

IN THE HIGH COURT OF TANZANIA
DISTRICT REGISTRY
AT DAR ES SALAAM

CIVIL CASE NO. 53 OF 2015

JUMA ONESIPHOLO FRANCIA.....1ST PLAINTIFF

KHALFAN SAID.....2ND PLAINTIFF

MICHAEL JULIUS MASSAKA.....3RD PLAINTIFF

VERSUS

ZAINUDDIN T. ADAMJEE.....DEFENDANT

JUDGMENT

MUTUNGI, J.

The plaintiffs represented by Mr. Majaliwa learned counsel have filed this suit seeking for Judgment and Decree against the defendant jointly and severally for the following:-

- (i) A court's declaration that the defendant breached the principle terms of the written Agreement with the plaintiffs.

- (ii) The court's order for the immediate payment of the sum of Tshs. 175,000.000/=
- (iii) The court's order for payment of Tshs. 50,000,000/= being compensation for breach of contract.
- (iv) General damages against the defendant as would be assessed and found appropriate by this court.
- (v) An order for interest on the claimed amount at the commercial rate of 18% per annum from the date of signing the agreement up to the date of Judgment.
- (vi) An order for payment at the interest on the decretal sum at the court rate of 14 % per annum from the day of Judgment to day of the payment of the same.
- (vii) Costs of this suit.
- (viii) Any other and further relief (s) as this honorable court shall deem just.

The above claims emanate from an outstanding amount owed to the plaintiffs as commission for a sale of school owned by the defendant. PW1 (HALFANI

SAIDI) in support of the said claims did explain to the court that the defendant was the owner of a school christened **"The Great Lake Secondary School"** located at Marumbo area within Kisarawe District. Further that the defendant also owns a website known as **"Global Land Solution"**. That sometime in July, 2014 the defendant did advertise for sale (school) in various social media and through individuals including his employee one JUMA FRANCI ONESMO.

The plaintiffs being intermediaries (madalali) got wind of the intended sale and were likewise attracted to the transaction. They then went forth and met the defendant in his office and started negotiations. It was agreed that the purchase price would be Tshs.1,500,000,000 and the commission thereof was to be 10% of the said amount. It was further agreed that, in the event the plaintiffs brought a purchaser who will accept to pay a purchase price beyond the specified amount (1.5 billion) then any amount exceeding 1.5 billion will be the plaintiffs' commission. The agreed terms were reduced in writing (contract – Exhibit P1) duly prepared by the plaintiffs' advocate (PW2).

There was a further agreement that the plaintiffs would cause the transfer to be effected. Having completed the negotiations and duly signing Exhibit "P1" the plaintiffs did find a purchaser whom they introduced to the defendant. To their surprise the defendant never consulted or involved them thereafter and started avoiding them. As a result they had no knowledge of the sale Agreement between the defendant and the purchaser. It was then that they got information from the purchaser that, the sale transaction had already been conducted and concluded. After a close follow up and harassment, the defendant was only able to pay the plaintiffs Tshs. 75,000,000/=. It was also agreed that an amount of Tshs. 100,000,000/= will be retained by the defendant as fees for the transfer process of the suit property.

It was PW1's testimony that the reality on the ground is that, the said property was sold for Tshs. 1,750,000,000/= hence their commission had to be Tshs. 250,000,000/=. Since it is written in the Agreement that their commission was Tshs. 150,000,000/= then they are still to be paid

Tshs. 75,000,000/= plus Tshs.100,000,000/= as transfer fees. The defendant is also to pay them Tshs. 50,000,000/= as damages which was pegged on their business projections.

According to PW1 they were to be paid in two installments and the Agreement with the defendant had a time guide line. PW1 clarified that during the period the payments were underway the defendant had issued them postdated cheques in their advocates name ([PW2]). These according to the witness (PW1) were returned to the drawer since they had bounced due to insufficient funds in the bank (CRDB).

In conclusion PW1 averred that, due to the defendant's breach of the Agreement they have unjustifiably and unlawfully been deprived of their money. They have consequently suffered loss, exposed to unnecessary expenses and psychological injury hence entitled to the claimed compensation and general damages.

PW2, MOHAMED MAJALIWA who also happens to be the plaintiffs' lawyer as was earlier pointed out by PW1 explained that, the plaintiffs being his clients had approached him to draft them an agreement. The terms of

the said agreement had been reached upon between the plaintiffs and the defendant. He had been made to believe that, the plaintiffs were intermediaries (madalali) who had assisted the defendant to sale his school.

The plaintiffs had informed him that, the purchase price was Tshs. 1,750,000,000 and what they were to remit to the defendant was 1,500,000,000/= hence their commission was Tshs. 250, 000,000/=.

According to his memory the defendant had only paid Tshs. 75,000,000/= (cash) to the plaintiffs. It was agreed the remaining amount be paid by postdated cheques which were dully tendered by PW2 as Exhibit "P2" and "P3" issued in his name. Once he had tried to cash the cheques on the said dates, these bounced and was fully informed by the CRDB Bank that, the defendant had cancelled the said cheques via Exhibit "P4". PW2 insisted that as per the Agreement the plaintiffs were to be paid Tshs. 250,000,000/= out of which Tshs. 150,000,000/= would be paid directly to the plaintiffs and the remaining 100,000,000/= would cater for the transfer expenses.

Having realized that the defendant had breached the Agreement PW2 did send him a demand notice (Exhibit P 5). In reply thereof the defendant admitted liability.

DW1 (Zainuddin Tayabal Adamjee) represented by Mr. Emmanuel Kessy, learned Advocate admitted in principle to have met the plaintiffs who had been introduced to him by one Deogratius Moses. These agreed to find a customer to buy his school which was on sale. They agreed that the purchase price was 1.5 billion and the three were to receive a 10% commission payable as per the purchase money received. DW1 further elaborated that the would be purchaser had agreed to pay him in installments within a year and consequently the defendant would pay the plaintiffs when and as the purchaser paid.

As agreed the defendant first paid Tshs. 20,000,000/= and proceeded to issue the plaintiffs postdated cheques in their advocates name (55 Million on 3/1/2015 and 75 million on 30/4/2015). DW1 was supposed to make alternative payments since the plaintiffs advocate wanted to be paid in cash. DW1 had to follow the bank procedures since the amount had to be split into ten million parts hence he

proceeded to pay 25 million on 25/2/2015 followed by 30 million on 13th March. This meant he had already now paid the first installment (75million). The remaining amount was subject to the purchaser who had yet to finalize the payments and invoices together with receipts for audit purposes from the plaintiffs (Exhibit "D3). To date the Plaintiffs have never furnished him with these documents on the already paid amount. In view thereof he was made to write to the bank to cancel the postdated cheques and a copy to their lawyer.

DW1 narrated further that, thereafter he received a demand notice of Tshs. 75 million. He responded by elaborating that first and foremost he admits the plaintiffs are yet to be paid Tshs. 75 million but what he still needs is the invoice and payment receipts of the money already advanced to the plaintiffs. He also admitted any amount over and above the Tshs. 1.5 million (purchase price) would be the plaintiffs' money but this never happened.

Considering the foregoing facts and for the sake of deliberating upon the dispute the court did frame 3 issues as hereunder:-

- (1) Whether the defendant instructed the plaintiffs to bring the purchaser of his property based on the agreed terms.
- (2) Whether there was a breach of terms by either of the parties to the agreement.
- (3) What reliefs are the parties entitled thereof.

On the outset it is paramount to find that the dispute revolves around an agreement that was reached between the two disputing sides in regards to a sale of the defendant's school. It has not been disputed that eventually a buyer was found by the plaintiffs after the two camps had sat and agreed between themselves as to the terms and conditions of the said transaction.

It is the finding of this court that the plaintiffs were governed and guided by the agreement dully signed by both sides (Exhibit P1). There is therein a clear clause which states:-

“Kwamba Muuzaji ameamua kuuza shule yake na madalali wamekubali kumletea mteja kwa makubaliano ambayo yataainishwa katika mkataba huu.”

Having gone through the above clause, it is not hard to find that, the defendant had instructed the plaintiffs to bring the purchaser of his property based on the agreed terms. This answers the first issue.

As to the second issue, one has to go through the conditions set forth by the contracting parties to Exhibit "P1". This is in line with **Section 10 of the Law of Contract Cap. 345 RE: 2002** which for the sake of clarity states:-

"All agreements are contracts if they are made by the free consent of the parties competent to contract for a lawful consideration and with a lawful object."

What then were the conditions set out in Exhibit "P1" **FIRST**, and foremost the defendant had agreed to sale his property for Tshs. 1.5 billion.

SECONDLY, the defendant had agreed to pay the plaintiffs any amount over and above the purchase price depending on how they would have convinced the buyer.

THIRD, it was agreed that the buyer (purchaser) buys the said property for Tshs. 1, 750,000,000/= by the plaintiffs.

FOURTH, the defendant is to pay the plaintiffs Tshs. 150,000,000/= as and when the purchaser pays him in accordance with the sale agreement.

FIFTH, the defendant is to pay half the amount stated in the fourth condition through a postdated cheque of 1st January, 2014 written in MOHAMED MAJALIWA Advocates name worth Tshs. 55,000,000/=.

SIXTH, The remaining amount of Tshs. 75,000,000/= to be payable through a postdated cheque of 30 April, 2015.

SEVENTH, any remaining amount shall be payable to the plaintiffs any time within four months as and when the purchaser pays the defendant.

EIGHTH, the plaintiffs through their lawyer (MOHAMED MAJALIWA) will effect the transfer on an amount agreed upon by TRA as per their assessment.

The evidence on record as per PW1, PW3 and DW1, they all agree that the purchase price was 1.5 billion and the plaintiffs were to receive Tshs. 150,000,000/= as their commission. It is further agreed that to date only Tshs. 75,000,000/= has been advanced to the plaintiffs.

The defendant without mincing words admits to owe the plaintiffs Tshs. 75,000,000/= only, but they have first to issue him an invoice and payment receipts on the amount already paid.

The court has painstaking gone through the Agreement and finds there is no set condition prior to receiving the remaining Tshs. 75,000,000/=. The defendant was duty bound to pay the defendants depending on the installments payable by the purchaser within four months.

The evidence adduced is crystal clear that, the defendant had never involved the plaintiffs in the sale Agreement nor the installments paid by the purchaser. There being such a gap on this aspect, it is thus inferred that the defendant was dully paid by the purchaser but for some unknown reason he had not finally paid the outstanding Tshs. 75,000,000/=. He did not even want to summon the

buyer to testify in order to clarify on the payments he had received so far. This is as per section 122 of the evidence Act (Cap. 6 R.E 2002) which states as follows:-

“The court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case”.

The foregoing notwithstanding, the plaintiffs have claimed Tshs. 100,000,000/= as money alleged to have been retained for the transfer process. There is no basis at all on this claim nor is it reflected in the Agreement which is the subject matter.

In the upshot to answer the second issue, it suffices to find that, the defendant was in breach of the terms of contract having failed in the performance of the Agreed payments. The same was underscored in the case of

Ongecha v. The City Council of Nairobi (1982)KLR 151 where it was held:-

“Failure of performance whether total or partial may constitute to a breach if it goes to the root of the contract.”

LASTLY, on the issue of relief (s) entitled to the parties, the court orders as follows:-

- (1) The defendant is declared to have breached a principle term in the written agreement with the plaintiffs that is the payment of the balance of the purchase price.
- (2) The defendant to pay the plaintiffs Tshs. 75,000,000/= with immediate effect.
- (3) Since the plaintiffs have endured sufferings and a long period of waiting they are to be paid Tshs. 10,000,000/= as general damages.
- (4) An interest at the court rate on the principal sum from the date of Judgment to the day of full payment of the same.
- (5) Costs of this suit.

It is so ordered.


Read this day of 11/04/2018 in the presence of all the plaintiffs and Mr. Kessy Advocate for the defendant.


B. R. Mutungi

JUDGE

11/04/2018

Right of appeal explained.


B. R. Mutungi

JUDGE

11/04/2018