IN THE COURT OF APPEAL OF TANZANIA

AT MOROGORO

(CORAM: JUMA, CJ., MWARIJA, J.A. And MAKUNGU, JA.:)

CIVIL APPEAL NO. 387 OF 2020

MELCHIANDES JOHN MWENDA..... APPELLANT

VERSUS

RAMADHANI M. MUSSA.....1ST RESPONDENT

PHILIP FELIX KWEKA.....2ND RESPONDENT

(Appeal from the Decree and Judgment of the High Court of Tanzania, Land Division at Dar es Salaam

(Mohamed, J.)

dated the 30th day of November, 2018

in

Land Appeal No. 158 of 2017

JUDGMENT OF THE COURT

25th April & 2nd May, 2023

MWARIJA, J.A.:

This appeal arises from the decision of the High Court of Tanzania (Land Division) in Land Appeal No. 158 of 2017 dated 30/11/2018. In that appeal, the High Court (Mohamed, J.) upheld the decision of the District Land and Housing Tribunal for Morogoro (the DLHT) handed down on 3/8/2017 in Application No. 127 of 2014. The application was filed in the DLHT by the respondents, Ramadhani M. Mussa and Phillip Felix Kweka (the 1st and 2nd respondents respectively) following a dispute between the 2nd respondent and the

appellant, Melchiades John Mwenda over a purchase of a house situated on Plot No. 2 in Msamvu area within Morogoro Municipality owned by the 2nd respondent vide the Certificate of Title No. 83277 (hereinafter "the suit property").

The 2nd respondent had mortgaged the suit property to the CRDB Bank (the Bank) so as to secure a loan of TZS 20,000,000.00 credited to him in July 2009. The loan was to be repaid by 15/8/2010. As it turned out, he defaulted to repay the loan and therefore, to save the suit property from being auctioned by the Bank, he decided to find a person who would pay the outstanding loan on the condition of being offered to buy the suit property. The appellant, agreed to buy it and therefore, on 17/08/2008, he entered into agreement with the 2nd respondent on a consideration of TZS 43,000,000.00 on the terms and conditions that; the amount of TZS 22,000,000.00 should be deposited into the 2nd respondent's loan Account No. 01J207769800 at the Bank to settle the outstanding amount of the loan facility which the 2nd respondent owed the Bank. The balance of TZS 21,000,000.00 was to be paid in instalments: (i) TZS 3,000,000.00 upon execution of the sale agreement, (ii) TZS 10,000,000.00 to be paid on 10/10/2010 and (iii) TZS 8,000,000.00 was to be paid on 30/09/2010. The agreement was admitted during the hearing in the DLHT as exhibit A1.

The agreement was later on terminated by the 2nd respondent by a letter dated 08/10/2010 and on 01/10/2013, he entered into another agreement (the second agreement) with the 1st respondent. The 2nd respondent did so on contention that, the appellant had breached the terms of the agreement, particularly the condition in which he was required to deposit TZS 22,000,000.00 in the 2nd respondent's loan Account to settle the outstanding loan.

In the second sale Agreement the suit property was to be purchased by the 1st respondent at the price of TZS 50,000,000.00 on the conditions that: (i) TZS 18,000,000.00 was to be paid in the 2nd respondent's loan Account at the Bank to settle the outstanding debt, (ii) TZS 12,000,000.00 was to be paid on signing of the sale agreement and (iii) TZS 20,000,000.00 to be paid after the Certificate of Title, which was in the custody of the Bank, had been handed over to the 1st respondent.

As it turned out however, after having entered into the contract with the 1st respondent, the 2nd respondent failed to give vacant possession. As a result, the 1st respondent instituted a case in the DLHT, Application No. 66 of 2013 seeking a declaration that the 2nd respondent had breached the sale agreement. The 1st respondent

prayed also for *inter alia*, vacant possession or in the alternative, a refund of TZS 32,000,000.00 and payment of general damages of TZS 100,000,000.00 plus interest.

The application did not proceed to its conclusion as, on 01/10/2015, by a deed of settlement and compromise of suit, the parties terminated the application. In the settlement deed, the 2nd respondent agreed to give vacant possession upon payment by the 1st respondent of the balance of the purchase price amounting to TZS 20,000,000. On his part, the 2nd respondent undertook to notify the Bank, which had the custody of the Certificate of Title, that the same and other documents concerning the suit property be handed over to the 1st respondent.

