

**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**

**CIVIL CASE NO. 229 OF 2014**

**ARBOGAST CHRISTOPHER WARIOBA .....PLAINTIFF**

**VERSUS**

**NATIONAL MICROFINANCE BANK LIMITED .....1<sup>ST</sup> DEFENDANT**

**MWAFRIKA GROUP LIMITED ..... 2<sup>ND</sup> DEFENDANT**

*First Order 28/3/2018*

*Last Order 17/4/2018*

**JUDGMENT**

**I.P.KITUSI,J.**

This case covers a very narrow landscape in my view, because most of the matters that form its background are uncontroverted. The uncontroverted background is as follows;

One Shaibu Sozy Salum whom I shall hereafter refer to as the borrower is the original owner of a house described as KND/KGG/KAT/10/57 at Kigogo Kati area in Dar es Salaam Region. On 19<sup>th</sup> December 2009 this house (the suit house) was sold in a public auction conducted by Mwafrika Group Limited, the second defendant, during which Arbogast Christopher Warioba, the plaintiff, was the successful bidder and buyer for shillings 40 million.

The basis of the auction was an alleged mortgage deed signed between the National Microfinance Limited, the first defendant, and

the borrower, and that the latter defaulted in servicing the loan which gave the first defendant the right of sale of the said house. Upon payment of the purchase price of Shs 40 Million, the plaintiff was given a certificate of Sale and a Residential Licence for the house. I take judicial notice of the fact that a Residential Licence is to an unsurveyed landed property what a certificate of occupancy is to a surveyed landed property.

The suit arises from allegations by the plaintiff that subsequent to the auction he was denied entry to and possession of the house, and that the first defendant who had initiated the said auction to recover the debt as well as the second defendant who conducted it could not intervene to assist him. The plaintiff claims that the denial to take possession of the house which he had bid and paid for affected him in more ways than one, and claims compensation.

The plaintiff's case is that when he followed up with the Land Registry of Konondoni Municipal council he came to learn that the alleged mortgage between the first defendant and the borrower was unregistered and that the same suit house was subject of a registered mortgage with Tanzania Women Bank. The plaintiff was further informed that the Residential Licence given to him by the defendants was not genuine. He is therefore suing for breach of contract, loss of expected earnings and interest.

The plaintiff has pleaded that relying on the certificate of sale and Residential Licence he had confidently signed a Lease Agreement with Buzahya Investment Limited for monthly rent of Shs 3,600,000/=



which was to run for one year from January 2010. It was when he took these would-be tenants to the house in order to hand it over to them that he met muscular men (bouncers) paid by the borrower, who denied him entrance.

The plaintiff claims a declaration that the defendants deceived him into buying the house which they had not diligently ascertained the genuineness of its documents. He also claims an order for immediate refund of the purchase price of Shs 40 million and compounded interest thereof amounting to Shs 102,805,000/= calculated at 32% per annum from 19<sup>th</sup> December 2009 to 3<sup>rd</sup> November 2014 when the suit was filed. He also claims payment of 208,800,000/= being the expected rent of Shs 3,600,000 per month from 1<sup>st</sup> January 2010 to 3<sup>rd</sup> November 2014. Compound interest at the rate of 30% per annum for this amount is also claimed. General damages for breach of contract has been claimed as well as punitive damages for deception. Lastly interest at court rate from the date of judgment till payment in full and costs of this suit.

The first defendant did not dispute the fact that the plaintiff purchased the house for Shs 40 million but disputed the allegation that the said house had never been mortgaged to them as well as the alleged forged Residential Licence. Further the first defendant pleaded that they have nothing to do with the alleged Lease Agreement between the plaintiff and the third party. They have disputed the claims of refund, compensation and interests as being baseless.

The following three issues were agreed upon at the commencement of the trial

1. Whether the defendants breached a contract of sale for residential house situated on Plot NO KND/KGG/KAT'10/57.
2. If the answer to issue No. 1 is in the affirmative whether the plaintiff suffered loss from such breach.
3. To what reliefs are the parties entitled.

The plaintiff's case was told by four witnesses including the plaintiff himself who testified as Pw1. He stated that he became aware through a newspaper that a house at Kigogo area would be auctioned. He visited the house for inspection on Friday during which he noted nothing suspicious.

Because of this fact he attended the public auction on the next day and became the successful bidder, at the price of 40million shillings. He complied with the conditions and paid the requestite sum to the second defendant which had conducted the auction.

