IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: MUGASHA, J. A., KITUSI, J.A. And MDEMU, J.A.:)

CIVIL APPEAL NO. 35 OF 2021

AZIZ S. MASASI..... APPELLANT

VERSUS

EMMANUEL T. MAKENE..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania (at Dar-es-salaam)

(Luvanda,, J.)

dated the 18th day of February, 2019

in

Land Case No. 58 of 2014

JUDGMENT OF THE COURT

18th & 28th August, 2023

MUGASHA, J.A.:

In the High Court of Tanzania (Dar es salaam District Registry), the respondent instituted a suit against the appellant over ownership of a House (the suit premises) No. 185 on Plot No. 17/2/ Block 35 D at Matimba Street, Mchangani Mwananyamala "A" area within the Municipality of Kinondoni, Dar Es Salaam Region. In the suit, the respondent claimed that, initially, on 18/5/2011 he entered into a two year lease agreement with the appellant on monthly payment of

TZS.250,000.00 in respect of the suit premises. Upon signing the lease agreement, he paid a total of 6,000,000/= being rental charges for the said period of two years commencing from 10/6/2011 up to 10 June 10/6/2013. After the expiry of the lease term, it was extended for another period of one year, during which the respondent expressed interest to purchase the suit premises which was offered for sale by the appellant. Having agreed orally that the purchase price was TZS. 70,000,000.00, the respondent deposited the said amount in two instalments in the appellant's Bank Account No. 040201041585 at the National Bank of Commerce Corporate Branch. Further, the respondent averred to have renovated the suit premises including removing old fixtures and replaced them with new ones at the cost amounting to TZS. 63,000,000.00. That apart, before leasing the house, the respondent cleared water bills having paid a sum of TZS. 2,000,000.00.

It was also alleged by the respondent that subsequently, contrary to his earlier promise and the oral agreement, the appellant refused to sign the sale agreement and started to threaten to evict the respondent from the suit premises as opposed to their oral agreement. Thus, the respondent prayed to be granted following reliefs: specific performance that the appellant being ordered to sign the sale contract and land forms

for the same purchase price of TZS. 70,000,000.00; permanent injunction restraining the appellant from any interference and trespass onto the suit premises which the respondent had owned since 18/7/2014; a refund of TZS. 750,000.00 paid as a rent in advance for 10/6/2012 up to 18/7/ 2014; compensation of TZS. 63,628,500.00 being costs of renovation authorised by the appellant; an order that the appellant pay 4,000,000/= being the compensation for disturbance caused, trespass, annoyance suffered by the respondent due to illegal acts of the appellant; an order that the appellant should pay the respondent a sum of TZS. 23,050,000.00 as compensation for loss suffered in the whole cause, time wasted in the investment, exemplary damages and punitive damages due to the appellant's acts.

On the other hand, the appellant did not dispute to have entered into lease agreement with the respondent for a term of 24 months. He as well, did not dispute the fact that, the respondent had expressed intent to purchase the suit premises after the expiry of the lease term. However, the appellant claimed that they had parted ways on the purchase price. While the appellant stated that the price was TZS. 120,000,000.00 which was to be paid within two weeks from 9/6/ 2014 up to 23/6/2014, this was not heeded to by the respondent who instead,

deposited a sum of TZS. 70,000,000.00 in the appellant's bank account. Upon demand to pay the remainder sum or else vacate the suit premises, the respondent did not oblige and instead, on 27/8/2014 served the appellant the plaint.

Also the appellant denied to have authorised the respondent to make extensive renovations and that in terms of the lease agreement, the respondent was not allowed to effect any kind of renovation onto the suit premises without the appellant's consent. On that account, the appellant sought for orders that: the respondent's suit be dismissed with costs; a declaration that the respondent has failed to comply with the conditions for purchasing the suit premises; an order compelling the respondent to pay rent for the period he has been in occupation of the premises without paying rent; an order compelling the respondent to vacate the suit premises; and any other relief which the court deemed fit to grant.

At the trial, the framed issues were: whether there was a sale agreement of the suit premises between the appellant and the defendant; what were the terms and conditions of the sale agreement; whether the respondent complied with the terms and conditions of the

sale agreement; who was the lawful owner of the suit premises; and to what reliefs are parties entitled to.

At the trial from the totality of the respondent's evidence, besides echoing what is contained in the plaint, he recounted that there was no written agreement for the sale of the suit premises. He told the trial court that, the transaction was based on the gentleman's agreement and that the agreed purchase price was TZS. 70,000,000.00. On the question of renovation of the suit premises, besides not establishing the appellant's authorisation, he claimed that the renovation was justified because the suit premises was in a dilapidated condition.

