IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL
ACCRA

CORAM: 1. ARYEETEY J. A. PRESIDING
2. MARFUL-SAU J. A
3. MARIAMA OWUSU J. A.

17TH APRIL 2008

SUIT NO. H1/148/06

BEN YAW OBENG } PLAINTIFF/RESPONDENT.

V E R S U S

STATE HOUSING CO. LTD. } DEFENDANT/APPELLANT.

MARFUL-SAU, J. A.

This is an appeal against the judgment of the High Court Accra dated the 29th October 2004. The Plaintiff/Respondent in his writ commencing the action claimed the following reliefs:-

a) An order for specific performance directed at the Defendant to deliver a House Type SH3 situated at Dansoman, Accra to the Plaintiff by reason of a contract dated 11th January 1979.
b) In the alternative the recovery of the purchase price for a similar house type at Dansoman, Accra at its current value.
c) Damages for breach of contract.
d) Cost.

The brief facts of the case are as follows. The Plaintiff herein called the Respondent in his desire to own a house applied to the Defendant to acquire house type SH3 at Dansoman, Accra in 1979. The Respondent was made to complete Exhibit 1 which is a form headed "Application for Hire Purchase House". On this form the Respondent indicated that he was prepared to pay a deposit of ¢19,000.00. The overleaf of this form Exhibit 1, are conditions and of particular relevance is condition (e) which reads as follows

"If at any time during the course of the building operations there

is an increase in prices of building materials and or cost of labour or there are any other changes in circumstances resulting in an increase in the cost of building, there will be a corresponding increase in the purchase price of the house and the actual purchase price shall be the price prevailing when the house is completed".

Tendered in evidence by the Appellant is Exhibit A which is dated January 1979. The day Exhibit A was written is not clear, however from the contents it is clear that it was written after 11th January 1979.

Through Exhibit A, the Appellant was informing the Respondent that due to the shortage of building materials the Respondent will have to wait for at least three years before a house will be completed for him. The letter also stated that during the three years any increase in the selling price resulting from increase in the price of building materials or wages would be passed on to him.

The Respondent claims that upon receipt of this letter he inquired from the offices of the Appellant what the likely increase in the selling price would be. According to Respondent he was told the increase would not be above ¢3000. Consequently he paid an additional ¢5000 on 4th November 1980. A receipt was issued in which the payment was described as "Further deposit against house type SH3 at Dansoman Estate".

The Appellant however contended that the two sums paid by the Respondent were deposits towards the purchase price and did not amount to the final selling price of the SH3 house. The Appellant also claimed that it invited the Respondent for discussions through a letter of 31st January 1991 but he failed to attend the meeting. For these reasons the Appellant claimed the Respondent was not entitled to his claims.

At the end of the trial, judgment was entered against the Appellant to pay an amount of ¢175,000,000 representing the value of the SH3 house. The trial court also awarded general damage of ¢20,000,000.00 and cost of ¢5,000,000.00. It is this judgment that the Appellant seeks to reverse.

The following grounds of appeal were formulated in the Notice of Appeal and same argued by Counsel for the Appellant.

a) The judgment is against the weight of evidence

b) The learned Judge erred in law when she fixed the current value of house when that value was never specified during evidence or in Counsel's written address.

c) The Judge erred when she awarded damages against the Defendant.

d) The costs awarded were excessive.

I shall address these grounds one after the other. The first is the general ground that the judgment is against the weight of evidence. In this appeal, the Respondent's cause of action was founded on a breach of contract and claimed for specific performance or the current value of house, subject matter of the dispute. The court at the end of the trial found that there was a breach. That conclusion I find is right since there are sufficient evidence on the record to suggest same. Indeed I have looked at the statement of defence filed by the Appellant which is at pages 14 and 15 of the record and I am of the opinion that the Appellant did not have any answer to the breach.

The seemingly defence to the breach is the averment at paragraph 8 of statement of defence which read as follows:-

8. "In further denial of paragraph 7 aforesaid the Defendant says that by his letter D/9276 dated 31st January 1991 the Plaintiff was invited to meet the Defendant's Chief Estate Officer for discussions on 14th February 1991 but he refused, failed or neglected to do so and never bothered to see the defendant anytime thereafter".

I have already made reference in this judgment to Exhibit A, which was tendered by Appellant. By that Exhibit A the Appellant undertook or assured the Respondent that, the house will be ready for him at least in three years. Exhibit A was written in January 1979. Three years from January 1979 takes us to January 1982. From the record therefore, the Appellant breached or defaulted in its promise by January 1982. So that when it wrote on 31st January 1991 to invite the Respondent for discussion, the breach had occurred. The Appellant could therefore not hide under the Respondent alleged failure to meet the Chief Estate Officer, as a defence to its failure to deliver. Between the year 1979 when the Appellant promised to build for Respondent and 1991 when Appellant invited Respondent for Discussion was a span of twelve years.