Having complied with the conditions Pw1 was given the Residential Licence for the house (Exhibit P1(a)) and a certificate of sale (Exhibit P1(b)). Subsequently PW1 was approached by one Michael Nyaruba (Pw3) who requested Pw1 to sell the house to him but Pw1 declined. Finally Pw1 and Pw3 signed a Lease Agreement. Pw3's testimony supported this version and said he had special interest in the house which he had earlier intended to buy in the public auction.



Pw1 and Pw3 testified that the Agreement (Exhibit P2) was for one year from 1<sup>st</sup> January 2010 at a monthly rent of Shs 3, 600,000/=. PW3 is the Director of Buzalya Investment Limited.

However when Pw1 accompanied by officers from Pw3's company went to the house with the view of performing a handing over, Pw1 could not gain entry into it because a group of pre- arranged muscular men commonly known as : "bouncers" prevented him. When Pw1 notified the defendants about that turn of events, the defendants did nothing about it.

Pw1 recruited Tanvaluer Company to do an official search of the house so as to transfer it into his name. According to Francis Nyanyula (PW2) an officer working for that company the search revealed that the house was subject of a mortgage with Tanzania Women Bank. He tendered the Official search report as Exhibit P4.

Pw2's testimony was supported by that of Astanius Regumerila (Pw4) a Land Officer at Kinondoni Municipal Council. Accordign to Pw4 the house could not be transferred into the name of Pw1 as requested by him because it was subject of a mortgage by Shaibu Sozy Salum to Tanzania Women Bank. According to Pw4 the records did not support a contention by the first defendant that the house had been mortgaged by the said Shaibu Sozy Salum with them. The Land Registry demanded by letter(Exhibit P5) proof by the first defendant that the house had been mortgage by the said Shaibu Sozy Salum with them but they could not furnish that proof.

The first defendant called one Nsajigwa Raphael Ndabi (DW1) its employee, to rebut the plaintiff's story. DW1 confirmed that the plaintiff purchased the suit house in the public auction and paid Shs 40 million for it. He testified that the sale was a result of the borrower's failure to service the loan he had secured from the first defendant's Bank House Branch. He also testified to have been the one who handed over to the plaintiff the Residential Licence and a sale Agreement.

DW1's assertion is that the suit house was handed over to the plaintiff by the defendants. He disputed the allegation that the Residence Licence was not genuine and, after all, the plaintiff never raised the allegation with the first defendant after the documents had been handed over to him. In DW1's view, without proof to the contrary by an expert opinion, the Licence is genuine. In relation to evidence of an expert DW1 stated further that there is none to suggest which of the Licences is genuine between that deposited with the first defendant and that deposited with Tanzania Women Bank.

As far as DW1 knows, the house was handed over to the plaintiff and he has been in its possession since 2009 after which the first defendant was not responsible for anything. DW1 asserted that the plaintiff has adduced no proof of the fact that he was denied entry to the house, and that had the said "*bouncers*" denied him entry as alleged the plaintiff would have reported them to the police. Only if the plaintiff had taken such action would the first defendant have the duty to support him.



When Exhibit P5, the letter of demand addressed to the first defendant, was shown to DW1 he said there is no proof that the letter was received by the addressee because it does not bear the first defendant's official stamp and signature of its receiving officer. DW1 prayed that the suit be dismissed.

DW1 was subjected to a lengthy cross-examinations by Mr Hamza Byarushengo, learned advocate who represented the plaintiff. In the course of the cross-examinations, DW1 conceded that Kinondoni Municipal council wrote to the first defendant (Exhibit P5) requiring it to submit a document known as KND/KGG/KAT 10/57 as the Land Registrar at that Municipality was in possession of a document bearing similar numbers, presented by Tanzania Women Bank. DW1 also conceded that the first defendant did not comply with the request in Exhibit P5 explaining during re-examination, that the non-compliance was caused by the fact that the document was already in the Plaintiff's hands.

DW1 was also cross-examined on the Report on official search. He conceded that the Report shows that the house had been mortgage with Tanzania Women Bank, and also conceded that he had presented no proof of the fact that the said suit house had also been mortgage with the first defendant.

As regards DW1's denial that Exhibit P3 was not received by the first defendant, Mr Byarushengo drew his attention to paragraph 11 of the written statement of Defence, but DW1 maintained that the demand letter was not received. Under paragraph 11 of the WSD the

first defendant did not dispute receiving the letter but stated that they had no duty to pay as demanded.