Having settled their dispute, the respondents teamed up and filed an application in the DLHT against the appellant, Application No. 127 of 2014 to seek an order declaring the 1st respondent the rightful owner of the suit premises and not the appellant who allegedly breached the terms of the agreement between him and the 2nd respondent. The respondents prayed for *inter alia,* a declaration that the appellant had breached the agreement and consequently an order

nullifying the sale agreement, damages of TZS 100,000,000.00 and interest.

In his written statement of defence, the appellant disputed the claims contending that, he did not breach the sale agreement between him and the 2nd respondent but that, to the contrary, it was the 2nd respondent who failed to comply with the terms of the agreement. In paragraph 3 of his written statement of defence, he stated, among other things, that: the 2nd respondent refused to hand over the shop frame while the appellant had discharged its obligation and had at the time paid the 2nd respondent a total of TZS 28,000,000.00 including TZS 7,000,000.00 which was deposited in the 2nd respondent's loan Account. He claimed further that the 2nd respondent made unjustifiable demands and avoided the appellant whenever he wanted to effect payment, the acts which were intended to defraud the appellant.

In addition, the appellant raised a counterclaim seeking declaration that the 2nd respondent had, by his deeds and conduct, breached the sale agreement thus causing the appellant to suffer financial and economic loss as a result of being denied the use of the shop frame. He thus prayed for among other reliefs, a declaration that

the respondents had breached the sale agreement between him and the 2nd respondent, compensation for loss of business, general damages of TZS 100,000,000.00 and interests.

In his testimony, apart from restating the facts, most of which were undisputed, the 1st respondent (AW1) testified that, in compliance with the terms of the agreement, he paid TZS 18,000,000.00 in the 2nd respondent's loan Account at the Bank in settlement of the debt which he owed the Bank and TZS 12,000,000.00 directly to the 2nd respondent. He tendered *inter alia,* a bank pay in slip in respect of payment of TZS 18,000,000.00 (exhibit A2) and a handing over letter in respect of the suit premises (exhibit A6).

On his part, the 2nd respondent, who testified as AW2 gave evidence to the effect that, the appellant, with whom he had previously entered into the sale agreement in respect of the suit premises (exhibit A1) breached the terms of the agreement by failing to pay the whole amount of TZS 22,000,000.00 in the 2nd respondent's loan Account so as to settle the debt owed by him to the Bank as agreed in the sale agreement. He said that, the appellant paid only TZS 7,000,000.00. It was his evidence further that, as for the three

instalments in respect of the balance of TZS 21,000,000.00, he was directly paid by the appellant TZS 8,000,000.00 followed by TZS 10,000,000 which was paid to him (the 2nd respondent) through his advocate in his office and TZS 2,000,000.00 which was paid in the appellant's office. The 2nd respondent contended that, it was due to the appellants failure to pay to the Bank the balance of TZS 15,000,00.00 that the 2nd respondent opted to rescind the agreement between them.

As a result of the failure by the appellant to deposit the balance of TZS 15,000,000.00, the interest accrued and by 5/9/2012, the outstanding amount of the debt had increased to 18,000,000.00. The unpaid debt compelled the Bank to issue a notice of intention to auction the suit property. To rescue the situation, the 2nd respondent filed an application in the DLHT seeking a restraint order against the Bank. Later on however, upon negotiation with the Bank, whereby he introduced the 1st respondent as the person with whom he had agreed to settle the outstanding amount, and the agreement to withdraw the application, the 2nd respondent was allowed to pay the debt through the 1st respondent. While the outstanding balance was paid to the Bank, the balance of TZS 32,000,000.00 was paid to the 2nd

respondent and as a result, according to him, the 1st respondent acquired the suit property.

In his defence, the appellant, who testified as RW1 told the DLHT that, on the date of signing the agreement, that is, on 17/8/2010, he paid TZS. 3,000,000.00 to the 2nd respondent in compliance with the terms of the agreement (exhibit R1). He testified further that on the same date, he went to the Bank to pay the agreed sum of TZS. 22,000,000.00 which would settle the balance of the loan payable to the Bank by the 2nd respondent.

