintiff.

What remedies are available to the parties?

The plaintiff's counsel submitted that the plaintiff is entitled to *special damages* of UGX 101,588,951/= being the Principle of 44,435,727/=; Accrued Interest of 56,854,468/= and Penalty 298,765/=.

The defendant's counsel submitted that the special damages included the principle sum of 46,000,000/= accrued interest and penalties. PW1 testified that only 44,000,000/= was owing as principle and the rest of the claim is interest and penalty which were charged on the client-David Golola. PWI also stated that while Golola was traceable, they simply came against the defendant on the ground of fraud and negligence.

Analysis

Where two parties have made a contract which one of them has broken, the damages which the other ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e according to the natural course of things, from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract as the possible result of the breach.

The defendant can only be liable for the consequences of his advice being wrong or misleading, but not to underwrite the whole venture (loan and default). The liability of valuers in professional negligence cases was recently considered in United Kingdom in *Khan Meadows [2021] UKSC 21* and *Manchester Building Society v Grant Thornton UK LLP [2021] UKSC 20* where the court held that if a professional adviser gives negligent advice on which a client relies, the adviser is only liable for those losses which fall within the scope of its duty of care, not all the losses incurred by the action taken by the client relying on the advice.

The above authorities give this court guidance on how to compute the special damages that would be awarded to the plaintiff although the case has not been determined on principle of professional negligence. There is a direct nexus between the breach of the terms of the retainer agreement and professional negligence.

The plaintiff bank had demanded for recovery of 60,192,255/= on 16th May 2013 according to PEx 4 in one of the demand notes. This implies that if the plaintiff had been vigilant to recover the loan then the same would have remained at rate and not the current 101,588,951/= with accumulated interest and penalties surpassing the principal sum.

If the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of contract under these special circumstances so known and communicated. But, on the other hand, if the special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.

The plaintiff in this case is only awarded the actual outstanding loan balance in a sum of 44,435,727/= as the principal sum outstanding on the loan.

General damages

The plaintiff sought general damages in a sum of 100,000,000/= for the financial loss and mental suffering.

The plaintiff could indeed have suffered some financial loss as a result of the failure to recover the loan in time with accumulated interest and penalties accruing therefrom. The plaintiff is awarded a sum of 10,000,000/= being general damages and this shall be recoverable from the pledged security since the title is still a security although it is encumbered. It should not mean that the title is worthless or should be returned to the loan defaulter-Golola David.

The plaintiff may recover other claims not awarded by this court especially interest and penalties from the pledged security comprised in Plot No. 75 Block 215 Mulamba Bulemeezi-Nakaseke District.

The plaintiff has not made out a strong case to award aggravated damages and the same is disallowed.

The plaintiff is awarded interest on the principal sum awarded at 22% from the date of this judgment until payment in full.

The plaintiff is awarded costs of the suit.

I so order.

SSEKAANA MUSA

JUDGE

29th September 2023