IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL CASE NO. 169 OF 2013

VITUS LYAMKUYU .....PLAINTIFF

VERSUS

IMALASEKO INVESTMENT LIMITED ..... DEFENDANT

15/5/2018 & 17/5/2018

JUDGMENT

I.P.KITUSI,J

In this suit the plaintiff Vitus Lyamkuyu alleges breach of contract that was entered between him and the defendant Imalaseko Investment Limited, a limited liability Company registered under the laws of this country. The plaintiff is the registered owner of a property described as Plot No. 1 Block Oysterbay, hereafter the suit premises.

In September 2009 the parties entered into and signed an agreement known as Joint Venture Agreement (Exhibit P2) whose performance has given rise to this suit. On the suit premises there stands a house in which the plaintiff resides, but there is enough space around it to construct other houses. So by the Joint Venture Agreement the parties intended that the said remaining space should be developed and thereafter used for commercial purposes for their mutual interests.

According to the contract and the plaintiff who testified as Pw1 his duty in the contract was to provide the space or construction site while the defendant's duty was to develop it by constructing 17 apartments, each with four floors. However by an Addendum (Exhibit P3) the parties agreed to increase the unit number of apartment from 17 to 24. The contract period was twelve (12) months running from 1 September 2009 when the contract was signed.

The plaintiff's position is that he provided the requisite space for the construction but it is the defendant which did not fulfill its side of the contractual obligation as it constructed eight (8) instead of twenty four (24) units. On the other hand the defendant's case both in the pleadings and testimony is that the plaintiff is to blame for his failure to give vacant possession to allow construction of more units to continue, even after he was given by the said defendant Shs 100 million to facilitate his relocation.

The fact that Shs 100 million was received by the plaintiff from the defendant is admitted by the said plaintiff but the purpose for which it was so received is controverted. The plaintiff has maintained both in his pleadings and testimony that the money was paid gratis as advance for earnings expected upon completion of the project and that this arrangement was as per a clause in the Addendum.

It is alleged further by the plaintiff that the contractual period within which the defendant ought to have completed works ended on 31 August 2010, and that as of August 2013, more than 36 months

later, when he filed this suit, the defendant was yet to complete construction. The plaintiff claims redress for what he alleges to have suffered a as a result of the defendant's alleged breach.

According to the contract, the plaintiff was, on completion of the project, entitled to 30% of the units which, it has been pleaded, equals to 7.2. apartments or flats. In this suit therefore the plaintiff claims loss of what he would have earned by renting the 7.2 flats at a price of Us dollars 2, 500 each which amounts to Us dollars 18, 000 per month and Us dollars 648, 000 for 36 months. The plaintiff prays for this specific relief of Us dollars 648, 000 for loss of earning and general damages of Us dollars 300,000 for breach of contract. The court is also asked to award interest and costs of the suit.

In the written statement of defence the defendant states that it has constructed nine (9) units out of the agreed twenty four (24) but the reasons it assigns for the inability to construct all 24 units are not associated with it. It is stated in the written statement that construction had to be supervised and approved by the relevant Municipal Council and that some of the important permits were belatedly obtained. The plaintiff is also blamed for expelling or chasing engineers from the site alleging that they were incompetent for the project and that he did this in several occasions. In addition, the defendant alleged that another reason for the delay was a dispute of boundaries between the plaintiff and his neighbours and also a threat by the Tanzania Building Agency questioning the plaintiff's Mandate to enter into the Joint venture Agreement.

As regards the alleged expected earning the defendant stated that the rent pleaded by the plaintiff is exaggerated and that the occupancy rate of leased houses around the area stands below 50% per annum.

The defendant raised a counter claim in the course of which it alleged that the plaintiff's duties under the contract were to ensure that all paperwork regarding the Title were in order, to resolve boundaries disputes with his neighbours and any queries raised by authorities and relocate from the premises to enable the construction proceed. Therefore the defendant alleges that the plaintiff is guilty of failing to relocate, failing to resolve boundaries disputes and expelling engineers from the site, all of which made it to fail to complete the construction within the agreed time. The defendant pleads that the elongation of construction time caused loss of revenue on its parts.

It is prayed that the plaintiff's suit be dismissed and he be held liable in breach of the contract for failure to relocate, and that he pays general damages. Further that the plaintiff be ordered to relocate from the suit premises to allow construction to proceed. Lastly that the plaintiff be condemned to pay costs of this suit.