According to the appellant, the Bank officials informed him that the payment could not be accepted because the Bank was in the process of auctioning the suit property. He added that, he was advised to pay 1/3 of the outstanding amount, which was TZS. 7,000,000.00 while awaiting further instructions from the Bank's Headquarters, the advice which he heeded to by paying that amount of money. Subsequent to the payment of TZS. 7,000,000.00 in the 2nd respondent's loan Account, on 26/9/2010, before the agreed date of payment of TZS. 8,000,000.00 which was to be paid on 30/9/2010, he paid that amount on the 26/9/2010 on the request of the 2nd respondent.

Having effected the payment on the same date, he went to see the 2nd respondent with a view to being handed over the shop frame but could not find him. Later on 8/10/2010, he received a notice of termination of the agreement (exhibit R3) on allegation that he had breached the terms of the agreement; that he had failed to pay TZS. 24,000,000.00 out of the purchase price of 43,000,000 claming that the total amount paid by him was only TZS 19,000,000.00. He went on to testify on the steps which he took against the 2nd respondent, including filing of caveat emptor with the CRDB and the move to seek the assistance of the State Attorney's office so as to resolve the dispute, but all in vain.

The appellant called Denis Kayanda (RW2) who was at the material time the Bank's Loans Manager. This witness stated that, after the 2nd respondent's default in repayment of the loan, and after the Bank had shown its intention to auction the suit property, the said respondent went to the Bank with the 1st respondent and introduced him as the person who would pay the loan. The Bank required them to show commitment by paying at least 1/3 of the debt so that the intended auction could be stopped. According to RW2, the respondents did so and the Bank stopped the auction. After few days, the 2nd respondent directed the Bank not to accept any further

payments from the appellant because he was no longer the 2nd respondent's sponsor and the Bank honoured the directives of its client (the 2nd respondent).

Prof. Cyriacus Binamungu, who prepared the sale agreement, also testified for the appellant as RW3. His evidence was merely on the contents of the agreement. He also confirmed that, the amount of TZS 3,000,000.00 was paid by the appellant to the 2nd respondent at the time of signing the agreement in compliance with one of the terms and conditions of the agreement.

The appellant called also Fulgence Moris (RW4) who was mistakenly recorded as RW5 (he was the fourth witnesses to testify). In his evidence, he told the DLHT that, at the material time, he was the business partner of the appellant. He recalled that, sometime in September, 2010, the appellant and the 2nd respondent met at the former's business premises. Since he was at the business premises together with them, he saw the appellant handing over to the 2nd respondent TZS 8,000,000.00 and after both of them had signed a document, they both left.

Having considered the evidence tendered by the witnesses for the respondents and the appellant the DLHT found that the appellant

breached the agreement because he failed to deposit the whole amount of TZS 22,000,000.00 in the 2nd respondent's loan Account so as to settle the unpaid amount of loan as per the terms of the agreement. It found that, apart from the payment of TZS 3,000,000.00 and TZS 7,000,000.00, the appellant did not pay the remaining from TZS 43,000,000.00, which was the agreed purchase price. The DLHT considered the fact that, because of the appellant's failure to abide by the terms of the agreement, the suit property was in danger of being auctioned and the 2nd respondent's act of finding another person who could buy it, was a proper move. It thus found that the contract between the 1st and 2nd respondents was valid. It found also that the respondents did not act fraudulently.

On those findings, the DLHT declared the 1st respondent the lawful owner of the suit property and ordered that, he be handed over the Certificate of Title thereof. It ordered further that the appellant be refunded TZS 28,000,000.00 plus interest. As to costs, it was ordered that the parties bear their own costs.

On appeal to the High Court, the decision of the DLHT was upheld. The learned first appellate Judge considered the fact that, the agreement between the respondents was entered into while there was

a pending application in the DLHT, Application No. 105 of 2010 and while there was an order made in Application No. 179 of 2012 restraining the 2nd respondent from disposing of the property. He was of the view however, that, since the 1st respondent was not a party to any of the two applications, he remained to be a *bonafide* purchaser of the suit property. On the agreement between the 2nd respondent and the appellant, the learned first appellate Judge found that, the latter breached it by failing to pay prompty TZS. 22,000,000 into the former's loan Account.

