IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: LILA, J.A., LEVIRA, J.A. And KITUSI, J.A.)

CONSOLIDATED CIVIL APPEALS NO. 22 & 155 OF 2020

LULU VICTOR KAYOMBO.....APPELLANT/1ST RESPONDENT
VERSUS
OCEANIC BAY LIMITED.....1ST RESPONDENT/NECESSARY PARTY
MCHINGA BAY LIMITED.....2ND RESPONDENT/APPELLANT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Mtwara)

(Ngwembe, J.)

Dated 14th day of November, 2019
in
Land Case No. 6 of 2018

JUDGMENT OF THE COURT

28th May, & 7th June, 2021.

LEVIRA, J.A.:

This decision responds to Consolidated Civil Appeals No. 22 and 155 of 2020, where parties instituted cross appeals. For easy reading of the decision and avoidance of confusion, we shall refer parties by their names. Vide Civil Appeal No. 22 of 2020 (the main appeal) the appellant, Lulu Victor Kayombo (hereinafter referred to as Lulu) is challenging the decision of the High Court in Land Case No. 6 of 2018 in which decision, she won the suit against Mchinga Bay Limited (hereinafter referred to as Mchinga) but was not satisfied with the specific performance order of the trial High Court. The essence of the current appeal on the one hand is that, Lulu is claiming that the said specific performance order ought to

have been against both, Mchinga and Oceanic Bay Limited (hereinafter referred to as Oceanic Bay) who was also sued as the 2nd defendant, but that was not the case. On the other hand, Mchinga was also not satisfied by the said decision of the High Court on account that, the same was not justified as Lulu was not entitled to the specific performance order, instead the trial High Court ought to have enforced the Agreement which the parties had entered between them. Therefore, being aggrieved as well, Mchinga instituted Civil Appeal No. 155 of 2020 (the cross appeal) against that decision of the High Court.

Briefly, the background of the appeals before us goes as follows: In the High Court of Tanzania at Mtwara, Lulu had sued Mchinga and Oceanic Bay for specific performance of a Sale Agreement for payment of USD 250,000 as a balance of purchase price for properties situated at Plots No. 11 and 12 Block "C" located at Mamba, Mchinga in Lindi District (the suit property), payment of general damages, interest at court's rate of 12% per annum from the date of judgment until full payment; costs and any other reliefs as the court would deem fit to grant.

It is important to note at the outset that the Sale Agreement between the parties was entered on 7th January, 2015. Lulu being the seller of the suit property had agreed with Mchinga who was the purchaser to sale the suit property at a consideration of USD 350,000 as a purchase

price. A down payment of USD 100,000 was made on the date of signing the Agreement. The parties agreed further that the remaining balance of USD 250,000 had to be paid on 1st July, 2015 and that in the unlikely event of the purchaser failing to pay the balance amount as agreed, the purchaser would be in breach of contract and that the seller would take full possession of the suit property and in consequence the purchaser would have no claim against the seller.

As things were on the part of the purchaser, she failed to pay the agreed balance of USD 250,000. Following that failure, the parties entered into an Additional Agreement in which the purchaser guaranteed to pay the said balance by instalments in the following order: February, 2016 USD 50,000, June, 2016 USD 100,000 and July, 2016 USD 100,000. However, the purchaser failed to pay that balance as agreed. As a result, Lulu instituted a suit against Mchinga and Oceanic Bay on account that Oceanic Bay's Bank Account was used by the Mchinga to pay Lulu the initial instalment of USD 100,000 as intimated above. Upon full trial, the trial Judge ordered Mchinga who was the 1st defendant to pay Lulu the amount claimed, that is USD 250,000 within 30 days from the date of judgment and costs of the suit. Other prayers were not granted.

Both, Lulu and Mchinga were aggrieved by the decision of the trial High Court, as such, they have presented before us cross appeals which

we have consolidated for convenience in our determination as intimated above.

