

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWANDAMBO, J.A., KIHWELO. J.A., And MGONYA J.A.)

CIVIL APPEAL NO. 152 OF 2022

KINONDONI MUNICIPAL COUNCIL APPELLANT

ATTORNEY GENERALINTERESTED PARTY

VERSUS

OYSTERBAY VILLAS LIMITED RESPONDENT

**(Appeal arising from the judgment and decree of the High Court of
Tanzania, Commercial Division at Dar es Salaam)**

(Magoiga, J.)

dated the 16th day of July, 2011

in

Commercial Case No. 88 of 2011

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JUDGMENT OF THE COURT

14 February & 21st May, 2024

MGONYA. J. A.:

At the High Court of Tanzania, Commercial Division at Dar es salaam (the trial court), the respondent, Oysterbay Villas Limited unsuccessfully sued the appellant Kinondoni Municipal Council in a suit for payment of a sum of United States Dollars Three Hundred Thousand (USD \$ 300,000.0) being compensation for losses, costs and damages said to have been suffered by the respondent for the alleged breach of a Joint Venture Development and Joint Ownership of the properties Agreement involving two plots of land situate in Oysterbay, Dar es Salaam City.

Both the appellant and respondent were aggrieved by the decision of the trial court. On 22nd April, 2022 the appellant filed a notice of appeal followed by an appeal. Subsequently, Oysterbay Villas Limited lodged a notice of cross appeal.

The facts giving rise to the appeal are as follows. On 13th December, 2007, the appellant Kinondoni Municipal Council (herein to be referred as "KMC") and the respondent, Oysterbay Villas Limited entered into two separate agreements which were termed as, Agreement for Joint Venture Development and Joint Ownership (herein to be referred "the Agreements"), (exhibit P1). The first agreement was for the development of the property situated at Plot No. 322 along Ruvu Road Oysterbay involving Contract No. KMC/150/2007. The second agreement was for development of the property on Plot No. 277 along Mawenzi Road involving Contract No. KMC/ 151/2007. Under the 1st agreement, the respondent was agreed to construct two blocks of 24 units residential apartments. Under the 2nd agreement, the respondent was obliged to construct four blocks of 44 units residential apartments. It was agreed between the parties under clause 2.2 read together with clause 9.1 of both agreements that, the developed properties will be jointly owned by the parties at the ratio of 75% by the respondent and, 25% by the

appellant. Besides, it was their agreement that the respondent was responsible for the construction costs while the appellant's contribution was in the form of the value of the land. Further, under both contracts, it was agreed that, upon completion of the apartments, the appellant shall transfer the right of occupancy of the properties in the joint names of the parties.

It was the respondent's complaint before the trial court that, after the successful completion of the construction on 16th August, 2020, she wrote a letter to the appellant notifying that she had performed her contractual obligation. The appellant issued her a certificate of occupation (exhibit P2) certifying the completion of the construction work but she refused to fulfil other obligations contrary to the terms and conditions of the agreements. It was claimed further that, after several reminders to the appellant to process the issuance of new certificates of title bearing joint names of both parties in accordance with the contracts, the appellant came up with a proposal to change the agreed terms and conditions on the ratio of ownership and the period of the agreements. The appellant emerged with a proposal to change the terms from unexpired residual term to Build Operate Transfer (BOT) term. The new proposal was rejected by the respondent who resorted to seek intervention of the Prime

Minister which resulted the appellant surrendering the certificates of title to the Commissioner for Lands (exhibit P4). However, the appellant did not process certificates of joint ownership as they agreed by the respondent in their agreements. It is from the said breach, the respondent instituted a suit before the trial court claiming among other reliefs, specific performance of the agreements and order to compel the appellant to transfer the certificates of title to the joint names of parties to the agreement.

Before the commencement of hearing, the trial court framed five issues as indicated below:

- (i) Whether the defendant breached the terms and conditions of the Joint Venture Agreements by refusing to transfer the right of occupancy into joint ownership;
- (ii) Whether the agreements entered between the parties specified any time limit for the joint ownership of the properties;
- (iii) Whether the agreements entered between the parties were of joint ownership of the properties or Build, Operate and Transfer (BOT);

- (iv) Whether the plaintiff suffered loss as a result of the defendant's refusal to transfer the right of occupancy over the properties into joint ownership; and
- (v) To what reliefs are the parties entitled to.

At the end of the hearing, the trial judge found that, both parties contributed in causing the legal wrangle that led to the suit. The learned judge reasoned, that, not only the appellant but also the respondent in the course of their efforts to have the title deeds transferred, caused misunderstanding by introducing new terms and conditions not envisaged in exhibit P1 and P2 which was the basis of their relationship. Further he held that, while the respondent was claiming issuance of unit titles instead of tenancy in common and misinterpretation of phrase "*unexpired residual term*" which were not provided for in the contracts, the appellant introduced the issue of citizenship of PW1 and Build, Operate and Transfer (BOT), matters which were unnecessarily introduced hence, affected the performance of the agreements. Having so reasoned, the learned trial judge concluded that, the appellant did not breach the agreements, but the same was contributed by both parties.

In answer to the second issue, whether the agreements had time limit, the trial judge held that, the same was for the remaining period of

the residual term which is 46 years. Further, he rejected the claim for damages by the respondent on the ground that the sum of US\$ 300,000.0 was a specific claim which was not strictly proved.

Finally on the reliefs, the trial judge ordered the appellant to immediately apply for renewal of the rights of occupancy with the Commissioner for Lands and the issuance of new certificates in joint names of the parties in accordance with the agreed ratio of 75% respondent and 25% appellant as per Item II, IV and IX (clause 9:3) of the contracts. Meanwhile, the trial judge ordered the respondent to hand over 25% of the apartments to the appellant for own use immediately after completion of the transfer of the rights of occupancy into the joint names as stipulated in the agreements.

Both parties were dissatisfied with the trial court's decision. The appellant preferred an appeal predicated upon one ground faulting the trial court's decision on the joint ownership while the respondent was a non-citizen at the time of signing the agreements. On the other hand, the respondent filed a notice of cross appeal predicated on four grounds namely:

1. *That the trial judge erred in holding that the appellant was not in breach of the terms of contract as relates to*

transfer of the property and issuance of title deed in the joint names of the appellant and respondent.

2. *The trial judge erred in holding that the joint ownership of the properties was limited to a period of 46 years.*
3. *That the trial judge erred for failing to note that as a registered holder of the certificate of title the respondent was entitled to the renewal of the right of occupancy upon expiry of the current tenure.*
4. *The trial judge erred by holding that the appellant had not suffered any loss and damages from the appellant's breach and refusal to transfer the properties in joint names.*

When the appeal came for hearing, Ms. Vivian Method, learned Senior State Attorney assisted by Messrs Edwin Joshua Webiro and Mjahidi Kamugisha, learned State Attorneys represented the appellant whereas, Mr. Gaspar Nyika, learned advocate represented the respondent. At the instance of the learned Senior State Attorney, we marked the appeal withdrawn and proceeded with the hearing of the cross appeal. It is significant that, in terms of rule 102 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), upon the withdrawal of the appeal, Oysterbay Villas Limited became a cross appellant and KMC the respondent.

When invited to argue in support of the cross-appeal, Mr. Nyika invited the Court to consider the cross appellant's written submissions which he had lodged earlier on. Essentially, Mr. Nyika submitted that in resolving the issue whether the appellant breached the terms of the agreements, the trial judge was supposed to focus on its terms and see whether parties had fulfilled their respective obligations. In his view, the trial judge was wrong to determine the issues basing on the unproved claims that the respondent introduced new terms which were raised by the parties in their pleadings. Counsel also submitted that the contracts did not prescribe any time limitation hence, the trial judge was wrong to hold that the contracts was for 46 years only. In his view, the findings of the trial judge had the effect of denying the respondent's right to the renewal of the rights of occupancy upon expiry.

Submitting on the issue of loss suffered, Mr. Nyika contended that, after the breach of the agreements, respondent suffered loss as some of the tenants who were asking for the title deeds as proof of ownership from the respondent for them to rent the apartments declined to lease the apartments. Hence, the trial court was wrong for not awarding damages for the loss suffered by the respondent.

Responding to Mr. Nyika's submissions, Mr. Webiro contended that the trial judge was right as the cross appellant introduced new terms to the agreement which made impracticable for MKC to discharge its obligation outside the agreements.

Responding to the third and fourth grounds of appeal, Ms. Method referred the Court to its previous decision in **Nitin Coffee Estate & 4 Others v. United Engineering Works Limited & Another** [1988] T.L.R. 203 and contended that, the trial judge was right as the agreements are silent on renewal of the right of occupancy. It was her stance that, the law is settled that, the court can only enforce the terms and conditions of the agreement and not to redraft the same. She also referred the Court to the case of **Miriam E. Maro v. Bank of Tanzania**, Civil Appeal No. 22 of 2017 (unreported) for the proposition that, renewal of a right of occupancy is not automatic and thus it was not right to include the same in the agreements.

The learned Senior State Attorney also submitted that, the trial judge was right to hold that the cross appellant did not suffer any damages since she did not adduce any evidence to support the loss she claims to have suffered. She contended further that, as from completion

to date, the cross appellant is renting the apartments, and earned income from them.

With regard to general damages, the learned Senior State Attorney contended that the same is within the discretion of the Court. Supported by the Court's holding in **Anthony Ngoo & Another v. Kitinda Kimaro**, Civil Appeal No. 25 of 2014 (unreported), the learned Senior State Attorney argued that, since there was no proof of breach, the trial court was right in refusing to award damages.

In his rejoinder Mr. Nyika submitted that, according to the agreements, the respondent's obligation was to transfer the right of occupancy to the shares of 75% and 25% respectively, and that the appellant is the one who delayed the process. It was his further submission that, the efforts to remind the cross-appellant to fulfil the terms of the contracts became fruitless. Mr. Nyika submitted further that, after the respondent had surrendered the rights of occupancy, nothing proceeded as she kept quiet until 2015.

Rejoining on the issue of damages, he conceded that, the cross appellant is renting the apartments, but serious tenants declined entering into lease agreements without being shown proof of ownership by way of title deed. Further, the counsel informed the Court that, indeed the cross-

appellant uses the rent from the suit properties to mitigate his costs. On the 3rd and 4th grounds, Mr. Nyika was of the view that, when the land is transferred, the residual term is automatically transferred. On the strength of his submissions, counsel invited the Court to allow the cross appeal with costs.

Having examined the grounds in the notice of cross appeal, written and oral submissions as well as the record of appeal, it is not disputed by the parties that the agreements were for the purpose of the construction of the residential apartments on plot No. 322 and 277. After completion of the project, subject of the agreements, the respondent undertook to transfer the right of occupancy in the joint names of the cross-appellant and the respondent. Therefore, the remaining question is whether the parties complied with the terms and conditions of the agreements and if so, whether the finding of the trial court was correct.

In order to resolve this issue, it is necessary that we revisit the contracts (exhibit P1). Clause 2.1 provides:

"The Kinondoni Municipal and M/S OYSTERBAY VILLAS LTD shall have joint ownership of the said property to be constructed on Plot No. 322 Ruvu Road, Oysterbay within the Kinondoni Municipality for the unexpired residual term."

Further, Clause 4 of the agreement stipulates that:

"4.1 KMC shall undertake to transfer the Right of Occupancy of the property to be in the joint names of KMC and the Partner M/S OYSTERBAY VILLAS LTD as per the venture interests. As provided in Article 2.2 this transfer shall be affected upon completion of the building."

It is from the above agreed term under clause 4.1 the cross-appellant alleged that the respondent was in breach as she failed to transfer the right of occupancy of the properties in the joint names of the parties.

As we have indicated earlier, the trial judge found that the appellant did not breach the agreements, rather, each party contributed to the stalemate. At pages 23 and 24 of the judgement, the learned trial judge stated:

"It is clear from the record that not only the defendant but also the plaintiff in the course of their efforts to have the title deeds transferred in respect of the disputed plots and properties therein caused misunderstanding by introducing new terms and conditions not envisaged in exhibits P1 and P2 which is the basis of their relationship. On the part of the plaintiff, claiming issuance of unit titles instead of tenancy in common and misinterpretation of phrase

'unexpired residual term' which were not provided for, amounts to introducing a new term with different consequences to the contracts which could altogether change the whole intention of the parties. For the defendant to introduce the issue of citizenship of PW1 and Build Offer Transfer (BOT) were matters which were unnecessarily introduced and in a way affected the entire commercial joint venture the parties had agreed and anticipated to benefit from."

The determination of the issue whether the impugned finding was justified necessitates our attention to section 37 of the Law of Contract (the Act) provides thus:

"37. -(1) The parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or of any other law."

It is remarkable that, in **Abualy Alibhai Azizi v. Bhatia Brothers Ltd** [2000] T. L. R. 288 the Court aptly stated that:

"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"

It is common ground that, none of the parties complained before the trial court that the performance of the agreements was vitiated by any factors such as fraud, misrepresentation or coercion. According to clause 4.1 of exhibit P1, KMC was duty bound to transfer the rights of occupancy in the joint names of the parties. However, KMC did not do so as agreed. Instead, she introduced new terms outside the scope of the agreements. In our view, failure to transfer the ownership amounted to non-performance. That said, we find the first ground of appeal to be meritorious and allow it.

In the second and third grounds of appeal, the cross-appellant faults the trial judge in holding that, joint ownership of the properties was limited to a period of 46 years contrary to her expectation for the renewal of the rights of occupancy upon expiry. It was the counsel's submission that, the agreements did not give a precise date of expiry which means that the same did not have time limit. Referring to section 32(3) of the Land Act, counsel submitted that the renewal of right of occupancy is automatic as long as the holder complied with its terms and conditions. Mr. Nyika argued further that, there was no indication in the agreements that the cross-appellant as a co- occupier in common of the rights of

occupancy will not enjoy the right of renewal upon expiry of the residual term. He contended that, fixing the tenure of the co-occupation of the rights of occupancy, the trial judge took away the cross-appellant's right of renewal which is provided for under the Land Act.

Upon examination of the agreements, it is common ground that, the term 'unexpired residual term' is not defined. In responding to the issue of the duration of the agreements, the trial judge resorted to Black's Law Dictionary which defined the word "residual" to mean left over quantity. Therefore, he interpreted the clause unexpired residual term as the remaining time from 99 years of the rights of occupancy counting from when the agreements were signed and concluded that the unexpired residual term was 46 years.

It is trite law that once parties have freely agreed on their contractual terms, it is not open for the courts to change those terms which parties have agreed. It is also trite that, it is not the role of the courts to re-draft terms in agreements but to enforce them where parties are in dispute. See: **Univeler Tanzania Ltd v. Benedict Mkasa T/A Bema Enterprises**, Civil Appeal No. 41 of 2009 (unreported). Nonetheless, where there is a dispute as to the interpretation of the agreement, the starting point is the words used in the agreement and

then ascertaining the intention of the parties. To this end, the court has to examine all the circumstances surrounding the conclusion of the agreement. This position was echoed in a persuasive decision of the Supreme Court of Appeal of South Africa in **Meyer & Others v. Big Five Developments (Pty) Ltd** (1017/17) [2018] ZASCA 136 (28 September 2018) dealing with the question as to "*whether the JVA intertwined with the elements of property development as well as the sale of land by the trust to the realization company*", it stated that:

*"To answer this question, it is necessary to interpret the agreement. The starting point is the words of the agreement. It has to be borne in mind as emphasized by this court in **Novartis SA (Pty) Ltd v. Maphil Trading (Pty) Ltd** 2016 (1) SA 518 (SCA) at para 27, that this court has consistently held that the interpretative process is one of ascertaining the intention of the parties. To this end the court has to examine all the circumstances surrounding the conclusion of the agreement i.e. the factual matrix or context including any relevant subsequent conduct of the parties."*

Similarly, in the case of **North East Finance v. Standard Bank** (492/2012) [2013] ZASCA 76 (20 May 2013) the Supreme Court of Appeal of South Africa stated that:

"The court asked to construe a contract must ascertain what the parties intended their contract to mean. That requires a consideration of the words used by them and the contract as a whole, and, whether or not there is any possible ambiguity in their meaning, the court must consider the factual matrix (or context) in which the contract was concluded." [at page 11].

In the instant appeal it is the construction of clause 2.1 of the agreements which calls for the Court to interpret the phrase "**unexpired residual term**". Guided by the reasoning in the persuasive decisions above, we agree with the trial judge that the phrase "*unexpired residual term*" means the remaining period of the granted rights of occupancy. With respect, Mr. Nyika is not right in submitting that the trial court's finding had the effect of denying the cross appellant right to a renewal of the rights of occupancy. On the contrary, we think Mr. Nyika should be aware of the old adage; *caveat emptor* - buyer be aware and so by entering into the agreements, the cross appellant must have been aware that, such agreements did not give her a *carte blanche* with respect to

the period. We agree with the learned trial judge that the agreements were for the residual period of the rights of occupancy. Mr. Nyika's contention on renewal is neither here nor there. Since renewal of the rights of occupancy is subject to the discretion of the Commissioner for Lands. Therefore, by indicating that the agreements will be for unexpired residual term, it meant that the same will survive only on the unconsumed time of the right of occupancy. In the upshot, the second and third grounds of appeal have no merits and stand dismissed.

The fourth ground faults the trial court for holding that, the cross-appellant did not suffer any loss or damages from the breach. Submitting on this ground, Mr. Nyika submitted that, it is the respondent who breached the terms of the agreements and not the cross-appellant. Therefore, the cross-appellant is entitled to general damages. Referring the Court to section 73(1) of the Law of Contract Act and our decision in **Evarist Peter Kimati and Others v. Protas Lawrence Mlay**, Civil Appeal No. 3 of 2000, Mr. Nyika submitted that, since the respondent was in breach of the agreement to transfer 75% of the right of occupancy in the cross-appellant's name as agreed, the respondent has to pay all losses it has suffered as a result of the breach. On the respondent's part, Ms. Method contended that the trial judge was right in not granting the

damages as the cross-appellant did not suffer any loss as she is renting the apartments and the respondent is not getting anything from the project as the cross-appellant is in full control of the apartments.

It is settled that, general damages are such as the law will presume to be direct, natural or probable consequence of the breach. General damages generally are that sum of money which will reposition the party who has suffered loss to his previous position before the loss. See: **Victoria Laundry v. Newman** [1949] 2 K.B. 528 at page 539 referred by the Court in **Stanbic Bank Tanzania Limited v. Abercrombie & Kent (T) Limited**, Civil Appeal No. 21 of 2001, holding that, the damages are intended to put the plaintiff in the same position as far as money can do so. See also **Anthony Ngoo & Another v. Kitinda Kimaro** (supra).

In this case, there is uncontroverted evidence that, having completed the construction of the intended project, the cross-appellant is in full control of the apartments and renting some of them. Therefore, although the issuance of new title deeds in joint names is yet to be completed, the intended business is ongoing. In a bid to justify the loss, the cross-appellant's counsel submitted that, they failed to rent some of the apartments because some of the tenants needed to see the title deeds. However, upon being prompted, the learned counsel for the cross-

appellant admitted that there was no evidence on record to prove the tenants who could not take up leases because of lack of title deed. Hence, the cross-appellant's counsel claim is untenable. In the premises, this ground too has no merit and we dismiss it.

That said and done, the cross appeal is allowed to the extent explained above. Considering the peculiar circumstances in this appeal, we order that, each party shall bear own costs.

DATED at DAR ES SALAAM this 24th day of April, 2024.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered this 21st day of May, 2024 in the presence of Ms. Magdalena Mwakabungu Senior State Attorney for the appellant and Mr. Gasper Nyika learned counsel for the respondent and Mr. Bakir Samardzie the respondent Managing Director in person is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to read "J. J. Kamala".

J. J. KAMALA
DEPUTY REGISTRAR
COURT OF APPEAL