On the part of the appellant, his evidence that purchase price was TZS. 120,000,000.00 was flanked by two brokers DW1 and DW2 who claimed to have been involved in brokering the sale of the suit premises by both, the appellant who had offered to sell the house and the respondent who had expressed intent to buy the suit premises. Besides, not disputing that the respondent had deposited the TZS. 70,000,000.00, he claimed that to have been effected after issuing notice of eviction to the respondent. He added that, the money was not refunded to the respondent because he was still in occupation of the suit premises without paying rent after the expiry of the extended lease

term. The appellant maintained his earlier stance that he did not authorise the respondent to renovate the suit premises and that the renovation was not warranted because before leasing the said suit premises to the respondent he had effected extensive renovations in order to uplift the market value of the house.

After the trial, the High Court found that, the respondent's case was proved on the balance of probability. It was the trial court's finding that, as the respondent was not a prospective buyer according to the lease agreement he should have handed over the suit premises after the expiry of the lease agreement. However, it was the finding of the trial court that since the respondent was entitled to make renovations and given that appellant made no effort to refund the money to the respondent, the respondent had proved that there was a gentleman's agreement between the parties on the sale of the suit premises. Moreover, the learned trial Judge reasoned that, the respondent being a lawyer by profession and a practicing advocate, could not have risked to embark on extensive renovation of the suit premises at the tune of TZS. 63,628,500.00 for purpose of renting the house for two years for a rental of TZS. 6,000,000.00 only. In the final analysis, the High Court found that, the respondent had lawfully purchased the suit house. Also,

the learned High Court Judge went ahead to order the respondent to add TZS. 20,000,000.00 on the purchase price and that parties should sign and execute the sale agreement in respect of a suit premises.

Aggrieved, the appellant has preferred this appeal which is grounded on five (5) points of grievance, namely: -

1. *That, in the absence of the sale agreement, the trial Court erred in law and fact in holding that, the respondent lawfully purchased the disputed property situated on plot No. 17/2 Block 35D House No. 185 Matimba street Mchangani Mwananyamala.*

2. *Having observed the lease agreement contains no purchase clause of the disputed property, upon its expiry, the trial Court erred in law and fact by failing to properly analyse evidence on record and make a finding that there was neither agreement to sell the disputed property nor consensus ad idem on the alleged purchase price of TZS 70,000,000/=.*

3. *That, the trial Judge erred in law and fact by holding that there was an enforceable agreement in law between the appellant and the respondent in respect of the purported sale of Plot No. 17/2 Block 3 D House No. 185 Matimba Street Mchangani Mwananyamala 'A' Kinondoni Dar Es Salaam.*

4. *That, the trial Judge erred in law and fact by holding that, clause 6 of the lease agreement did not require the respondent to seek consent of the landlord prior to making the renovations of the disputed property.*

5. *That, the trial Judge erred in law and fact by ordering the parties to sign and execute a sale agreement in respect of Plot No. 17/2 Block 3ED House No. 185 Matimba Street Mchangani Mwananyamala 'A' Kinondoni Dar Es Salaam in the absence of consensus ad idem on the purchase price.*

At the hearing, in appearance was Mr. Ndurumah Keya Majembe learned counsel for the appellant and Mr. Samwel Shadrack Ntabaliba, learned counsel for the respondent. The appellant filed written submissions containing the arguments for the appeal which he adopted at the hearing of the appeal. The respondent filed none and thus made oral submissions at the hearing.

The grounds of appeal, the record before us and the submissions made by either party, boil down to mainly three issues; **one,** whether the sale of the suit premises was valid according to the law; **two,** whether the appellant authorised the respondent to renovate the suit premises; **three,** the propriety or otherwise of the order of the High

Court requiring the parties to sign the sale agreement which addresses the 5th ground of complaint.

The first issue relating to the propriety or otherwise of the agreement to sell the house in question is premised on the 1st, 3rd and 5th grounds of appeal. It was submitted by the appellant's counsel that, in absence of a written sale agreement, the trial court erred to hold that, the respondent lawfully purchased the suit property situated on plot No. 17/2 Block 35D House No. 185 Matimba street Mchangani Mwananyamala. On this, reliance was placed on the provisions of section 64 (1) (a) and (b) of the Land Act [CAP. 113 R.E. 2019] which mandatorily requires the disposition of registered land to be in a written contract or a memorandum containing the agreed terms and conditions. In this regard, it was argued that, it was not proper for the learned trial Judge to rely on a gentleman's agreement to confirm about the sale of the suit premises as between the parties. To bolster the propositions, the appellant's counsel cited to us the case of **REGISTERED TRUSTEES OF THE HOLY SPIRIT SISTERS TANZANIA VS JANUARY KAMILI SHAYO AND 136 OTHERS,** Civil Appeal No. 193 of 2016 (unreported).