Four issues were agreed upon at the commencement of the trial. The first issue is;

"What are the terms and conditions of the contract between the parties"

The plaintiff's testimony on this issue is that all what the contract required of him was to provide the land upon which the construction would be done by the defendant. It is further his testimony that after completion of the construction, the parties would jointly manage the project with the view of getting the mutual benefits as per percentages stipulated in the contract.

On the other hand it is the defendant's case that while the plaintiff's duty was to provide the land and later take part in the joint management of the project, it was also a condition that at some stage of the construction he would relocate so as to give way to the construction on the space where his house stood. The Managing Director of the defendant company one Jumanne Kishimba (DW1) testified that the defendant gave the plaintiff shillings 100 million to facilitate the relocation in addition to identifying the biggest five bedroom apartment, of the completed apartments within the project for the plaintiff to move in.

The issue of relocation therefore, features prominently in the testimonies of both parties. The plaintiff's version is that the Addendum stipulated the manner in which he was to relocate, that is, by the defendant providing him with an alternative accommodation from among the constructed apartments with the same grade as the house he was occupying, including a servant quarter. He testified that the defendant did not fulfill this obligation, and that the money, shs 100 million, received from it had nothing to do with relocation.

This issue will have to be determined by taking a look at the contract itself and I will bear in mind that when the terms of a contract are written they cannot be altered by oral agreement.

In her closing written address, Ms. Prisca Chogero learned counsel for the defendant submitted that;

> *" The terms of that Agreement briefly consisted that the parties were to have joint ownership of the property to be constructed on the Plot No. 1 for a term of 50 years with equal ownership for a period of time and with an agreed profit sharing scheme.*
>
> *Further it was agreed that the Landlord (Plaintiff herein) contribution was the value of Land and unexhausted improvements which contribution was taken as 50% while the Developer (Defendant Herein) was undertake financing of the project which included costs of preparing drawings and designs appointing consultancy team construction costs, insurance and all related costs to the project."*

I accept the learned counsel's view because what comes out of the Joint Venture Agreement (Exhibit P2) read together with its Addendum (Exhibit P3) is that the plaintiff's main duty was to provide the land for the initial works and later vacate his residence to enable the defendant use the space on which the house stands. The defendant's duty was to provide the financing for the whole project after making follow ups and obtaining relevant permits. At a later stage the defendant was to provide to the plaintiff the first apartment to be complete in the project to serve as alternative accommodation to him including building of a structure alternative to his (plaintiff's) existing servant quarter.

Those in my conclusion were the main terms of the contract relevant to this suit and the issue of relocation is a double edge sword at the center of the controversy.

The second issue is ;

> " *Whether there was a duty on the part of the plaintiff of specifically ensuring that the documents regarding title to the land were in good order as a condition precedent."*

This issue came as a result of a paragraph in the counterclaim that raised the fact that the plaintiff 's duties included the seeing to it

that all paperwork regarding the Title were in order. It turns out however, that the issue is uncontested and no evidence was led to prove or disprove it. It is in my view a fact that the plaintiff had a duty under the contract to provide land with documents establishing his title to its, which covers issues one and two.

The third issue is whether parties or any of them is in breach of the terms and conditions of the contract. Strangely each party alleges breach on the part of the other. In the plaint the plaintiff accuses the defendant for breach of the contract by failing to complete the construction of 24 apartments by 31 August, 2010, the agreed date of completion. On the other hand the defendant, by way of counter claim, accuses the plaintiff for refusing to relocate, thereby causing the delay in the completion of the construction.

During his testimony, the plaintiff stated that the defendant failed in its duty to relocate him. Under the contract, he stated, the defendant was to provide him with accommodation in the first apartment that would have been complete, and having the same grade as the house he was occupying at that time. This included provision of a servant quarter. It was further his testimony that the defendant had constructed only eight apartments instead of twenty four. Both during his chief testimony and in cross - examinations the plaintiff maintained that construction of the remaining apartments was not going to be done on the space that his house stands.

The other breach complained by the plaintiff is that the defendant runs the Management of the completed apartments on his own without his (plaintiff's) participation. When a question was put to the plaintiff whether it is not true that his participation in the Management was through his nominee, the plaintiff's answer was that his nominee's participation is limited. The said nominee does not identify tenants, nor fix rent, although he receives a share. He only gets invited to check books of accounts which he does not take part in the preparation.

On the other hand DW1 and one Ally Kassim Mkali (DW2) a lawyer employed by the defendant maintained that for construction of the other apartments to continue, it is imperative that the plaintiff vacates his house. They testified that they provided the alternative accommodation for the plaintiff in addition to the money they gave him for relocation. DW2 stated that the servant quarter that was to be constructed to replace the old one was in place and was being used by the plaintiff. As regards the management the defence case is that it was joint through the plaintiff's nominee known as Boniface.