DW1 admitted to a suggestion that the first defendant was supposed to issue to the plaintiff a document known as Transfer under Power of Sale to assist the plaintiff transfer the house into his name. He conceded that this document was not issued to the plaintiff.

The case proceeded ex parte against the second defendant it having defaulted in both pleading and entering appearance. Mr Daibu Kambo, learned advocate represented the first defendant, and made brief oral closing submissions.

Mr Kambo submitting on the principle that he who alleges a fact must prove it, pointed out that there was no proof either that the Residential Licence that had been submitted by the borrower to the first defendant was a forged one or that the one submitted to Tanzania Women Bank was the genuine one. The learned counsel submitted further that there is no evidence upon which the court may make a finding that the first defendant is in breach of the contract of sale. He invited the court to answer the first issue in the negative.

On the issue whether or not the plaintiff is entitled to financial reliefs the learned counsel's general submission was that since the alleged breach has not been proved, there would be no basis for awarding the reliefs prayed for. Specifically he submitted in relation to the claim for Shs 208 800,000/= being expected rent, that there was no proof that the money was, in fact, received by the plaintiff. The



learned counsel submitted that the amount claimed for rent being specific in nature requires strict proof.

As regards the claim for Shs 40 million which was paid in purchasing the house, Mr. Kambo submitted that there is a Land case pending before the District Land and Housing Tribunal and that since that case has not been determined, this case has been preferred prematurely.

On the other hand, Mr. Byarushengo submitted that the issues of forgery was abandoned by the parties during the Pre-Trial Conference which, he submitted, is permissible under Order XIV of the Civil Procedure Code, hereafter the CPC. The learned counsel referred to a book by **V.V. Chitale** **K.N. Annaji Rao**, The Code of Civil Procedure (Act of 1908) 2<sup>nd</sup> Edn at page 1533 where the learned authors commenting on Order XIV of the Indian Civil Procedure Code Similar to our Order XIV of the CPC write that parties may abandon some issues. Mr. Byarushengo therefore justified the omission to lead evidence of forgery in this case.

As for the alleged breach of contract, the learned counsel submitted that it is in the form of the defendants assuring the plaintiff that they had powers to auction the suit house whereas in fact they had none, and by their failure to hand it over to him. The learned counsel referred to the fact that a follow up at the Land Registry revealed that the Mortgage Deed between the first defendant and the borrower had never been registered with the relevant authority and he cited Section 112(5) of the Land Act which provides that under such

circumstances the lender shall not exercise any remedies that would otherwise be available to it, including the power of sale provided for under section 131 of the Land Act.

Further Mr. Byarushengo submitted that it is breach to invite somebody to a contract that cannot be executed, and cited section 56 of the Law of Contract. On the reliefs, Mr Byrushengo submitted that there is no dispute that the plaintiff paid the purchase price but did not have the house handed over to him. Counsel cited the case of **ULC (Tanzania) Limited V. National Insurance Corporation & Another** [ 2003] T.L.R 212,.

On the interest, the plaintiff's counsel has submitted, citing the case of **Francis Andrew V. Kamyn Industries** (T) Limited [1986] T.L.R 31, that the plaintiff has pleaded it and is entitled to it. He further submitted that according to established practice of banks, the interest charged is compounded. For this Mr. Byarushengo cited the case of **National Bank of Commerce Vs Walikuma Engineering Company & Two others** [2005] TLR 273.

Before I deliberate on the issues let me make findings on some of the important facts in this case. The central fact is that the suit house was sold in a public auction conducted by the second defendant at the instance of the first defendant. Secondly, the plaintiff purchased the house for shs 40 million after emerging the successful bidder.

The plaintiff alleges that he has not taken possession of the house because the borrower could not let him, and the defendants did



not intervene to assist him. The first defendant's response to this is that the plaintiff must have taken possession of the house because he never complained to them subsequent to the sale. I think the question whether or not the plaintiff took possession of the house is a matter of evidence. There is for the plaintiff evidence of Pw1 that the plaintiff was denied entry and that the defendants could not assist. For the defence there is the evidence of DW1 that the plaintiff took possession of the house.

I accept PW1's version as true and I consider DW1's story as casual and speculative. The fact as to one's entry into and occupation of a house is so tangible that it would be seriously disputed by evidence if the plaintiff's allegations were untrue. Moreover in view of a tacit admission that the house is now a subject of litigation before the District Land and Housing Tribunal, the defendants cannot validly maintain that the plaintiff is in possession of that house.

In this case it would not be practical for the plaintiff to prove a negative, that he is not in possession, or occupation of the house, but the defendants could prove that he is actually in possession or occupation of it. On the basis of the foregoing it is my finding that the plaintiff has not taken possession of the house.

The fact that there was a contract of sale between the plaintiff on the one hand and the defendants on the other is apparently not in dispute, because nowhere in the pleadings as well as in the evidence is that fact controverted.

What calls for determination is whether there was breach of that contract by the defendants, which is the first issue. In **Legend Aviation (PTY) Limited t/a King Shaka Aviation Vs Whirlwind Aviation Limited**, Commercial Case No. 61 of 2013 High Court Commercial Division, at Dar es Salaam (unreported) this court (Mwambegele, J as he then was) adopted the following passage from a Ugandan case of **Nakama Trading Co. Limited Vs Coffee Marketing Board** [1990 – 1994] 1EA – 448.

*"A breach occurs in contract when one or both parties fail to fulfill the obligations imposed by the term...."*

Applied to the case at hand, the major and clear terms of the contract created an obligation on the plaintiff to pay the purchase price for the house, after which the defendants had an obligation to hand over the said house to him.

I have made a finding in the proceeding pages that the defendants did not hand over the house to the plaintiff because I accepted the plaintiff's version and because the defendants did not attempt to prove that they discharged this duty. In determining the following first issue I am mindful of the principle;

*" The man who brings another before a judicial tribunal must rely on the strength of his own right and the clearness of his own proof, and not the*



*want of right or weakness of proof in his adversary....."*

This paragraph from Sarkar's Law of Evidence, 18<sup>th</sup> Edn was cited with approval by this court (Mwandambo,J) in **Kibaigwa Agriculture and Marketing Co – operative Society Limited V. Stanbic Bank Tanzania Limited**, Civil case No. 211 of 2011, High Court Dar es Salaam District Registry, (unreported).

During his testimony DW1 stated that the plaintiff adduced no evidence to prove that he was prevented from entering the house. The plaintiff testified to the effect that he was denied entry and he called PW3 to prove that the Lease Agreement could not be effected for the reason that the plaintiff was denied entry. Another dimension is an allegation by the plaintiff that the documents given to him by the defendants were not authentic and further that the house was incumbered with another mortgage. Evidence of Pw2 and Pw4 supported the fact that the house was incumbered.

I will consider the issue of denial of entry in terms of actual denial and technical denial.

As regards the actual or physical denial, the plaintiff gave an affirmative testimony. When cross examined by Mr. Kambo why he did not report the denial to the police, Pw1 stated that he considered it prudent to report the matter to the ones who had sold the house to him. Subsequently it occurred to him that even the documents given to him during the sale were doubtful. In the circumstances of this case I have

no reason to doubt Pw1's word because the defence has not suggested what could have made him pay 40 million shillings for the house then decline to take possession of it for no reason. Therefore I find that the plaintiff has proved that he was actually denied entry to the house.

The actual denial aside, there is a suggestion that the house was incumbered. There is the evidence of PW2 and PW4 as well as Exhibit P4 that the house had been mortgaged to Tanzania Women Bank. On the other hand DW1 stated in his testimony that he had no proof of the mortgage of the house to the first defendant.

My conclusion is that the fact that the defendants have no proof that the house was mortgaged to the first defendant, and the fact that I am satisfied that the house was mortgaged to another bank, constitutes technical denial of entry into the house. Thus the plaintiff was actually denied possession of the house by the borrower's henchmen and was technically denied possession by the defendants because of the incumbrance. In view of the above I answer the first issue in the affirmative, that the defendants breached the contract of sale.

Before I proceed to determine the second issue, I need to weed out that issue of forgery that featured prominently in the submissions. Forgery was not among the issues raised at the commencement of the trial but, I have given this aspect a thought and wondered whether proof of forgery would be relevant in this case. I do not think the issues of Forgery would bear any relevance in determining whether or not the defendants performed their contractual



duty by handing over the house to the plaintiff, the buyer. If anything, forgery would be an issue between the first defendant and the borrower, but not in the present case. Therefore it would not be necessary for the plaintiff to prove the genuineness of the Residential Licences submitted by the borrower to the two banks.

The second issue is whether the plaintiff suffered loss as a result of the breach. It is the plaintiff's case that it is a loss for his money to be in the hands of the first defendant for all this time from 2009 even after he demanded a refund. He further stated that had he taken a loan from the first defendant they would have charged him compound interest. He therefore claims the money (40 million shillings) back with compound interest thereon.

The other loss is the expected income from the Lease Agreement. According to PW1, PW3 and Exhibit P2, the agreed monthly rent was Shs 3,600,000/= in a tenancy that was for twelve months, though renewable. It means therefore that the plaintiff had expectation of getting Shs 43.2 million for the initial twelve months. The defendant's breach caused the plaintiff to lose this money for a period from 1<sup>st</sup> January 2010 to 3<sup>rd</sup> November 2014 when the suit was filed, bringing the total loss to Shs 208,800,000/=.

The defendants have maintained that they had nothing to do with the way the plaintiff used the house. In his submissions, Mr. Kambo argued that the plaintiff has not proved that he received the money.

With respect my finding is that it is a loss for the plaintiff to have paid shs 40 million for the house which he never got. In my view unless it is suggested that the plaintiff gave the defendants that money in charity, which is not the case, it cannot be said it was not a loss to him.

As for the Lease Agreement, there is no evidence to contradict that of PW1, PW3 and Exhibit P4, that the agreed rent per month was Shs 3, 600,000/=, and that the contract was renewable. The first defendant's breach of the contract resulted into loss on the part of the plaintiff in that he did not get the expected rent.

Consequently my answer to issue number two is in the affirmative.

The last issue is about the reliefs the parties are entitled to. The first relief which was pleaded is general damages for breach of contract. The plaintiff has established without controversy that he is a businessman and my conclusion is that he suffered by the breach and is entitled to relief. I assess general damages at eighty million shillings and accordingly award it to the plaintiff. I also order that the amount of Shs 40 million that the plaintiff paid for the house be refunded to him, by the first defendant.

The next relief is in a form of special damages. The law in **Zuberi Augustino Vs. Anicet Mugabe** [1992] TLR 137 that special damages must be strictly proved has been echoed in many subsequent decisions. See, for instance **Tanzania Telecommunication**



**Co. Limited (TTCL) V. Twalib Kiluwa** Civil Appeal No. 146 of 2012 High Court Dar es Salaam Registry (unreported); **T – Better Holding Company Limited V. African Banking Corporation(T) Limited** Commercial Case No. 3 of 2015 High Court Commercial Division, (unreported).

The plaintiff has proved that he was going to receive Shs 43.2 million per year from Pw3 as rent. The Lease Agreement (Exhibit P4) shows that the contract was renewable. Pw3 testified that he had been so interested in the house that he had initially bid to buy it only to be defeated by Pw1. On the strength of this evidence there is nothing to contradict the plaintiff's claim that the Lease Agreement was meant to continue. I therefore grant the prayer for payment of Shs 208, 800,000/= as rent from January 2010 to 3<sup>rd</sup> November 2014. I order interest at court rate on this amount from this date till full payment.

As for the claim for compound interest on the amount of Shs 40 million, Mr. Byarushengo cited the case of **National Bank of Commerce Vs Wakulima Engineering Company**(supra). The principle that was pronounced in that decision is that banks all over the world charge compound interest against loans. With respect I am not persuaded that this principle should apply the same way as when a person's money is held by the bank. Although the plaintiff's argument that the first defendant must have made profits from his money is attractive, the duty on his shoulder is to prove that he would have made that profit. It should be recalled that profits are special damages that need to be strictly proved. [See **Tangamano Transport Services**

**Limited Vs Elias Raymond & Another** Commercial Case No. 50 of 2004(unreported), cited in **T- Better Holding Company Limited** (supra)] There is no proof of any profits, therefore there cannot be and entitlement to compound interest by the plaintiff. He is awarded interest at bank rate from the date of the cause of action to the date of judgment, and interest at court rate from the date of judgment till payment in full.

The plaintiff has also prayed for punitive damages, however there is neither testimony nor submission to support it. The principle underlying award of punitive or exemplary damages is that the court should be satisfied that the defendant's act was calculated to make a profit for himself. See the case of **Rev. Christopher Mtikila Vs Attorney General** [2004] TLR 172, There is no such proof in this case.

In fine, judgment is entered against the first defendant for payment of Shs 80 million general damages for breach of contract. Refund of Shs 40 million being the purchase price, Shs 208,800,000/= as loss of earning from the expected rent. Judgment with interest and costs



**I.P. KITUSI**

**JUDGE**

**17.4.2018**