He found further that, under section 75 of the Law of Contract Act, Cap 345 of the Revised Laws (the LCA) the 2nd respondent had the right to rescind the agreement and thus did so because time was of essence. He thus dismissed the appeal and ordered the 2nd respondent to refund TZS 7,000,000.00 to the appellant.

Aggrieved further by the decision of the High Court, the appellant has preferred this second appeal which is predicated on the following five grounds

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"1. The first appellate judge erred in holding as

valid the sale of the suit property by the 2nd to the 1st respondent because at the date of purported sale the 2nd respondent did not have any property to sell having previously sold the same to appellant.

2. *The appellate judge erred in law and in fact, in concluding that the 1st respondent was bonafide purchaser for value without notice of any encumbrances in view of (a) the lack of evidence of due diligence on the part of the 1st respondent, (b) the order of temporary injunction protecting the property from alienation and disposition issued by the tribunal in Misc. Civil Application No. 179 of 2012, (c) the Tribunal's custody of the Title No. 83277 and (d) the arranged handing over of the suit land and the purported Deed of Settlement and Compromise of Suit Exh. A6) in the absence of Title No. 83277 on 1/10/2013.*

3. *The appellate judge erred in deducting without assigning reasons TZS 7,000,000.00/= from the refund (purchase price) that was ordered by the Tribunal to be reimbursed to the appellant and in removing interest thereof.*

4. *In view if the absence if a provision in the Sale Agreement (Exh. A) for the payment of the balance of the price (TZS 22,000,000/=) within any specific time, coupled with the evidence that the 2nd respondents instructed the Bank not to receive from the appellant into the 2nd respondent's bank account further payments, the appellate judge erred in holding that the Appellant was in breach of the Sale Agreement in that consideration was not fully furnished, and thus there was no valid or concluded contract between the appellant and the 2nd respondent, and further that the 2nd respondent was entitled to rescind the Agreement.*

5. *The appellate judge erred in not holding that the 2nd respondent was guilty of fraud that vitiated the purported sale of the suit property by the 2nd to the 1st respondent."*

At the hearing of the appeal, the appellant was represented by Mr. Sylvester Shayo, learned counsel. The respondents appeared in person, unrepresented. The appellant and the 2nd respondent had duly filed their written submissions in compliance with Rule 106(1) and (7) of the Tanzania Court of Appeal Rules, 2009 and the same were adopted by the respective parties.

In the appellant's written submissions, which Mr. Shayo highlighted during the hearing, the appellant maintained, as he did in both the DLHT and the High Court, that he did not breach the agreement. Having restated the background facts giving rise to the parties' dispute, by way of a prelude,Mr. Shayo submitted that, the failure by the appellant to deposit in the 2nd respondent's loan Account the whole of the agreed amount of TZS 22,000,000.00 was not due to the appellant's mistake. The learned counsel stressed that the appellant was prevented by the Bank from depositing that amount because it was in the process of auctioning the suit property and thus allowed him to deposit only TZS 7,000,000.00 and await the approval of the Headquarter of the Bank before depositing the balance of TZS 15,000,000.00.

Later on, he said, the appellant learnt that the 2nd respondent had directed the Bank not to accept any further payments from the appellant. As for other payments to the 2nd respondent, which were to be made by instalments, Mr. Shayo submitted that, although some of the payments were made outside the agreed time, that was because of the 2nd respondents' unavailability when the appellant went to him with the intention of effecting such payments. Mr. Shayo argued further that, the sale agreement between the 2nd respondent and the

1st respondent is invalid because the same was entered into while there was a caveat filed by the appellant.

Having said so, Mr. Shayo proceeded to submit on grounds 1, 4 and 5. He argued that the 2nd respondent breached the agreement by selling the suit property to the 1st respondent because, as at 7/10/2012, the said propertly did not belong to him, the same having been sold to the appellant on 17/8/2010. The learned counsel cited the case of **Melchiades John Mwenda v. Gizelle Mbaga and Others**, Civil Appeal No. 57 of 2018 (unreported) to bolster his argument that, even without a document evidencing that the title of a property had passed, an agreement is sufficient to that effect.