In his submissions Mr. Rwenyongeza learned advocate for the plaintiff stated that the defendant 's allegation that an apartment was identified for the plaintiff to move in and that he refused to, was not true and was an afterthought. The learned Counsel submitted that it is an afterthought because in the pleadings the defendant did not make that averment, and underlined the principle that parties are bond by their pleadings. He cited the case of **James Funke Gwagilo V. Attorney General** [2002]. T.L.R 455.

The learned counsel referred to paragraph 8(b) of the written statement of Defence to show the defendant's pleading that it was not **solely** the cause of the delay in the construction. He submitted that this pleading is an admission on the defendant that it contributed to the delay although it has failed to prove the plaintiff's contribution to that delay.

On her part Ms. Chogero for the defendant submitted that the fact that eight apartments were complete within time has not been challenged. She submitted that the plaintiff refused to occupy one that was identified for him on the ground that it did not meet the standard, but he has not shown what standards were expected by the plaintiff.

It is settled law that;

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

[See the case of **Nakana Trading Co. Limited Vs Coffee Marketing Board** [1990 – 1994] 1 EA 448 cited in **Legend Aviation(PIY) Limited t/a King Shaka Aviation Vs Whirlwind Aviation Limited,** Commercial Case No. 61 of 2013 High Court Commercial Division (unreported).

Before I proceed to determine whether there is and if any who committed breach in this case, it seems crucial to determine one important issue that has cropped up. This is whether continuation of

construction of more apartments depend on the plaintiff relocating to another place. This is not an express term in the contract but one that formed a basis for animated testimonies. Briefly the plaintiff took the view that his relocation was not a condition precedent for construction of the remaining apartments. On the other hand the defendant's view is that construction would be impossible without the plaintiff vacating his house.

In resolving this issue I am conscious of the fact that the issue of relocation forms the main feature of the Joint Venture Agreement under Article III clause 3 and later in the Addendum. I think the fact that relocation was to be to the **first apartment to be constructed** was for a purpose. My reading of the Agreement and its Addendum leaves me satisfied that it was an implied term in the contract that the relocation was aimed at creating space for construction of the remaining apartments.

According to DW1's statement during cross - examinations by Mr Rweyongeza, the constructed apartments cover about 35% of the area that is supposed to be built on. The plaintiff's house occupies about 20% - 25% of the whole area. DW1 boldly stated that construction would continue immediately if the plaintiff gave vacant possession of his house. Under section 9 of the Law of Contract Act, Cap 345, some terms of a contract may be implied. In this case for the reasons that I have shown and the fact that relocation was to be to the first constructed apartment, my conclusion is that there was a nexus between the relocation and continuation of construction.

The next important point to be dealt with is whether the defendant had the first apartment ready for plaintiff's occupation or whether there is proof that he had not. The plaintiff's counsel has submitted that had the apartment been ready as alleged by the defendant, it would have stated so in its written statement of defence. When DW1 was cross – examined by the leaned counsel for the plaintiff he stated that the initial eight apartments were complete by 2010. DW2 stated that the servant quarter is ready and being used by the plaintiff.

My examination of the pleadings shows that the issue of refusal to relocate was raised by the defendant under paragraph 8 (b) of the written statement of defence which the plaintiff's counsel quoted in submitting that the defendant did not plead the plaintiff's contribution in the delay in completing the construction. Further under paragraph 5 of the written statement of defence the defendant stated;

> " *The contents of paragraph 6 of the plaint are vehemently contested and the plaintiff is put to a very strict proof thereof. Further to that the Defendant states that, the act of Plaintiff not giving the vacant possession to the Defendant to allow the constructions to proceed upset the time frame set to the completion of the project"*

Then under paragraph 7 of the statement of defence it was stated that nine apartments were ready for occupation.

I have already pronounced myself on the fact that the money given by the defendant to the plaintiff could not have been for relocation even if there was an oral agreement to that effect. The reason is that the parties written agreement could not be altered orally. As regards the defendant's assertion that it also provided an alternative accommodation for the plaintiff it is my finding that since there is no dispute that eight apartments had been constructed the fact that one was reserved for plaintiff's occupation is more probable than not. On a balance of probabilities I accept the defendant's version and find that one apartment had been reserved for the plaintiff to move in.