For ease of reference, we shall reproduce the grounds of appeal as they appear in the memorandums of appeal. In Civil Appeal No. 22 of 2020, Lulu presented a three grounds memorandum of appeal to the effect that: -

"1. *That the trial Judge erred in law and fact by failure to hold that the 1st respondent was equally liable to pay the appellant jointly and severally with the 2nd respondent, the purchase price balance of USD 250,000 as per terms of written and oral contract entered between the parties, the 1st respondent having paid USD 100,000 as down payment.*

2. *That the trial Judge erred in law and fact by failure to hold that the 1st respondent was liable to pay the Appellant the outstanding balance of USD 250,000 to the Appellant despite ample evidence and admission by the 2nd respondent that the said 1st respondent was and agent of the 2nd respondent in respect of payment of the purchase price of properties situated on Plot No. 11 Block C and Plot No. 12 Block C both located at Mamba, Mchinga in Lindi District within Lindi Region.*

3. *That the trial court having held that the respondents without any colour of reason refused to comply with their contractual obligations to pay the Appellant the remaining balance of USD 250,000, it erred by holding that only the 1st respondent (sic) was required to perform its obligation to pay the appellant."*

On the other hand, Mchinga has presented the following grounds of appeal:-

1. *That, having heard the admissions made 1st respondent (Lulu Victor Kayombo) on acknowledgment of a term in the contract providing for inter alia automatic termination of the contract upon failure by the Appellant to pay the remaining sum of money, the trial Judge erred both in law and fact by reaching a decision contrary to the admission of the 1st respondent.*
2. *That, the trial Judge erred both in law and fact by reaching decisions contrary to the terms of the contract between the Appellant and the 1st Respondent.*
3. *That, the trial Judge erred both in law and fact by failing to evaluate the adduced evidence and testimonies of the witnesses in court to reach a proper and just decision.*
4. *That, the trial Judge erred in fact in finding that the Appellant deliberately refused or neglected to honour the contract.*
5. *That, the trial Judge erred in fact and law in awarding 1st Respondent with payment of the balance of purchase price of USD 250,000 and costs of the suit.*

At the hearing of the appeals, Mr. Amon Crecent Ndunguru, learned advocate, appeared for Lulu, whereas Mr. James Andrew Bwana, learned advocate, entered appearance for Mchinga and Oceanic Bay. The said learned counsel represented the same parties as they appear in Civil Appeal No. 155 of 2020 except that Oceanic Bay, the Necessary Party was

represented by Mr. Stephen L. Lekey, learned advocate. Counsel for the parties opted to adopt and solely rely on the parties' written submissions which they had earlier on lodged in Court and the grounds of appeal.

Having gone through the grounds of appeal, parties' written submissions and the entire records of appeal, notwithstanding the detailed written submissions by the parties for and against the appeals which we commend, we think the current appeals raise the following common issue: *whether the agreement between Lulu and Mchinga created a cause of action to sue in breach.*

It is common knowledge that parties to a contract are bound by the terms of their contract. (See: **Unilever Tanzania Ltd v. Benedict Mkasa trading as BEMA Enterprises**, Civil Appeal No. 41 of 2009; **Philipo Joseph Lukonde v. Faraji Ally Saidi**, Civil Appeal No. 74 of 2019 and **Simon Kichele Chacha v. Aveline M. Kilawe**, Civil Appeal No. 160 of 2018 (all unreported)).

In the current Civil Appeal No. 22 of 2020, Lulu's main complaint can be traced from the grounds of appeal and her written submissions where she claimed for specific performance of the contract, while pressing that Oceanic Bay was also liable to pay her the balance of USD 250,000 and thus, she faulted the trial Judge for not ordering so. This claim is

pegged on the premise that, Oceanic Bay was the one who paid the first instalment of USD 100,000 as an agent of Mchinga. Therefore, the trial Judge ought to have also ordered it to pay. At page 3 of her written submissions, she stated:-

> *"That the 1st Respondent is joined in the suit and was required to pay the claimed outstanding sum of USD 250,000 jointly and severally with the 2nd Respondent as both Respondents agreed to pay the entire sum in the sale agreement jointly.* ***The said 1st Respondent paid the first instalment of USD 100,000 to the Appellant as an agent of the 2nd Respondent for the purchase of the two plots****, a sister company, and oral understanding which was reached between the* ***Appellant and the Late Abdi Mumin, who was the Managing Director of the 1st and 2nd Respondent companies*** *as the 1st Respondent had final powers to pay the Appellant on behalf of the 2nd Respondent."*
>
> [Emphasis Added].

We have thoroughly gone through the record of appeal, but we could not locate anywhere the alleged agreement between Lulu and the late Abdi Mumin. We must state once that even if for the sake of argument there was such an oral agreement, the fact that parties to a contract reduced their agreement into writing, as a general rule, the written agreement

prevails in terms of section 101 of the Evidence Act, Cap 6 RE 2019 which provides that:-

> *"101. When the terms of a contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 100,* ***no evidence of any oral agreement or statement shall be admitted, as between the parties to that instrument or their representatives in interest****, for the purpose of contradicting, varying, adding to or subtracting from its terms:"*
>
> [Emphasis added].

The Sale Agreement between Lulu and Mchinga is found at page 32 of the record of appeal. Clause 2 of the said agreement states that:-

> *"No variation of the terms of AGREEMENT or of any other documents referred to herein shall be effective* ***unless it is in writing and signed by the parties hereto."***
>
> [Emphasis added].

Since the above clause provides that nothing out of the agreed term could vary the terms of contract, it means the parties are bound by it. We take note that, in the mode of payment the parties had agreed as follows:-

"That in unlikely events the Purchaser ***fails to pay the balance amount by 1st July 2015*** *the Purchaser will be in breach of contract and that the* ***seller will take full possession of the said land*** *and the Purchaser shall have no claim against the seller."*

[Emphasis added].

We take further note that even when the parties entered into an Additional Agreement on 30th December, 2015 after Mchinga's failure to pay the balance of USD 250,000, the position in case of failure to pay as indicated above did not change. In other words, the only remedy Lulu had against Mchinga was to recover her suit property. However, she sued for specific performance as intimated above and the trial Judge at page 150 of the record of appeal having observed and quoted the parties agreed mode of payment and the outcome of purchaser's default in payment of the balance, went on to state as follows:-

"The seller complied with all conditions including survey of the two plots in the name of the 1st defendant and handed to the purchaser. However, in turn the purchaser defaulted to pay the balance of USD 250,000.00 to date. Thus the plaintiff is praying for specific performance arising from the executed contract... In respect to this suit, the defendants have not disclosed any failure of the

plaintiff arising from the contract. ***I find it unjust, so to speak, to the piaintiff to subject her to another serious hardship of retransferring the title deeds in her name*** *from the name of the defendants who refused or neglected to execute the agreed terms and conditions of the contract...* ***Since the defendants have not performed their obligations under the agreement/contract, then the plaintiff is right to ask this court to order the defendant for specific performance."***

[Emphasis Added].

At page 153 of the record of appeal, the trial Judge concluded that:-

"It is only logical to order the 1st defendant, a privy to the contract, to perform its obligation within thirty (30) days from the date of this judgment. The plaintiff is also granted costs of this suit."

While Lulu claims that the trial Judge was supposed to order even Oceanic Bay to pay her the balance, in cross appeal which is also supported by Oceanic Bay, Mchinga is totally faulting that decision on account that the trial Judge was not justified to grant Lulu's prayer of specific performance and costs.

At page 7 of its written submissions, Mchinga argued that, Lulu had failed to demand repossession of the suit property after Mchinga's failure to pay the entire purchase price as agreed. She went on arguing, which we agree, that had Lulu demanded and sued for recovery of sold land from Mchinga, the trial court would have been correct to enter judgment for specific performance. In **Unilever Tanzania Ltd.** (*supra*) at page 16 the court had this to say: -

> *"Strictly speaking, under our laws,* ***once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which the parties have agreed between themselves...*** *It is not the role of the courts to re-draft clauses in agreements* ***but to enforce those clauses*** *where parties are in dispute."*

In the light of the above quoted decision, we agree with both, Mchinga and Oceanic Bay that what the trial Judge ought to have done was to enforce the parties' agreement particularly the clause which entitled Lulu to recover her land/suit property upon failure by Mchinga to pay the balance of USD 250,000 agreed in the Sale Agreement and order accordingly.

According to the record of appeal, the Sale Agreement under consideration was tendered and admitted as exhibit **P4** wherein the

parties were Lulu and Mchinga. A fact which was also taken on board by the trial Judge when awarding the purported damages to the appellant. It is settled position that only parties to a contract are bound by the terms they freely enter in their agreement. (See **Simon Kichele Chacha** (*supra*)). Similarly in the current case, Oceanic Bay whose bank account was used to execute the initial instalment could not be compelled to pay Lulu had it been that the order of payment was justified. Having so observed, it is our finding that the order of specific performance by the High Court was not justified neither to Oceanic Bay nor Mchinga. The trial Judge ought to have enforced the clauses of the parties' Sale Agreement by ordering them to stick to what they had freely agreed, that in case of default in payment of the balance (USD 250,000) Lulu would recover her property.

With respect, we think, since according to the terms of clause 8 of the contract between the parties in the Sale Agreement, the obligation to transfer the land in the name of the purchaser was of the seller, it was not proper for the trial Judge to find it unjust for Lulu to retransfer the suit property in her name from the name of Mchinga upon failure by the purchaser to pay the balance of USD 250,000. We agree with Mchinga, as stated at page 11 of the written submissions that, the said finding of the trial Judge was incorrect and it went against the intention of the parties

and that the trial Judge ought to have retained the principle that documentary evidence (Sale Agreement) reflected repositories and memorials of truth as agreed between the parties and retained the sanctity of their understanding.

In our final analysis we observe that Oceanic Bay was not a party to the Sale Agreement between Lulu and Mchinga. Therefore, she could not be compelled together with Mchinga to pay Lulu the balance of USD 250,000 despite the fact that the first instalment was made through her bank account as terms of the Agreement bind only parties to the Agreement - (see section 37(1) of the Law of Contract Act Cap 345 RE 2019). It is therefore our finding that the main appeal is misconceived and it is without any merit.

As far as the cross appeal is concerned, there is no doubt that parties to the Sale Agreement had agreed on how their contract should be performed. Mchinga conceded that she failed to perform her obligations under the Sale Agreement. The Additional Agreement did not vary the terms of the original Sale Agreement. Therefore, the seller was required to recover her property after failure by the purchaser to pay the balance of USD 250,000 as the terms of Sale Agreement remained intact. We find that if anything, Lulu ought to have sued for recovery of the suit

property as agreed as her contract with Mchinga did not create a cause of action to sue in breach.

For the reasons stated above, we dismiss with costs Civil Appeal No. 22 of 2020 that was preferred by Lulu and allow Civil Appeal No. 155 of 2020 by Mchinga. Consequently, we quash the judgment and decree and set aside the orders directing specific performance of payment of USD 250,000 and costs as against both, Mchinga and Oceanic Bay.

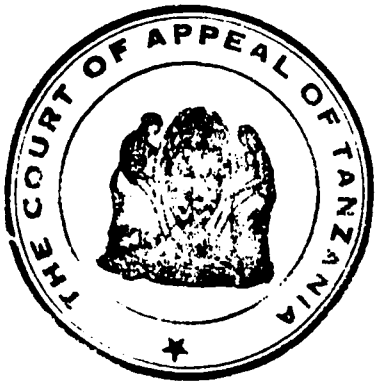
DATED at **MTWARA** this 4th day of June, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered this 7th day of June, 2021 in the presence of Mr. Stephen Lekey, learned advocate holding brief for Mr. Amon Crecent Ndunguru, learned advocate for Appellant/1st Respondent, Mr. Stephen Lekey, learned advocate holding brief for Mr. James Andrew Bwana, learned advocate for Respondents/Appellant and Mr. Stephen Lekey, learned Advocate for the Necessary Party, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL