IN THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION
AT ARUSHA

COMMERCIAL CASE NO.9 OF 2012

THE GRAND ALLIANCE LIMITED.....PLAINTIFF

VERSUS

MR. WILFRED LUCAS TARIMO.....1ST DEFENDANT

MR. DERICK WILFRED TARIMO.....2ND DEFENDANT

DOREEN WILFRED TARIMO.....3RD DEFENDANT

MRS IRENE WILFRED TARIMO.....4TH DEFENDANT

SNOW CREST AND WILDLIFE SAFARIS LTD.....5TH DEFENDANT

Hearing Dates: 24th July, 2013; 17th February & 20th May, 2014

Judgment Date: 22nd August, 2014

Appearances:

Mr. Lutema, Advocate, for the Plaintiff

Mr. Merinyo, Advocate, initially and later Mr. Omary, *Advocate, for the Defendants*

JUDGMENT

MAKARAMBA, J.:

This judgment is in respect of a suit which **THE GRAND ALLIANCE LIMITED**, the Plaintiff herein, lodged in this Court on the **29th day of June 2012** against the Defendants, **MR. WILFRED LUCAS TARIMO**, the 1st Defendant, **MR. DERICK WILFRED TARIMO,** the 2nd Defendant, **DOREEN WILFRED TARIMO**, the 3rd Defendant, **MRS IRENE WILFRED TARIMO,** the 4th Defendant and

SNOW CREST AND WILDLIFE SAFARIS LTD, the 5th Defendant. In the suit, the Plaintiff is suing the 1st to the 4th Defendants inclusive severally and jointly for breach of contract and for specific performance to alleviate or remedy the breach of contract. According to the Plaint, the 5th Defendant has been joined in the suit as a matter of convenience in that the disputes forming the bone of contention in the suit may relate to or affect the shareholding position or set up of the 5th Defendant in one way or another. The Plaintiff as is the case with the 5th Defendant are both limited liability companies incorporated under the provisions of the Companies Act (Act No.12 of 2002). The 1st, 2nd 3rd and 4th Defendants are natural persons, residents in Arusha.

The background to this suit briefly as it could be garnered from the Plaint is that, on the **5th day of September 2011**, the Plaintiff and the 1st to 4th Defendants entered into a ***Share Acquisition Agreement*** (*hereinafter the Agreement*), for the purchase by the Plaintiff of the 1st to 4th Defendants' shares in the 5th Defendant Company. It was the understanding between the parties *inter se,* and indeed it is the position of the law that, by purchasing the shares in the 5th Defendant Company, the Plaintiff would automatically be entitled to all movable and immovable assets of the 5th Defendant Company. The 1st to 4th Defendants represented in writing that the 5th Defendant Company owned **Snow Crest Hotel** (*hereinafter the Hotel),* which is situated and erected on the parcel of land known as **Plots Numbers 39 and 58, Blok BB, Kwangulelo Area, Arusha City,** comprised in respective **Certificates of Titles** numbers **13551 and 20125**. The Plaintiff paid and the 1st and 4th Defendants received a sum of **USD 1,730,000.00** (Say ***US Dollars One Million Seven Hundred Thirty Thousand)***

towards the purchase of the 1st to 4th Defendants' shares in the 5th Defendant Company. After payment of the above mentioned sum of money, the Plaintiff was given management of the **Hotel** from the **1st of October 2011.** The Plaintiff claims that on **5th January, 2012** the 1st to 4th Defendants unilaterally took over the management of the **Hotel** from the Plaintiff and continued to manage the **Hotel** until now.

The Plaintiff Company has now come to this Court claiming that the 1st to 4th Defendants inclusive have refused, neglected or failed to transfer to the Plaintiff Company the shares which are equivalent to the sum of **USD 1,730,000.00,** the amount the Plaintiff Company paid pursuant to the Agreement. The Plaintiff Company claims further that the 1st to the 4th Defendants have unilaterally usurped the management of the Hotel and have subsequently refused, neglected or failed to handover to the Plaintiff Company the management of the Hotel as well as they have refused to handle over to the Plaintiff Company specific documents agreed upon by the parties in the Agreement.

The Plaintiff Company alleges further that, it has discovered that the 1st and 4th Defendants misrepresented the fact that the Hotel was erected on two plots while in fact it was erected on three plots, namely, **Plot Nos. 38, 39** and **58.** The Plaintiff Company contends that in agreeing to purchase the shares in the 5th Defendant Company, the Plaintiff Company knew that it was ultimately purchasing the entire Hotel. However, the Plaintiff Company further contends, the reality is that the Plaintiff Company has ended up purchasing only part of the Hotel since the remainder of the Hotel is erected on a Plot that did not belong to the 5th Defendant's Company. The Plaintiff's therefore claim that, the Agreement was arrived at through fraud and/or non-disclosure

of material facts perpetrated by the Defendants. The Plaintiff further claims that, the Defendants obtained the sum of **USD 1,730,000.00** through fraud and/or misrepresentation and that the takeover by the Defendants from the Plaintiff of the management of the Hotel was unlawful and improper.

The Plaintiff Company has approached this Court praying for Judgment and Decree against all the Defendants severally and jointly for the following reliefs as stated in the Plaint, namely:

(a) A declaration that the 1st to 4th Defendants unilateral usurpation and subsequent refusal, neglect or failure to handle over the management of Snow Crest Hotel to the Plaintiff is breach of the share acquisition agreement;

(b) A declaration that the failure by the 1st to 4th Defendants to transfer to the plaintiff 61% of the shares in the 5th Defendant Company, which is equivalent to the amount paid by the Plaintiff pursuant to the Share Acquisition Agreement, constitutes a breach of the share acquisition agreement;

(c) A declaration that refusal, neglect or failure by the 1st to 4th Defendants to handover to the Plaintiff majority shareholder the required documents referred to in article 13.1 of the share acquisition agreement constitutes breach of the share acquisition agreement;

(d) A declaration that refusal, neglect or failure by the 1st to 4th Defendants to handover documents necessary for due diligence as per articles 3.1.3 and 3.1.4 of the share acquisition agreement constitutes breach of the share acquisition agreement;

(e) An order for specific performance requiring the 1st to 4th Defendants inclusive to immediately and unconditionally handover to the Plaintiff the management of Snow Crest Hotel;

(f) An order for specific performance requiring the 1st to 4th Defendants to transfer to the Plaintiff 61% of the shares in the 5th Defendant Company, which is equivalent to the amount paid by the Plaintiff pursuant to the Share Acquisition Company;

(g) An order for specific performance requiring the 1st to 4th Defendants to handover to the Plaintiff majority shareholder the required documents referred to in article 13.1 of the share acquisition agreement;

(h) An order for specific performance requiring the 1st to 4th Defendants to handover documents necessary for due diligence as per articles 3.1.3 and 3.1.4 of the share acquisition agreement;

(i) A order for rectification of the 5th Defendant's records in the companies register to reflect the above stated shareholding positions;

(j) In the alternative, an order for rescission of the share acquisition agreement subject to the Defendants refunding to the Plaintiff the sum of US$ 1,730,000.00 (say US Dollars One Million Seven Hundred Thirty Thousand Only);

(k) General Damages at a rate to be assessed by the court;

(l) Interest on (j) from 5th January 2012, which is the date of takeover of the management of the hotel, to the date of judgment;

(m) Interest on the decretal sum at the court's rate of 7% from the date of judgment to the date of satisfaction of the decree;

(n) Costs to be provided for; and

(o) Any other orders and reliefs as the court may deem fit and proper to grant.

On the first day of the hearing of the suit, the parties agreed to a set of five issues for the determination of the suit which this Court accordingly recorded as follows:

1) *Whether there was breach of the Share Acquisition Agreement;*
(2) *Whether the Share Acquisition Agreement was obtained through fraud;*
(3) *Whether the Defendants obtained the sum of USD 1,730,000.00 through fraud.*

(4) *Whether the take-over of the management of the Hotel was lawful and proper;* and

(5) *To what reliefs the parties are entitled to.*

The Plaintiff brought two witnesses to establish its case, **Mr. James Barnbas Ndika** as **PW1** and **Mr. Juma Ahmed Nyumba as PW2.** The Defendants on their part called only one witness **Mr. Wilfred Lucas Tarimo** as **DW1**. At the close of the trial, the learned Counsel filed their written closing submissions as per law required.

The first issue is *whether there was breach of the Share Acquisition Agreement.*

I should point out from the outset that, the fact that the parties herein executed a ***Share Acquisition Agreement*** (the Agreement), which was tendered in evidence and marked as **Exhibit P1** is not in dispute. The Agreement (Exhibit P1) is for the purchase by the Plaintiff Company of a total of **5,000 shares** at a consideration of **USD 7,000,000** in **Snow Crest and Wildlife Safaris Limited**. The fact that the Plaintiff Company have only managed to pay the first instalment of **USD 1,730,000** is also not in dispute. This fact is explicitly stated by the 1st Defendant in paragraphs Nos. 5, 10 and 13 of his Written Statement of Defence. The sum of **USD 1,730,000** which the Plaintiff Company paid as 1st instalment and which had been received by the Defendants was towards the purchase by the Plaintiff Company of the shares in the 5th Defendant's Company. According to paragraph 3.1.3 of ***Exhibit P1***, the remaining balance of **USD 2,184,457** was supposed to be paid within **60 days** from the **12th September, 2011**. It is not disputed that, until the **29th June, 2012,** which is the date of the filing

of this suit, the Defendants had not been paid by the Plaintiff Company the last instalment. The issue is *whether the non payment of the amounts as agreed to by the parties amounted to breach of the Share Acquisition Agreement?*

The consequence of default by the purchaser to pay the last instalment comes out clearly in Paragraph 4.0 of **Exhibit P1** (the Share Acquisition Agreement dated 5th day of September 2011 in the following terms:

> *"That in the event the Purchaser having paid out the first instalment is unable to proceed with payment of the last instalment ($2,184,457.51) or any part thereof the Seller shall be obliged to transfer to the Purchaser shares which are equivalent to the amount already paid by the Purchaser subject to this agreement and they may retain or sell the remaining shares to any person/company of their choice."*

The undisputed facts in this suit as I have stated above, boil down to the consequences of the Purchaser failing to proceed with payment of the last instalment having paid the first instalment as agreed. According to **paragraph 4.0** of the Agreement (Exhibit P1), the event of the failure by the Purchaser to proceed with payment of the last instalment or any part thereof, the Sellers was obliged to transfer to the Purchaser shares which are equivalent to the amount already paid by the Purchaser.

The attendant issue is whether there was an agreed time frame in the Agreement within which the Purchaser was required to have paid the remaining or last instalment of ***USD 2,184,457.51.*** In terms of the

Agreement, the parties agreed to "Payment Modalities" as clearly set out under paragraph 3.0 of the Agreement (Exhibit P1). According to paragraph 3.1.3, of the Agreement (exhibit P1), the remaining balance of ***USD 2,184,457.51*** *was to have been paid to the Sellers by the Purchaser with Sixty days (to be counted from the 2nd day of September, 2011).* Paragraph 3.1.3 of the Agreement (Exhibit P1) stipulated as follows:

> *"That the remaining balance of a sum of United States Dollars Two Million One Hundred Eighty Four Thousand Four Hundred Fifty Seven point fifty one ($2,184,457.51) shall be paid to the Sellers by the Purchaser within Sixty days (to be counted from the 12th day of September, 2011) upon commencement of the due diligence study and verification of the outstanding liabilities of the Snow Crest Hotel and Wildlife Safaris Limited. Save that, upon ascertaining the outstanding liabilities, the Purchaser shall be at liberty to settle the same by paying the creditors after deducting from the final instalment payable to the Sellers, save that such deduction and payment of the outstanding liabilities shall not take effect without proper consultation (in writing) with the Sellers."*

In terms of paragraph 3.1.3 of the Agreement (Exhibit P1), the payment of the last instalment of ***$2,184,457.51*** was to be made within **Sixty days**, which was to be counted from the **12th day of September, 2011** upon commencement of the due diligence study and verification of the outstanding liabilities of the Snow Crest Hotel and Wildlife Safaris Limited. In my view for there to be a breach, it must be established that indeed within sixty days, which was to have been

reckoned as from the **12th day of September, 2011**, the Purchaser failed to pay the last instalment. I am of the considered view, and as could be gathered from the express terms of the Agreement that, the **12th day of September, 2011** was set for the conduction of due diligence study and verification of the outstanding liabilities of the *Snow Crest Hotel and Wildlife Safaris Limited* by the Purchaser. This period was critical since ascertainment of the outstanding liabilities had an effect on the final instalment payable by the Purchaser to the Sellers. One of the terms of the Agreement was that the Purchaser was at liberty to settle the outstanding liabilities of *Snow Crest Hotel and Wildlife Safaris Limited* as would have been revealed by the due diligence and the verification, by paying the creditors and deduct the appropriate amount which is claimed from the last instalment payable to the Sellers after written consultation with the Sellers. In my view, the obligation to carry out the due diligence and the verification of the outstanding liabilities of the *Snow Crest Hotel and Wildlife Safaris Limited* was placed squarely on the shoulders of the Purchaser. This is so since in terms of paragraph 3.1.4 of the Agreement (Exhibit P1), during the commencement of the Due Diligence study, the Sellers were required "***to give access to the Purchaser of 'everything' required of them to conduct their Due Diligence.***" The Agreement however, did not specify as to what amounts to ***"everything"*** which the Purchaser was to have required from the Sellers in order to assist the Plaintiff in conducting the due diligence study and the verification of the outstanding liabilities of the *Snow Crest Hotel and Wildlife Safaris Limited*. The issue is whether the Purchaser carried out the due diligence study and the verification the liabilities Snow Crest Hotel and Wildlife

Safaris Limited as stipulated in the Agreement. The Purchaser claims that the 1st to 4th Defendants (the Sellers) refused, neglected or failed to handover documents necessary for due diligence as per articles 3.1.3 and 3.1.4 of the share acquisition agreement and is asking this Court to declare it as constituting a breach of the Share Acquisition Agreement. Let me point out here that before this Court can determine whether there was such breach, the default clause as set out in paragraph 4.0 of the Agreement is to be brought to bear on the issue of breach by the 1st to 4th Defendants of the obligations set out in paragraph 3.1.3 and 3.1.4 of the Agreement relating to the due diligence study and the verification of the outstanding liabilities of the *Snow Crest Hotel and Wildlife Safaris Limited.* I find it rather strange however the parties entered into agreement before the Purchaser carrying out due diligence study. The Purchaser is therefore seeking to be availed by the Sellers physical access to the suit property and "***everything***" the Purchaser will have required from the Sellers in carrying out the due diligence study and the verification of the outstanding liabilities of the *Snow Crest Hotel and Wildlife Safaris Limited.*

In his closing written submissions Mr. Lutema learned Counsel for the Plaintiff argued the Defendants refused to supply the necessary documents to the Plaintiff for conducting the due diligence and verification and therefore this hindered the finalization of payments of 100% acquisition of shares. It was the further submission of Mr. Lutema that, according to paragraph 13.1 of the Agreement (**Exhibit P1**), the Defendants were supposed to hand over to the Plaintiff the following documents, namely; the Certificate of Incorporation of the Company or any change of name, the Memorandum and Articles of Association of the

Company, the last Filed Annual Returns, TIN number, List of Company Assets, Copies of Various Licenses and Permits, the Last Financial Report/Audited Accounts, a Copy of the Board Resolution sanctioning the Sale of the Shares, and a signed copy of the Share Transfer Form. In his testimony at the trial, DW1 told this Court that the Defendants had supplied the Plaintiff with the Loan Agreement, the Company Memorandum and Articles of Associations, the Company Certificate of Incorporation, TIN Number, VAT and two Certificates of Titles. In his closing written submissions Mr. Omary learned Counsel for the Defendants, argued that, "***all the administration documents***" were handed over to the Plaintiff but did not tell this Court when this took place. There is therefore nothing in the court record evidencing handing over by the Sellers to the Purchaser of the documents stipulated under paragraph 13.1 of the Agreement (**Exhibit P1**) as DW1 testified and which seems to find support in the submissions of his learned Counsel.

Perhaps I should point out here, and with due respect to the learned Counsels for the parties that, there is no express provision in the Agreement (**Exhibit P1**) linking the kind of documents stipulated under paragraph 13.1 of the Agreement and paragraph 3.1.4 of the Agreement. It is therefore only left to imagination that, perhaps the documents mentioned under paragraph 13.1 of the Agreement fall under the term "***everything required of them to conduct their due diligence***", which imagination this Court is not prepared to embrace. In any event even if this Court was to have purchased such argument, which as I said I do not, still there is no evidence on record of such documents having been handed over to the Purchaser by the Sellers and/or the carrying out by the Purchaser of the Due Diligence study and

the verification of the outstanding liabilities of the *Snow Crest Hotel and Wildlife Safaris Limited.* Indeed as Mr. Omary rightly put it in his closing submissions, the documents stipulated under paragraph 13.1 of the Agreement are **"all the administration documents"** but not specifically the documents to assist the Purchaser in carrying out the due diligence study or verification, which as I pointed out already, there is no evidence that the Purchaser carried out the Due Diligence study and the verification of the outstanding liabilities of the *Snow Crest Hotel and Wildlife Safaris Limited* as obliged under paragraph 3.1.3 of the Agreement. The issue of breach of the Agreement does not therefore arise in the circumstances. In the absence of any evidence of carrying out by the Purchaser of Due Diligence Study and the verification of the outstanding liabilities of the Snow *Crest Hotel and Wildlife Safaris Limited*, the argument by the learned Counsel for the Plaintiff that, the Defendants refused to hand over the documents stipulated in paragraph 13.1 of the Agreement, and the counter argument by the learned Counsel for the Defendants, Mr. Omary that, the Defendants handed over to the Plaintiff "***all the administration documents***" are neither here nor there. The undisputed facts in this case are that, the Purchaser paid the first instalment of **USD 1,730,000.00** (Say ***US Dollars One Million Seven Hundred Thirty Thousand)*** but failed to proceed with payment of the second instalment of **USD 2,184,457,** which according to paragraph 3.1.3 of the Agreement (***Exhibit P1)***, was to have been paid within **60 days** from the **12th September, 2011**. The further undisputed fact in this case is that, until the **29th June, 2012,** when the Plaintiff lodged this suit in this Court, the Plaintiff Company had not paid

the Defendants the last instalment of **USD 2,184,457** as agreed in the Agreement.

The consequence of failure by the Purchaser to pay the second instalment of the purchase price is clearly stipulated in the Agreement that the Plaintiff Company (the Purchaser) having failed to proceed with payment of the last instalment within time as agreed, this constitutes default in terms of paragraph 4.0 of the Agreement, (Exhibit P1) which would have obliged the 1st to the 4th Defendants to transfer to the Purchaser (the Plaintiff Company) shares equivalent to the amount already paid by the Purchaser as first instalment to the tune of **USD 1,730,000.00** (Say ***US Dollars One Million Seven Hundred Thirty Thousand),*** subject to the Agreement.

I should emphasize here that by virtue of paragraph 4.0 of the Agreement (Exhibit P1), failure by the Purchaser to proceed with payment of the last instalment does not amount to breach of the Agreement, but it constitutes a default, whose remedy lies in the very Agreement as I have pointed out above. This being the case therefore, the argument marshalled with great zeal by the 1st to the 4th Defendants that their taking over of the Management of the Hotel was due to non payment of the last instalment, which resulted to what they allege to be a breach of Agreement, lack any merits and are hereby dismissed.

The 1st to 4th Defendants do not deny the fact that they unilaterally took over the management of the Hotel however, for reasons which this Court has determined that are not sufficient and do not find support in the provisions of the Agreement. I am of the firm view however that, the act of the Defendants of unilaterally taking over the management of the Hotel was in clear breach of the express terms

of **paragraphs 3.1.5** and **Clause 4.0** of the Agreement (Exhibit P1). Paragraph 3.1.5 of the Agreement (Exhibit P1) stipulated expressly as follows:

> *"That the Purchaser shall take over management of the Hotel with effect from the **1st day of October, 2011** whereby any interest on the outstanding Bank Loan accruing from thereon shall not be a liability of the Sellers. However if at the expiration of forty five day the Purchaser is unable to pay the remaining balance of the Purchase Price interest on the Bank Loan which will have accrued shall still be joint liability of the Purchaser and Sellers subject however to clause 4.0 of this Agreement."*

Clearly, there is no provision in the Agreement which authorized the Seller to take over the management of the Hotel by the Seller upon the Purchaser being *"unable to pay"* the remaining balance of the Purchase Price. In terms of paragraph 3.1.5 of the Agreement Exhibit P1), it was envisaged that the Purchaser will take over the management of the Hotel with effect from the ***1st day of October, 2011*** *"whereby any interest on the outstanding Bank Loan accruing from thereon shall not be a liability of the Sellers."* It was also an express term of the Agreement under paragraph 3.1.5 that, if at the expiration of **forty five day**, the Purchaser is unable to pay the remaining balance of the Purchase Price, interest on the Bank Loan, which will have accrued, *"shall still be joint liability of the Purchaser and Sellers."* This provision however, was subject to Clause 4.0 of the Agreement (Exhibit P1) which as I pointed out earlier in this judgment, obliged the Seller in the event the Purchaser has paid out the first instalment but is *"unable to proceed*

with payment of the last instalment or any part thereof, to transfer to the Purchaser shares which are equivalent to the amount already paid by the Purchaser subject to the Agreement" and the Sellers may also "*retain or sell the remaining shares to any person/company of their choice.*" The 1st to 4th Defendants having admitted to have unilaterally taken over the management of the Hotel, this Court is satisfied that the 1st to 4th Defendants are in breach of the Agreement. As a consequence of the failure by the Purchaser to proceed with the payment of the last instalment, it was not to entitle the Seller to take over the management of the Hotel, but "*to transfer to the Purchaser shares which are equivalent to the amount already paid by the Purchaser subject to the Agreement.*" It seems to me that the failure by the Purchaser to proceed to pay the last instalment also had an effect on "*any interest accruing on the outstanding Bank Loan which shall have been be joint liability of the Purchaser and Sellers*" at the expiration of **forty five day**, from the time Purchaser became unable to pay the remaining balance of the Purchase Price.

In his closing submissions Mr. Omary argued that, the original intention of the Defendants was to see that the Bank loan of the Plaintiff Company was also ultimately discharged. In terms of paragraph 2.3 of the Agreement (Exhibit P1) a sum of **USD 3,448,185.28** being part of the purchase price, represented a credit facility which was secured by the Sellers from the PTA Bank, which the Purchaser was required to assume, take over and service within four years after the purchase of the shares in the Plaintiff Company. Mr. Omary submitted further that in so far as interest is concerned, paragraph 2.4 of the Agreement (Exhibit P1) stipulated that, a sum of **USD 717,357.21** represented interest due

on the Bank Loan as at **12th day of August**, which the Purchaser was required to pay directly to the PTA Bank upon signing the Agreement. In his closing submissions, as Mr. Lutema rightly pointed out, the four years reckoning from the **1st of October 2011** was due to expire on the **1st of October, 2015.** According to Mr. Lutema, this means therefore that in terms of paragraph 2.3 of the Agreement (Exhibit P1), the Plaintiff Company had ample time to pay the Bank Loan. As I held above in this judgment, non payment of the Bank loan was not a sufficient ground to justify the act of the Defendants of unilaterally taking over the management of the Hotel on the **5th January, 2012**. Furthermore, the taking over by the Defendants of the management of the Hotel on the **5th January, 2012** in my considered view was rather premature given the terms stipulated in paragraph 3.1.5 of the Agreement (Exhibit P1) of which the Purchaser was to take over management of the Hotel with effect from the **1st day of October, 2011** whereby any interest on the outstanding Bank Loan accruing from thereon would not have been a liability of the Sellers. However, in terms of the same paragraph, it was expressly stipulated that if at the expiration of forty five day the Purchaser is unable to pay the remaining balance of the Purchase Price, interest on the Bank Loan which will have accrued was to have constituted a joint liability of the Purchaser and Sellers subject of course to Clause 4.0 of the Agreement, which obliged the Sellers in such circumstances to transfer to the Purchaser shares which are equivalent to the amount already paid by the Purchaser subject to the Agreement and the Sellers may retain or sell the remaining shares to any person/company of their choice. This, the 1st to 4th Defendants did not abide with. Instead they unilaterally decided to

prematurely take over the management of the Hotel on the **5th January, 2012** in breach of the clear terms of the Agreement.

It is for the above reasons, the first issue *whether there was a breach in the Share Acquisition Agreement* is to be answered in the affirmative.

The second issue is *whether the Share Acquisition Agreement was obtained through fraud.*

In his closing arguments Mr. Lutema argued that, Snow Crest Hotel is situated on **Plots Nos.39 and 58** under Certificates of Titles **Nos. 13551 and 20125**, Block BB, Kwangulelo Area, Arusha City respectively in the name of **Snow Crest and Wildlife Safaris Limited**. Mr Lutema further submitted that, the office block extension, parking lot and the kitchen of the Hotel are erected on **Plot No.38**, Block BB, Kwangulelo Area, Arusha City, comprised in Certificate of Title **No.13552** in the name of **Mr. Wilfred Lucas Tarimo**. According to Mr. Lutema, **Plot No. 38** is mortgaged with **Stanbic Bank** and therefore constitutes an encumbrance. Mr. Lutema submitted further that Defendants actively concealed these facts from the Plaintiff with a malicious intention to defraud. In support of his submissions Mr. Lutema referred this Court to the provisions of section 10 of the Law of Contract Act, [**Cap.345 R.E 2002**] which among other things provides that an agreement becomes a contract if among other things it is made with the **free consent** of the parties. Mr. Lutema submitted further that section 14(1)(c) of **Cap.345 R.E 2002** provides that, consent is said to be free if it is not caused by **fraud.** Mr. Lutema argued further that section 17(1)(b) of **Cap.345 R.E 2002** defines fraud to mean:

"the active concealment of a fact by one having knowledge or belief of the fact committed by a party to the contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract."

It is was the further submission of Mr. Lutema that, it is trite law under section 19(1) of **Cap.345 R.E 2002** that, when consent to an agreement is caused by among other things, fraud, the contract is voidable at the option of the party whose consent was so caused.

Mr. Omary on his part submitted that, a party who alleges fraud has to prove guilty intent on the part of the other or he must prove that the other party's goal was to induce the innocent party to conclude the contract. According to Mr. Omary, the Plaintiff has failed to adduce any evidence whether documentary or physical to substantiate its allegation of fraud on the part of the Defendants. Mr. Omary surmised that the allegation of fraud therefore does not exist and remains a mere allegation by the Plaintiff and added that in his testimony during the trial, DW1 told this Court that, Snow Crest is situated on **Plot Nos. 39 and 58.**

According to the evidence on record, *Snow Crest Hotel* was initially built on **Plot Nos.39 and 58** under Certificates of Titles **Nos. 13551 and 20125**, Block BB, Kwangulelo Area, Arusha City respectively. Later on, there was an extension which was made on **Plot. No.38** Block BB, Kwangulelo Area, Arusha City for Office Block, Kitchen, Restaurant, Laundry, Car park and generator kiosk. The Office Block, Kitchen, Restaurant, Laundry, Car parking and Generator kiosk therefore form part of the Hotel. At the time the parties executed the Agreement

(Exhibit P1), Snow Crest Hotel was therefore situated on **Plots No. 38, 39 and 58**. In his testimony under oath at the trial, DW1 told this Court that the Office Block and Car parking area sometimes are used by the Hotel although they are situated in a Plot separate from the ones owned by Snow Crest and Wildlife Safaris Limited. It is rather unfortunate that all these facts were not disclosed by the Defendants to the Plaintiff at the time of executing the Share Acquisition Agreement. Consequently, the Plaintiff has now found itself to have paid the first instalment for the purchase price of a Hotel without car parking, Office Block, Laundry, Kitchen, Generator and Restaurant, which in my view are vital amenities for any hotel business. The most pertinent question to consider however, is whether the concealment by the Defendants of those facts constituted fraud in the eyes of the law, whose main constituent element is *active concealment of a fact by one having knowledge or belief of the fact committed by a party to a contract with intent to deceive another party or to induce him to enter into the contract.* The person alleging the existence of fraud in entering into a contract must therefore establish the fact as to intent to deceive or to induce another party to enter into contract and the concealment of the facts must be active coupled with the knowledge or belief of the party alleged to have committed the fraud. The contract in dispute comprised of payment of price for the purchase of immovable property. The principle of law as regards sale and purchase of any goods including immovable property is that of caveat emptor, that is, let the buyer be aware. The Purchaser was therefore under a general duty to inspect the property to be purchased before taking possession. This is critical in order to establish if there any defects in title, which could not be discoverable with due

diligence. The situation in the present matter is however, somewhat peculiar in that, the parties agreed to conduct a due diligence study after executing the Agreement. The alleged fraud, if any, therefore was to have been discovered at the time of conducting the due diligence study. In any case at the time before the due diligence study, if any, the contract was voidable on the part of the Plaintiff and as such it cannot be said to have been obtained by fraud.

It is for the above reasons that, the second issue *whether the Share Acquisition Agreement was obtained through fraud* is to be answered in the negative.

The third issue is *whether the Defendants obtained the sum of USD 1,730,000.00 through fraud.*

In his closing arguments Mr. Lutema submitted that, this particular issue should be answered in the affirmative and that, the Court should order rescission of the fraudulently procured contract. On his part Mr. Omary submitted that, in absence of fraud at the time of executing the Share Acquisition Agreement, the Defendants cannot be stated to have obtained the USD, 1,730,000 fraudulently. It was the further submission of Mr. Omary that, the Plaintiff never presented the issue of fraud to the Defendants when they were holding management meeting or in the meeting held on the *9th March, 2012* with the 1st to 4th Defendants.

This Court has already found and determined the second issue in the negative that, the Share Acquisition Agreement was not fraudulently obtained. This being the case, the third issue whether the Defendants obtained the sum of USD 1,730,000.00 through fraud therefore has no legs on which to stand. It is for this reason that the third issue is also to be answered in the negative.

The fourth issue is *whether the take-over of the management of the hotel was lawful and proper.*

. In his closing submissions Mr. Lutema argued that, the Defendants cannot abide by the contractual agreement of relinquishing the management of the hotel to the Plaintiff. Mr. Omary on his part argued in his closing submissions that, the Purchaser (Plaintiff) having defaulted to pay the last instalment of the purchase price, the Sellers (Defendants) reverted to their original positions as shareholders except making the Plaintiff the minority shareholder holding **1,235.7** shares out of the **5000** shares of the Company. Mr. Omary submitted further that the 1st to 4th Defendants were therefore rightly entitled to resume their management position upon the Plaintiff having breached the terms of the payment under the Share Acquisition Agreement making the Purchaser a minority shareholder in the Defendants Company.

This Court has already determined earlier in this judgment that, by virtue of paragraphs 3.1.5 and 4.0 of the Agreement (Exh.P1) in the event the Purchaser (Plaintiff) of being unable to proceed with payment of the last instalment of the purchase price or any part thereof the Defendants were obliged to transfer to the Purchaser (Plaintiff) shares which are equivalent to the amount already paid by the Purchaser (Plaintiff) but not to unilaterally take over the management of the Hotel, which as I have determined earlier was rather premature and in clear breach of the Agreement. There is therefore no genuine reason to justify the act of the 1st to 4th Defendants of unilaterally taking over the management of the Hotel. Consequently the first prayer by the Plaintiff under paragraph **(a)** to the Plaint for this Court to declare the 1st to 4th Defendants unilateral usurpation and subsequent refusal, neglect or

failure to handle over the management of Snow Crest Hotel to the Plaintiff as being breach of the share acquisition agreement fails. It is accordingly it is dismissed.

It is for the above reasons that, the fourth issue *whether the take-over of the management of the Hotel was lawful and proper* is to be answered in the negative.

The last issue is as to *what reliefs the parties are entitled to.*

Under paragraph **(b)** to the Plaint in the prayers, the Plaintiff is seeking a declaration that the failure by the 1st to 4th Defendants to transfer to the plaintiff 61% of the shares in the 5th Defendant Company, which is equivalent to the amount paid by the Plaintiff pursuant to the Share Acquisition Agreement, constitutes a breach of the share acquisition agreement. It is without controversy that the Plaintiff has purchased a total of **1,235.7** shares out of **5000** shares in the 5th Defendant's Company. The issue is whether the **1,235.7** shares constitute 61% of the 5000 shares in the 5th Defendant's Company. A simple calculation of the percentage of **1,235.7** shares to 5,000 shares will result into only **24.714%** but not 61% as the Plaintiff claims. In any case the Plaintiff did not clearly substantiate how it arrived at 61% of the total shares thus making the Plaintiff a majority shareholder. It is worth noting here that, in terms of paragraph **2.3** and **2.4** of the Agreement (Exhibit P1), the Bank Loan and Interest are part and parcel of the purchase price. The only difference is that, whereas the Bank Loan and Interest were supposed to have been paid directly to the Bank by the Purchaser (Plaintiff), the actual amount of the purchase price was supposed to have been paid to the 1st to 4th Defendants. I am of the further view that, in calculating the percentage of the shares, the total

amount of **USD 1,730,000** which the Purchaser (Plaintiff) paid to the Sellers (Defendants) as first instalment of the purchase price of shares in the 5th Defendant's Company is to be calculated out of the **USD 7,000,000** being consideration inclusive of the Bank's loan and interest.

It is for the above reasons that this Court cannot grant the prayers under paragraph **(b)** and **(c)** in the Plaint.

Under paragraph **(d)** to the Plaint, the Plaintiff is praying for a declaration that refusal, neglect or failure by the 1st to 4th Defendants to handover documents necessary for due diligence as per articles 3.1.3 and 3.1.4 of the share acquisition agreement constitutes breach of the share acquisition agreement.

As I have already determined earlier in this judgment, there is no evidence on record as to what type of documents which were necessary for assisting the Plaintiff in the due diligence study that the 1st to 4th Defendant were required to hand over to the Plaintiff. Furthermore, the fact that, the type of documents stipulated under **paragraph 13.1** of the Agreement were "***all documents for administration purpose,***" thus the issue of refusal or failure by the 1st to 4th Defendants to hand over documents necessary for due diligence does not therefore arise. Consequently, there is no issue of breach of the Agreement by the 1st to the 4th Defendants as a result of their refusal or failure to hand over to the Plaintiff documents necessary for due diligence which may arise in the circumstances. This Court cannot therefore grant the prayer under paragraph **(d)** to the Plaint.

The Plaintiff has also prayed under paragraph **(j)** to the Plaint in the alternative, for an order for rescission of the Share Acquisition Agreement subject to the Defendants refunding to the Plaintiff the sum

of **US$ 1,730,000.00** (*say US Dollars One Million Seven Hundred Thirty Thousand Only).*

It is on record that DW1 told this Court that, the 1st to 4th Defendants are ready to refund the Plaintiff the sum of **USD 1,730,000.00** the Plaintiff paid as first instalment being consideration for the purchase of shares in *Snow Crest Hotel and Wildlife Safaris Limited.*

In the particular circumstances of this case, much as this Court has found and held that the 1st to 4th defendants are in breach of the Agreement by failing to transfer to the Plaintiff (Purchaser) shares equivalent to the sum of money the Plaintiff (Purchaser) paid to the Sellers as being the first instalment payment of purchase price as required under the Agreement, it is only reasonable in the circumstances for this Court to award the alternative prayer for rescission of the Share Acquisition Agreement subject to the 1st to 4th Defendants refunding to the Plaintiff the sum of **USD 1,730,000.00** which the Plaintiff paid to the 1st to 4th Defendants as first instalment of the purchase price of shares in the 5th Defendant's Company. A order of rescission amounts to a cancellation of the Agreement, that is, it is terminated from the beginning – as though the contract never existed. The result of rescission is that all parties to the Agreement are brought back to the position they were in before entering into the Agreement. This means that any benefit received as part of the Agreement, and in this case the amount of US$ 1,730,000 which the Plaintiff paid to the Sellers (1st to 4th Defendants), must be returned to the Plaintiff. Consequently, since the order of rescission leads to the unmaking or the undoing of the Agreement, there is nothing left for the parties to specifically perform.

As the prayers under paragraph **(e), (f), (g), (h)** and **(i)** to the Plaint cannot be granted by this Court.

The Plaintiff has also prayed under paragraph **(k)** to the Plaint for payment of general damages to be assessed by this Court. The Plaintiff however, did not make any submissions on this particular prayer. As a matter of general principle, general damages are payable at the discretion of the Court upon the claimant establishing by evidence such loss occasioned by the Defendant's breach. In this suit, the Plaintiff has not led any evidence to establish such loss occasioned by the Defendant's breach. Consequently, this Court cannot grant the Plaintiff's prayer for payment of general damages.

Under prayer **(l)** to the Plaint, the Plaintiff prayed for the payment of *"Interest on (j) from 5th January 2012, which is the date of takeover of the management of the hotel, to the date of judgment."* The Plaintiff however did not specify the rate of interest prior judgment. It is only during examination under oath that PW1 stated the specific rate of interest prior judgment at the rate of **9%** per annum from **5th January, 2012**, the date of the unilateral takeover of the management of Hotel by the 1st to 4th Defendants to the date of judgment. The general principle is that the award of interest prior judgment is at the discretion of the Court. The Plaintiff merely mentioned the rate of interest prior judgment at 9% per annum but did not give any justification for the award by this Court of interest prior judgment at the rate of 9%, which rate the Plaintiff did not specifically plead in the Plaint. However, the circumstances of this case and the fact that the Plaintiff parted with a colossal sum of money since 2012, which the Sellers accepted and received as being first instalment payment for the purchase by the

Plaintiff of shares in the 5th Defendant's Company and further that the amount involved is in foreign currency, this Court finds it that payment of interest prior judgment at the rate of **4%** per annum to be calculated as simple interest will suffice in the particular situation of this case.

The Plaintiff has also prayed under paragraph **(m)** to the Plaint for payment of interest post judgment at the Court's rate of **7%** per annum from the date of judgment to the date of full satisfaction of the decree, as well as the costs of this suit. The prayer for payment of interest at the Court's rate of **7%** per annum, is quite in order and in accordance with the requirement of law for payment of such rate of interest. Naturally, as a matter of general principle that costs follow the event, this Court shall award the Plaintiff costs in this suit.

In the whole and for the above reasons, Judgment and Decree is hereby granted against all the Defendants jointly and severally for the following reliefs:

1. *The Share Acquisition Agreement dated 5th September 2011 between Mr. Wilfred Lucas Tarimo, the 1st Defendant, Mr. Derick Wilfred Tarimo, the 2nd Defendant, Doreen Wilfred Tarimo, the 3rd Defendant and Irene Wilfred Tarimo, the 4th Defendant and The Grand Alliance Limited, the Plaintiff, is hereby* ***rescinded*** *subject to the 1st to 4th Defendants refunding to the Plaintiff the sum of* ***USD 1,730,000.00*** *the Plaintiff paid to the 1st to 4th Defendants as first instalment of the purchase price of shares in the 5th Defendant's Company;*

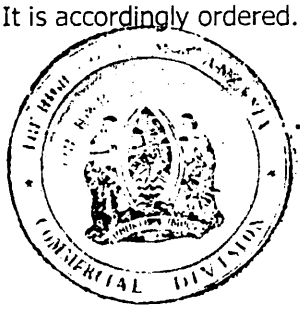
2. *The 1st to 4th Defendants shall pay the Plaintiff the sum of US Dollars One Million Seven Hundred Thirty Thousand (**USD 1,730,000.00**), which the Plaintiff Company paid to the 1st to 4th Defendants as first instalment of the purchase price of shares in the 5th Defendant's Company;*

3. *The 1st to 4th Defendants shall pay simple interest at the rate of **4%** per annum on the decretal sum at (2) above from the 5th of January, 2012 to the date of Judgment;*

4. *The 1st to 4th Defendants shall pay simple interest on the decretal sum at the Court's rate of **7%** per annum from the date of judgment to the date of full satisfaction of the decree;*

5. *The 1st to 4th Defendants shall pay the costs of this suit.*

It is accordingly ordered.



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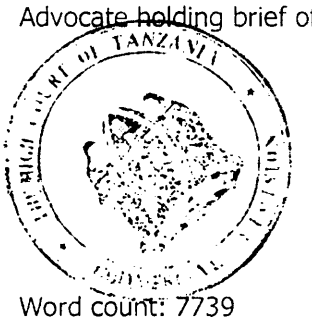
R.V. MAKARAMBA

JUDGE

22/08/2014

Judgment delivered this 22nd day of August 2014 in the presence of Mr. Lutema, Advocate for the Plaintiff and Mr. Aggrey Kamazima Advocate holding brief of Mr. Omary, Advocate for the Defendant.



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R.V. MAKARAMBA

JUDGE

22/08/2014

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