However, clause 8 of the contract requires that all notices and notifications by the parties be in writing. The issue therefore is whether the defendant duly notified the plaintiff that the apartment for him to relocate to was ready. Under section of the Evidence Act Cap 6 it is the defendant's duty to prove that it notified the plaintiff in terms of the contract. The defendant exhibited nothing written to prove the fact that it notified the plaintiff about the alternative accommodation. At one time when DWI was being cross – examined by Mr. Rweyongeza whether he made a written demand of payment of the defendant's money by the plaintiff, he stated;

> *" We paid the plaintiff money on 1/10/2010 and before we could serve him with Notice he came to court. He came to court in 2012, about one year after receiving the money. We kept discussing with the plaintiff because it was not desirable to use written Notice"*

There is however evidence that some communications between the parties were otherwise than in writing. For instance there is no dispute that the plaintiff's nominee has been receiving invitations from the defendant to attend meetings and/ or to check books of accounts on behalf of the plaintiff. The fact that the plaintiff has been receiving a share of the rent which presupposes prior communication is also uncontroverted. There is equally no dispute that the plaintiff is using the newly constructed servant quarter.

It is my finding that the parties agreed to communicate verbally in some matters and this is, under section 101 (b) of the Evidence Act Cap 6, permissible because it did not alter the rights and obligations of the parties to the contract See also the case **of Khalfan V. Kichwa** [1980] TLR 309.

On that basis, and considering the fact that the plaintiff was living right within the area where the apartments had been built, it cannot be said that he was not informed about the availability of the

complete apartment just because there is no proof of a written communication to that effect.

There is another reason why I am satisfied that the plaintiff was aware that there is an alternative accommodation for him but chose not to relocate. In his testimony the plaintiff stated at one stage as follows;

> *"I know that in his defence the defendant alleges that his failure to discharge the whole of his duty was caused by my failure to give vacant possession. Our agreement specifies that I would continue to reside there..... There is a space for construction of the remaining 16 apartments. We were going to agree on how to use the space where I am now residing."*

I have already made a finding that by providing for the plaintiff's relocation the contract implied that the area where his house stands would be built on. I find that the plaintiff's thinking that the area where his house stands was not going to be built on and that the parties were going to agree on how to use it, to have been a unilateral mistake by him. This is because the contract does not provide for such a thing nor can it be implied from it, apart from the fact that it defeats logic. Since this mistake by the plaintiff is, in my view,

unilateral it does not, under section 22 of the Law of contract Act cap 345, make the contract voidable.

My conclusion from the foregoing is that the plaintiff's mistaken belief as shown is inconsistent with his assertion that the defendant failed to relocate him. It is my finding that the plaintiff refused to relocate which was a breach of the contract on his part.

There is also a complaint by the plaintiff that the defendant unilaterally carries out the management of the project which is a breach of clauses 6. 5 and 6.6. of the contract. Mr. Rwenyongeza for the plaintiff has submitted that it was the defendant's duty to prove how he involves the plaintiff in the management and that the plaintiff could not be expected to prove a negative. On the other hand the defendant has maintained that the plaintiff was involved through his representative.

Clause 6. 5 of the contract stipulates that the parties would enter into a separate Property Management Agreement on or before the completion date. Logically because eight apartments are already in operation such Agreement needed to be in place before completion date. However clause 6.5 does not impose a duty on either of the parties to prepare the Agreement unless it is read together with clause 3.1.(c). Under the latter clause, the defendant has the duty to prepare the joint venture Agreement and I take this to include the Property Management Agreement. I agree with Mr. Rweyongeza learned advocate that it was more the defendant 's duty to prove that he prepared the

Agreement than the plaintiff's to prove that he did not. It is my finding that the defendant did not provide that evidence for which reason I hold it in breach of that term of the contract.

The fourth and last issue is what reliefs are the parties entitled to. The plaintiff has prayed for payment of Us dollars 648,000 being expected income from his share of rent for 7.2 flats for 36 months from 31 August 2010 to 30 August 2013 when the suit was filed. This amount is based on rent of Us dollars 2,500 per month per flat which the plaintiff stated in his testimony was lower than the prevailing rent at that time. He stated that rent at that time was Us dollars 3,000 per month. The plaintiff prayed for interest on the claimed specific amount, and also general damages for breach of the contract by failing to complete construction within time.

On his part the defendant in his counter claim prayed that the plaintiff be held in breach of contract for failure to relocate, and that an order be made to compel him to relocate so as to allow the construction to proceed to completion. General damages are prayed for the alleged breach.