In law, time generally is considered to be of essence of a contract and a party who fails to complete or perform on the agreed date or time will be in breach. In this appeal

the Appellant was to deliver a house within three years but as at the twelveth year of the agreement the house had not been delivered. Instead the Appellant was inviting the respondent for a discussion, the agenda of which was not known. For the fact that there is evidence on record to support the trial court's finding that the Appellant was in breach of the contract to provide a house type SH3 to the Respondent, the first ground of appeal will fail and same dismissed.

The second ground of appeal is that the trial Judge erred in fixing the current value of the house when the value was never specified during evidence. I concede that on the record of appeal, there is no evidence indicating what the current value of house type SH3 was. The Respondent who testified did not provide any evidence either orally or documentary as to the current value of SH3 house. The record also does not disclose how the trial Judge arrived at the amount of ¢175,000,000 as the current value of the house. That figure was thus arbitrary and for that fact this ground of appeal succeeds and the award for ¢175,000,000 as the current value of the house would be set aside.

The next ground is that the trial Judge erred when she awarded damages against the defendant. Learned Counsel for Appellant argued that having made an award for the Respondent to recover the actual value of the house, it was wrong for the Judge to have awarded the damages. Indeed the order that the Respondent was entitled to recover the full value of the house amounted virtually to a decree of specific performance. No wonder the Respondent himself by his writ claimed specific performance or in the alternative the current value of the house.

In **PRAAH and others V ANANE 1964 GLR 458**, the Supreme Court held among others as follows:-

"Once it has been held that there was a breach of contract, the innocent party has a right at common law to damages or where damages are inadequate, to specific performance as an equitable remedy. Since the damages were adequate the work was not clearly defined in the contract and there was no specified piece of land on which the respondent's building was to be erected, the court will not interfere with the order for damages".

At page 466 of the report, their Lordships quoted with approval, Fry on Specific Performance (3rd Edition) at page 27 as following:-

"The only remedy at common law for the non performance of a contract was in the damages, that is to say, in the payment of a sum of money by the party who had broken the contract to the party injured by that breach. If money were in all cases a perfect measure of the injury done by this breach, it is evident that an exact equivalent for the wrong might be done, and that the justice done might be complete. But money as an exact equivalent only when by money the loss sustained by the breach of the contract can be fully made good."

My understanding of the holding in Praah v Anane (supra) is that the relief of specific performance and damages are alternative and both cannot be awarded per se because there has been a breach.

However in Real Estate Developers Ltd v Fosua and Another 1984 – 86 2GLR 334, the Court of Appeal faced with a relatively similar case had this to say at pages 342 and 343.

"We now turn our attention as to whether the Plaintiff could be entitled to both specific performance of the contract and damages for detention. In the circumstances of this case the Plaintiffs had alternative remedies either specific performance or recession and damages for breach of the contract to complete the building at the due date. As already observed the Plaintiff elected to keep the contract alive and therefore claimed for specific performance, which has been granted. They also claimed for damages for the detention of the said property until the same is delivered to the plaintiffs. An action for detention is an action for detinue and it presupposes that the plaintiffs have vested in them either the legal estate or a right to immediate possession which they have not until the building is completed and ready to be handed over. Both the legal estate and possession are in the defendant company. This is not to say that the plaintiffs are not entitled to general damages for breach of contract".

This court in the above case held that the Plaintiffs were entitled to general damages and not damages for the detention of the property. The court further held that as a general rule there should be a basis for the award of damages in cases such as this for example an injured party could lead evidence as to the purpose for which he was acquiring the property, either for residential or commercial and the loss suffered as a result of the breach.

Following the courts decision in Real Estate Developers Ltd v Fosua (supra) I am satisfied that a party suing for specific performance may be entitled to the alternative relief of damages as well, depending on the circumstances of the case particularly if evidence is led to show that as a result of the breach, the injured party is made to suffer financial loss. A clear example of such circumstance would be where a party fails to deliver on the agreed time and the purchaser is compelled by the default to rent an alternative accommodation. In such a case, the purchaser shall be entitled to damages in addition to the remedy of specific performance provided evidence is led to establish the loss.

In this appeal, the Trial Court awarded the Respondent ¢20,000,000.00 general damages. This was in addition to the award that Appellant pay ¢175,000,000.00 being the current value of the SH3 house to the Respondent. I have held that the award of ¢175,000,000.00, in as much as it was to represent the 'current price' or value of SH3 house was in the form of specific performance. Therefore for the Respondent to succeed on a claim for damages, he had the duty to lead evidence as to the loss incurred by him flowing from the breach of the contract. I have examined Respondents evidence on record and no such evidence was led. The law is trite that damages are always in issue and failing to adduce evidence to prove any loss was fatal. Consequently the award of damages of ¢20,000,000.00 would be set aside and that ground also succeeds.