On the other hand, it was submitted by the respondent's counsel that, given that the appellant did not refund to the respondent the monies deposited into his account, and having allowed the respondent to continue to occupy the suit premises after expiry of the two years lease term, the respondent had acknowledged the gentleman's agreement hence the justification by the learned trial Judge to rely on such agreement. He was of the view that, the case of **REGISTERED TRUSTEES OF THE HOLY SPIRIT SISTERS TANZANIA VS JANUARY KAMILI SHAYO AND 136 OTHERS,** (supra) is distinguishable as it dealt only with the principle of adverse possession.

Having considered the rivalling contentions, as earlier stated, it is not in dispute that, the appellant was desirous of selling the suit premises and that a sum of TZS. 70,000,000.00 was deposited by the respondent in the appellant's bank account. However, parties parted ways as to the purchase price. While the appellant claimed to have offered to sell the house at the price of TZS. 120,000,000.00, the respondent claimed that the price offered was TZS. 70,000,000.00.

It is glaring that according to the evidence on the record at page 396 of the record of appeal, that the suit premises is on land held under the certificate of occupancy Title No. 88108 as per exhibit D2. That

being the case, its disposition is governed by the provisions of section 64 (1) (a) and (b) which stipulates as follows:

> *"(1) A contract for the disposition of a right of occupancy or any derivative right in it or a mortgage* ***is enforceable in a proceeding only if–***
>
> *(a) the contract is in writing or there is a written memorandum of its terms;*
>
> *(b) the contract or the written memorandum is signed by the party against whom the contract is sought to be enforced.*
>
> *(2) A contract for a disposition referred to in subsection (1) may be made using a prescribed form.*

According to the bolded expression, the disposition of the right of occupancy will only be enforceable if it is reduced in writing in the form of a contract or memorandum. Failure to do so renders the sale inoperative. This was earlier on underscored in the case of **REGISTERED TRUSTEES OF THE HOLY SPIRIT SISTERS TANZANIA VS JANUARY KAMILI SHAYO AND 136 OTHERS,**

(supra) where having considered Regulations 3 (1) to (3) of the Lands Regulations, 1960 (G.N. 101 of 1960) which among other things, states that, a disposition of a right of occupancy shall not be operative unless it is in writing, the Court stated as follows:

> *"There is, in this regard, a long line of authority to the effect that an oral ...disposition of land held under the Right of Occupancy, such as one relied by the respondents, it is inoperative and of no effect. If we may just cite a few, Patterson and another v Kanji [1956] E.A.C.A 106, dealing with a similar regulation, the defunct Court of Appeal for Eastern Africa stated that* ***one cannot seek to enforce at law which he can only establish by relying on a transaction declared by law to be inoperative."***
>
> [Emphasis supplied]

[See also **NITIN COFFEE ESTATES LTD AND 4 OTHERS VS UNITED ENGINEERING WORKS LTD AND ANOTHER** [1988] TLR 203.] In the latter case, the shareholding in the assets of the Company which included two farms held under the Right of Occupancy were sold vide the agreement made orally. The price of shares was not agreed and there was no means of ascertaining it. As the purchaser was put into

occupation of the farms as buyer, the original owners sought to repudiate the sale agreement that as the sale was not in writing, the agreement was not enforceable as required by Regulation 3 (1) of the Land Regulations, 1948. The Court among other things, held:

> *"An oral agreement to sell land held under a Right of Occupancy is inoperative and of no effect in terms of Regulations 3 (i) of the Land* Regulations, 1948."

The spirit that the disposition of then right of occupancy must be in writing as envisaged under the Old Land Regulations, is embraced under section 64 (1) (a) and (b) of the Land Act. The essence of having a written contract for disposition of a right of occupancy facilitate ascertaining the terms and conditions of the requisite transaction including the price and if any monies have been paid to the seller in respect of the disposition. In the present matter, there is no means of ascertaining the price of the suit premises in the gentleman's agreement which was not envisaged by the law makers in the disposition of a right of occupancy and this is what caused the learned trial Judge to have an uphill task to determine with certainty the conditions and terms of the agreement in order to address the framed issues in that regard. Thus, in this regard, the cases of **REGISTERED TRUSTEES OF THE HOLY**

SPIRIT SISTERS TANZANIA VS JANUARY KAMILI SHAYO AND 136 OTHERS, (supra) and **NITIN COFFEE ESTATES LTD AND 4 OTHERS v UNITED ENGINEERING WORKS LTD AND ANOTHER** (supra) apply in equal force in the present case on the principle of having written agreements in the disposition of land held under the right of occupancy.

Given the absence of a written sale agreement on the suit premises, there was no legal sale agreement between the appellant and the respondent on the suit premises. Thus, the terms and conditions imposed by the learned trial Judge who as well, required the parties to sign the sale agreement are of no consequence whatsoever as they cannot validate the inoperative or rather invalid sale of the suit premises. With respect, the learned trial Judge did not consider the prescribed position of the law regulating the sale of land held under the right of occupancy. Thus, the 1st, 3rd and 5th grounds of appeal are merited and we shall in due course state what reliefs are parties entitled to.

Next for determination is whether the appellant authorised the respondent to renovate the suit premises. Whereas, the respondent had claimed that the leased suit premises was in bad condition which necessitated making extensive repairs, it was the appellant's submission

that, according to the two-year lease agreement, the respondent was obliged to maintain the house in a habitable condition and if he wished to make whatever renovations, should do so after involving the landlord who is the appellant or his agent. In the premises, it was argued that, in the absence of the appellant's authorisation, the renovations on the suit premises were unwarranted.

On the other hand, the respondent's initially held the view that the respondent was authorised by the appellant to effect renovations. However, upon being probed by the Court and directed to read clause 6 the lease agreement, he conceded that prior consent of the appellant was not obtained.

The lease agreement of the suit premises between the parties herein was upon terms and conditions contained in the respective agreement dated 18/5/2011 which was admitted at the trial as exhibit P1. Clause 6 of the agreement categorically states as follows:

> *"Mpangaji kwa muda wote anatakiwa kutunza nyumba yote ikiwemo madirisha, makabati pamoja na vyombo vingine katika hali inayostahili na alivyokabidhiwa kinyume chake itamlazimu kufanya matengenezo kabla ya mkataba kuisha.*

Na amhusishe mwenye nyumba au Wakala wake."

In the light of the cited clause, the respondent was obliged to maintain the suit premises in good condition throughout the lease term or else, where necessary, make repairs before the expiry of the lease after obtaining authorisation of the appellant or his agent. However, the renovation was not in connection with the prospective selling of the suit property but rather in respect of the lease contract. In this record, we could not trace the appellant's authorisation to have the suit premises renovated by the respondent, let alone the respondent's request to have the suit premises renovated. It is settled law that, parties are bound by their agreements they freely entered into and this is a cardinal principle of the law of contract that, there should be a sanctity of contract. This was emphasised in the case of **ABUALY ALIBHAI AZIZI VS BHATIA BROTHERS LTD** [2000] TLR 288 at page 289, thus:

"The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement."

In the circumstances, given that parties were free agents and had capacity to execute the lease agreement and there being no evidence of fraud or misrepresentation or violation of public policy, the parties were bound to the lease agreement. Thus, respondent violated clause 6 of the lease agreement having renovated the suit premises without the authorisation of the appellant. Therefore, the option taken by the respondent was indeed a cause of his own peril and he cannot be heard to claim the renovation costs. Thus, the complaint in ground 4 of the appeal is merited.

Finally, as to what the parties are entitled to, we earlier intimated to deal with the matter at the end of our decision. Therefore, since it is settled that there was no valid sale of the suit premises; **one,** the appellant herein is the lawful owner of the suit premises; **two,** thus, appellant is hereby ordered to refund to the respondent the sum of TZS. 70,000,000.00 deposited in the appellant's bank account as the purported purchase price; and **three,** given that the respondent has been in occupation of the suit premises without paying rent, he is ordered to pay the appellant the rent for the whole term commencing from the date of expiry of the extended lease that is on 9/6/2014 at the

rate of TZS. 250,000.00 per month until when he vacates the suit premises.

Finally, the appeal is allowed to the extent stated and as such, we make no order as to costs.

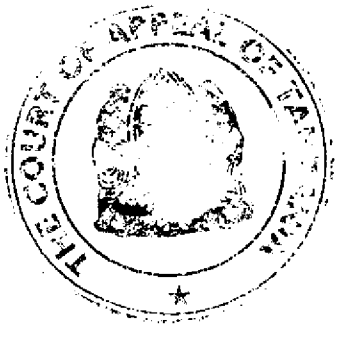
DATED at **DAR ES SALAAM** this 28th day of August, 2023.

S.E.A. MUGASHA
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered this 28th day of August, 2023 in the presence of Mr. Jesse Joseph Mwanisawa, learned Counsel for the Appellant and Mr. Erick Rweyemamu, learned counsel holding brief for Mr. Samwel Shadrack, learned Counsel for the Respondent, is hereby certified as a true copy of the original.



R. W. Chaungu
DEPUTY REGISTRAR
COURT OF APPEAL