Citing also the provisions of s.55(1) of the LCA, the Privy Council decision in the case of **Jamshed Khodaram Irani v Bujan** (1915) AC 386 and s.180(1) (b) of the Land Act, Cap. 133 of the Revised Laws, the learned counsel argued that, in the matter of a sale of land, time is not of essence. More so in this case, he said, because no time was prescribed for payment to the 2nd respondent's loan Account, the balance of TZS 15,000,000.00. On ground 5, Mr. Shayo insisted that, from his conduct as stated above, the contention that the 2nd respondent acted fraudulently has been proved.

As for the 2nd ground, on whether or not the 1st respondent was a *bonafide* purchaser of the suit property, Mr. Shayo argued that, the issue should be answered in the negative because the 1st respondent did not make a search before he purchased the suit property. Had he done so, the learned counsel argued, he would have found that the appellant had presented a caveat on 6/12/2010 in respect of the suit property. He argued further that, there was also a restraint order issued in Application No. 179 of 2012 which the 2nd respondent was aware of.

With regard to the 3rd ground, the appellant's counsel faulted the learned first appellate Judge for reducing the amount of TZS 28,000,000.00 which the DLHT ordered to be refunded to the appellant and instead, ordered a refund of TZS 7,000,000.00 without giving reasons for such reduction.

In his reply written submission, the 2nd respondent raised a point of law that, the appeal was filed out of time and that the same is also incompetent for misdescription of the appellant; that in the notice of appeal he was referred to as **Melchiandes Mwenda** not **Melchiades John Mwenda** as appearing in proceedings. He also raised a point

that, the appellant has cited a wrong provision of the Tanzania Court of Appeal Rules, 2009.

When the attention of the 2nd respondent was drawn to the fact that the appeal was filed on 19/10/2020 after the appellant had obtained a certificate of delay which excluded the period from 4/12/2018 to 22/9/2020, he abandoned his contention that the appeal was filed out of time. As for the other points, he conceded that the same are minor and thus curable. He also abandoned the his objection on those grounds.

On the grounds of appeal, the 2nd respondent made a brief submission. On the 1st, 4th and 5th grounds, he submitted that, the appellant breached the agreement because he did not discharge his obligation of paying the agreed amount timely leading to the threat by the Bank to auction the suit property.

On the 2nd ground, he contended that, he entered into agreement with the 1st respondent so as to save the suit property from being auctioned. With regard to the 3rd ground, it was the 2nd respondent's argument that, the learned first appellate Judge did not err in reducing the amount of refund to the appellant from TZS 28,000,000.00 to TZS 7,000,000.00.

The 1st respondent who did not file any written reply submissions did not have anything to submit in Court. He left the matter for determination of the Court.

To start with the 4th ground of appeal, from the submission of the learned counsel for the appellant and the 1st respondent, there is no dispute that the appellant did not comply with the requirement of paying the whole amount of TZS 22,000,000.00 in the loans Account of the 2nd respondent to settle the amount of loan which he owed the Bank. The appellant's defence is that the non – compliance was not of his own making but that he was prevented by the Bank and the 2nd respondent.

Having considered the evidence, we agree with both the DLHT and the High Court that the appellant breached the agreement. The contention that the appellant was refused by the Bank to pay the balance of TZS 15,000,000.00 is not a plausible argument. According to the evidence of RW2, after the deposit by the 2nd respondent through the appellant, of TZS 7,000,000.00, the Bank lifted its direction to auction the suit property. Yet until on the 30/9/2010, the date on which all the instalment should have been paid, the appellant had not discharged his obligation of depositing the balance of TZS

15,000,000.00. The fact that there was no specified period for depositing the full amount of TZS 22,000,000.00 does not mean that the appellant had the liberty to do so outside the contractual period which ended on 30/9/2010 particularly when the purpose of the agreement was to save the suit property from being auctioned. Failure to comply with the terms of the sale agreement would have the effect of defeating that purpose.