The last ground of appeal is that the cost awarded was excessive. As observed in this judgment at the end of the trial, the court awarded Respondent ¢5,000,000.00 cost. The judgment was delivered in October 2004. The rule governing the award of cost in our civil courts is Order 78. That rule has laid down clear guidelines for the award of cost. Among the guide is the length of trial. The writ was issued on 3rd April 2002 and the Plaintiff started his testimony on the 12th of May 2004, almost two years after the writ was issued. The trial itself took about six months, from May to October 2004. Taking into account that the Appellant did not have any defence in law, as I have held in this judgment but yet contested the suit from 2002 to 2004, I am of the opinion that the cost of ¢5,000,000.00 is in circumstance reasonable. The trial judge exercised discretion and the Appellant has not demonstrated that that discretion was not exercised judicially. To that extent that ground of appeal will fail.

By the rules of this court, an appeal is by way of rehearing. I have studied the record and I find that the fundamental issue in this suit was whether or not the Appellant was in breach of the contract. Indeed there is no dispute that a contract existed between the Appellant and the Respondent. At page 39 of the record, part of Defendant representative cross examination is recorded as follows:-

Q: How much did the Plaintiff pay for the house?

A: ¢19,000.00

Q: The application states how much the plaintiff is to pay for the house

A: Yes

Q: You agree with me that as far as the applicant paid the money stated on the application form a contract is entered between him and the defendant.

A: Yes

This evidence above supports Exhibit A in which the Appellant promised to deliver a house to the Respondent at least in three years time from January 1979. Clearly the Appellant did not deliver as promised and certainly it was in breach. In this appeal issue was taken as to whether the money paid by the Respondent was the final purchase price or a deposit. I am of the considered opinion that this was not a relevant issue in the circumstance of the case. By Exhibit A, the Appellant undertook to deliver a house at least in three years time upon which the Respondent was to be surcharged with any increase in cost of the house. I find that the breach committed by the Appellant rendered the status of the payments made by the Respondent irrelevant. For whether the amount paid by the Respondent was a deposit or full payment, the Appellant breached the contract and thus was to suffer the consequence of such breach in law.

In **REDCO V SARPONG 1991 2 GLR 457 CA** a case relatively similar to the instant appeal, this court decreed specific performance in favour of the purchaser. In that case the evidence was clear and undisputed that the purchaser had not finished paying the full purchase price of the house, but when Redco defaulted in delivering on the time promised, it was held that the purchaser was entitled to specific performance.

This court held at holding (2) as follows:-

"The basis upon which specific performance would be granted in equity is quite settled. Certain contracts were of such a nature that time became of essence, and a mere

award of damages was not enough. For example in contracts of sale where a house was required for immediate residence as in the instant case, a delay of six to seven years without any explanation could not be compensated for by mere damages when it was clear that such damage could not supply the flat for which the Respondent had paid a substantial purchase price. There was ample evidence that the conditions set out in the contract to be fulfilled by the Respondent had all been or a substantial part had been fulfilled which in equity would entitle him for his equitable right for specific performance".

In this case between 1979 to 2002 when the Respondent issued the writ he had been on the waiting list for almost 23 years. Clearly no amount of damages would adequately compensate the Respondent. The Respondent is thus entitled to the decree of specific performance. However there is no evidence on record that, the Appellant is still building at Dansoman. The fact however is that, the Appellant is still in the real estate industry providing houses similar to the one applied for by the Respondent, in other parts of the country.

There is no evidence that the Appellant is building at Dansoman, Accra, it will only be appropriate to award the Respondent his alternative claim for current value of a SH3 house in Accra. As I have already indicated the Appellant is still in the housing business and it should be in a position to furnish the actual current value of SH3 house in any part of Accra. I hold that the Respondent is entitled to be paid the current value of SH3 house in Accra. Accordingly the Appellant is ordered within 14 days to file in the Registry of this court, the actual value as at April 2008 of a SH3 house and refund same to the Respondent herein.

In conclusion apart from the award of the ¢175,000,000.00 to the Respondent and the damages of ¢20,000,000 which are set aside in this judgment, the appeal fails and same is dismissed. It is ordered that the Appellant refund or pay to the Respondent the actual current value of SH3 house, the particulars of the cost price to be filed in this court as directed above.

S. MARFUL-SAU, J. A
JUSTICE OF APPEAL

I agree

ARYEETEY, J. A
JUSTICE OF APPEAL

I also agree

MARIAMA OWUSU, J. A.
JUSTICE OF APPEAL

COUNSEL: MR. MOHAMMED SHANEON FOR RESPONDENT.

MR. JOHN AIDOO FOR APPELLANT.

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