Regarding the specific claim of Us dollars 648,000 Mr. Rwenyongeza submitted that although the plaintiff has not shown how he arrived at the rent of Us dollars 2,500 which is disputed by the defendant, the amount of Us dollars 700 per month stated by the defendant has not been substantiated by it while it is the custodian of the Tenancy Agreements. The learned counsel submitted by failing to prove what

the actual rent is being paid, the defendant has failed to challenge the plaintiff's suggested rent of Us dollars 2, 500. He submitted in the alternative that if the court declines to go along with his submission then it should grant him damages on the principle that there is no wrong without a remedy (ubi jus ibiremidium). For this principle, he cited the case of **China Henan International Cooperatin Group Co. Limited V. Salvand K.A Rwegasira**, Civil Appeal No. 57 of 2011, CAT (unreported)

In response Ms. Chegero, learned advocate for the defendant cited a number of decisions to support her view that the prayer for Us dollars 648,000 being specific in nature needed specific and strict proof. The cases cited are **Masolete General Agencies V. African Inland Church Tanzania** [1994] TLR 192; **Zuberi Augustino V. Anicet Mugabe** [1992] TLR 137; **Bahiri Ally (a minor) V. Clemencial Fatima and others** [1998] TLR 215.

I agree with the learned counsel for the plaintiff that the defendant may be better placed to know the details of the Tenancy Agreements. However it is trite law that the one who alleges assumes the duty to prove the alleged facts, and there are a host of decided cases on this principle. Surfice to cite **Peter Joseph Mushi V. Lyolo & Co. Limited,** Civil Appeal No. 21 of 2014, High Court Dar es Salaam District Registry (unreported) and; **Kibaigwa Agriculture and Marketing Co- operative Society Limited V.Stanbic Bank Tanzania Limited** Civil Cases No. 211 of 2011, High Court at Dar es

Salaam District Registry (unreported). In the latter case this court cited the following passage from Sarkar's Law of Evidence, 18th Edn;

> *" The main who brings another before a judicial tribunal must rely on the strength of his one right and the clearness of his own proof and not he want of right or weakness of proof in his adversary....."*

In this case I have found it curiously disturbing why the plaintiff did not call his representative to testify on the accounts which admittedly he has accesses to. When DW2 was testifying he named the representative as Boniface and that he was present in court. It is again trite law that failure to call material witness is fatal and the court may draw an adverse inference that if that witnesses had been called he would have given evidence against the part's interest. **Hemaed Said V. Mohamed Mbilu** [1984] TLR 113 cited in **Eva Longinus**(as Adminstratrix of the Estate of the late **Longinus Lyawale) V. Rajabu Issa Lusala & Another** Civil Appeal No. 196 of 2005, High Court Dar es Salaam District Registry(unreported). Also the case of **Lilian Onael Kileo V. Fauzia Jamal Mohamed** Commercial Case No. 135 of 2013 High Court, Commercial Division (unreported).

However having concluded above that the delay in completing the construction was caused by the plaintiff's refusal to relocate the

claim for loss of expected rent has no legs on which to stand. It is therefore dismissed.

The next point to deal with is the respective breach committed by each party. This, I have given serious thought of in view of the circumstances of this case. Much as I agree with Mr Rwenyongeza learned counsel that there is no wrong without a remedy the applicability of that principle to this case my invite more injury to either or both of the parties. This dilemma is partly a result of the fact that the Joint Venture Agreement was drawn in such a way that it requires more agreements to be entered and also because the parties cannot go back to their original positions. I have therefore considered it just to order as follows;

(i) The defendant should, in consultation with the plaintiff prepare a Property Management Agreement and the parties should sign it within thirty (30) days

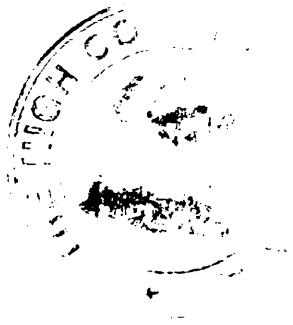
(ii) The plaintiff should give vacant possession of his residential house and the defendant should relocate him to the suitable apartment that was identified for that purpose. This should be done not later than forty five (45) days.

(iii) The defendant should resume construction of the remaining 16 apartments after vacant possession is given by the plaintiff and that construction should be finalized within eighteen (18) months from resumption.

(iv) No order of general damages are made against any of the parties because that will not serve the justice of this case.

(v) To that extent judgment is partly entered for the plaintiff and the defendant's counter claim partly succeeds.

(vi) Each party to bear own costs.



I.P.KITUSI

JUDGE

17.5.2018