It was Mr. Shayo's argument that given the nature of the subject matter of agreement between the appellant and the 2nd respondent, time was not of essence. The quintesses of the principle relied upon by the learned counsel was clarified in the English case of **Tilley v. Thomas** (1) L. R. 3 Ch. 61; that:

> *"A court of equity will indeed relieve against, and enforce specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for steps towards, if it can do justice between the parties, and it (as Lord Justice Turner said in Robert vs berry), there is nothing in the express stipulation between the parties, the nature of the property or the surrounding circumstance, which would make it in equitable to interfere with and modify the legal right. This is what it meant, and all that it meant,*

when it is said that in equity time is not of essence of the contract."

Furthermore, as regards the import of s.55(1) the LCA, it is the intention of the parties which determines whether or not time is of essence. The section provides as follows:

"55-(1) When party to contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before specified time, the contract, or much of it as not been performed, becomes voidable at the option of the promise, if the intention of the parties was that time should be of the essence of the contract"

In the case of ***Mirambo Mabula v. Yohana Maiko Sengasu and Another***, Civil Appeal No. 71 of 2020 (unreported) which had the facts similar to the case at hand, the Court held that, in an agreement for sale of a landed property, time may not be of essence only in certain situations. We cited with approval the comment in **Halsbury's Laws of England,** 5th Ed. Reissue Vol. 9 (1) at page 685 where it is stated that:

"The modern law, in the case of contracts of all types, maybe summarized as follows. Time will not be considered to be of essence, except in one of the

following: cases: 1) where the parties expressly stipulated that conditions as to time must be strictly complied with; or 2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of essence; or 3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of essence."

See also the persuasive decision of the High Court in the case of ***Cosco East Africa Limited v. Alexander Joseph Maiyi,*** Land Case No. 134 of 2017 (unreported). The failure by the appellant to comply with the term of the contract soonest as intended by the parties who, on the second day after the agreement went to the Bank with the intention of depositing the amount of TZS 22,000,000.00, compelled the 2nd respondent to rescind the agreement and find another buyer. He did so after the debt had accrued to TZS 18,000,000.00. In the circumstances the 2nd respondent was justified to rescind the agreement between him and the appellant.

The finding on the 4th ground suffices to dispose of the 1st and 5th grounds of appeal. Since the 2nd respondent had justifiably rescinded the agreement, the second agreement in respect of sell of the suit propertly to the 1st respondent was valid. It is also obvious

from the above stated finding that the 2nd respondent did not act fraudulently.

With regard to the 2nd ground, we agree with the finding of the High Court that since the 1st respondent was not a party to Misc. Civil Application No. 179 of 2012, the purchase by him of the suit property was made *bonafide*. As to lack of diligence, in that he did not make official search, that contention is in our considered view, misconceived. From the evidence, the purported caveat was presented to the Bank and not to the Registrar of Titles in terms of s. 78 (1) and (3) of the Land Registration Act Cap. 334 of the Revised Laws. As for the argument that the handing over was done without the Certificate of Title, as per the case of ***Melchiades v. Giselle*** (supra) cited by Mr. Shayo, the agreement was similarly sufficient to confer title on the 1st respondent.

Finally on the 3rd ground, we agree with Mr. Shayo that the learned first appellate Judge erred in reducing the amount of TZS 28,000,000.00 ordered by the DLHT to be refunded to the appellant. In his evidence as shown above, the 2nd respondent admitted that the appellant paid him that amount inclusive of TZS 7,000,000.00 deposited in the former's loan Account.

On the basis of the above stated findings, save for variation of the amount of the refund to the appellant, the appeal is hereby dismissed. In the circumstances, each party to bear its own costs.

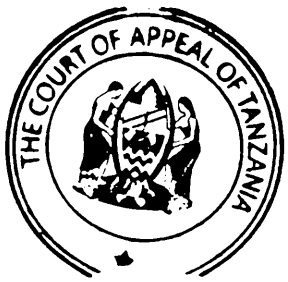
DATED at **MOROGORO** this 29th day of April, 2023.

I. H. JUMA
CHIEF JUSTICE

A. G. MWARIJA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

This Judgment delivered this 2nd day of May, 2023 in the presence of Appellant in person, the 1st respondent is absent and the 2nd respondent appeared in person via Video Link from Bagamoyo District Court, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL