IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

LAND CASE NO. 93 OF 2015

ABDUL RAHIM JAMAL MOHAMED.....PLAINTIFF
(suing through his attorney
FAUZIA JAMAL MOHAMED

VERSUS

WATUMISHI HOUSING CO. LIMITED.....DEFENDANT

JUDGEMENT

MASABO J.L.:-

This suit emanates from a land conveyance that turned sour. It was pleaded in the plaint that the plaintiff, being the rightful owner of a piece of land identified as Plot No. 195 and 196 with certificate of title No. 130674 and 130740, respectively both situated at Gezaulole area, Kigamboni in Dar es Salaam sold the two plots to the Defendant. That the consideration price for both plots was Tshs 660,420,000/= 80% of which payable at the execution of the sale agreement and the remining 20% payable upon completion of deed transfer processes. That, the transfer was completed and the title deeds handed over to the defendant on 7th November 2014 in anticipation that the Defendant would pay the remaining 20% of the consideration price but has so far failed/refused to effect payment. Further, it was pleaded that after executing the agreement the plaintiff discovered that the defendant fraudulently reduced the sale price from Tshs 17,000/= per square meter which was agreed during the negotiation to Tshs 15,000/= and fraudulently

inserted Plot No. 194 into the agreement although the same was not part of the transaction.

The facts and claims were vehemently disputed by the Defendant company In its written statement of defence the defendant averred that plot 194 was part of the sale transaction and that the sale price agreed by the parties was Tshs 15,000/= per square meter. Regarding the failure or refusal to pay the outstanding amount the Defendant averred that was been impelled by the Plaintiff's failure/refusal to surrender the title deed for plot No. 194.

Both parties were represented. The plaintiff was represented by Mr. Kung'e N. Wabeya whereas Mr. Joel Maeda, learned state Attorney appeared on behalf of the defendant.

The Plaintiff's claim was supported by one witness PW1 Fauzia Jamal Mohamed who is also representing the plaintiff under a special power of Attorney (Exhibit P1). She told the court that, the suit plots are part of a 24 acres farm which she personally acquired in 2008 and later had it surveyed and divided into five plots (plots No. 195, 196, 197, 198 and 194). She testified further that, having surveyed the plots she allocated two plots (Plots No. 197 and 198) to Ebony Company Ltd and two other plots (Plots No. 195 and 196) to Abdulrahim Jamal Mohamed, his son, the plaintiff herein, while she retained Plot No. 194. That, after the Plaintiff being the legal owner of plots 195 and 196 offered to sale them to the Defendant at a consideration price of Tshs 25,000/= per one square metre and upon negotiation they

agreed to deflate the price to Tshs 17,000/= per square meter making the purchase price of Tshs 687,990,000/= for the two plots which in total had an area of 40,470.

She testified that after negotiation the parties executed a sale agreement square metre. She further informed the court that, after the plaintiff had signed the sale agreement **(Exhibit P4**) he discovered that plot No. 194 was fraudulently listed in the sale agreement as it was not part of the sale transaction. He further discovered that the consideration price of Tshs 660,420,000/= was calculated on the basis of Tshs 15,000/= per square meter which is lesser the price of Tshs 17,000/= per square meter agreed during negotiation. She stated that the contract was prepared by the that defendant company and it used that to fraudulently deflate the sale price and insert Plot 194 into the sale agreement while knowing that the same was not part of the sale transaction.

PW1 further testified that upon discovery of the anomaly in the sale agreement the plaintiff immediately contacted the CEO for the Defendant who informed her that the contract and its terms has already been approved by the Defendant's Board and it was no longer possible to change it. In support she tendered minutes of the Defendant Board (**Exhibit P5**) which was allegedly availed to her by the CEO. She further stated that upon perusal of the minutes she noted that the Defendant reported to their Board that that the area sold had a total of 18 and six acres of which were offered by the vendor free for infrastructure development and that each square meter

was sold at T Shilling 15,000/=. That upon receipt of minutes they sought clarification from the Ministry for Land (Exhibit P6) on the requirement to set an area for infrastructure development whereby they were told that setting of an area for infrastructure development/public utilities was a responsibility of the purchaser/developer of the land, the defendant in this case.

The Defence side had equally one witness DW1: Dr. Fred Msemwa, Executive Director for the Defendant company who testified sometimes in July 2014, the Plaintiff sent them a letter (Exhibit. D1) through which he offered to sale the defendant three plots (Plots No. 194, 195 and 196) all situated at Block 25 Gezaulole) at Kigamoni for a consideration of Tshs 900, 000,000/=. That, two plots were described in the letter of offer as registered plots with title deeds (Plot 195 and 196) while one plot, plot 194 was unregistered. That, upon receipt of the letter and site visits, negotiations ensured between the plaintiff whereupon the plaintiff agreed to buy the three plots at a consideration of Tshs 660,420,000/= the same was reduced into a formal contract executed by all the parties. He further stated that in addition to these three plots the Defendant bought two plots plot No. 197 and 198 which were being sold by a company named EBONY whose directors were PW1 and his son Abdulrahim Mohamed, the plaintiff herein. That after conclusion of the negotiation the vendor through his Advocate one Mr. Kheri Rajab Mbiro reduced the terms in an agreement and sent the agreement to the defendant for signature whereupon it was signed and payment of 80% of the purchase price was effected. He further stated that the purchase price of 20% (Tshs 132,084,000/=) which was to be paid after the vendor has

transferred the title deeds to defendant id yet to be paid because the Plaintiff has failed/refused to avail the defendant with the title deed for plot 194.

Upon consultation with the parties, the court framed the following issues for determination:

1. Whether the plaintiff sold plot No. 194 to the defendant;
2. Whether the plaintiff is under contractual obligation surrender the title deed for plot No. 194 to the defendant;
3. What reliefs are the parties entitled to?

Before I dwell on these issues let me commence with the key principles that will guide my determination of the issues above. **First,** it is a trite law that the burden of proof lies on the person alleging existence of certain facts (see section 110 and 111 of the Tanzania Evidence Act, 1967 Cap 6 RE 2002). Echoing this principle, the Court of Appeal in **Godfrey Sayi and Anna Siame as Legal Representative of the Late Mary Mndolwa Civil Appeal No. 114 of 2014 between (unreported)** firmly stated that:

> " It is cherished principle of law that, generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provision of section 110 and 111 of the Law of Evidence Act[Cap. 6 R.E. 2002] which among other things states:-
> 110. Whoever desire any court to give judgment as to any legal right or liability depend on existence of facts which he asserts must prove that those facts exist.

> 111. The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side.

Second, this being a civil suit the standards is on the balance of probabilities which simply means that the court will accept evidence which is more credible and probable (see Al-**Karim Shamshudin Habib v Equity Bank Tanzania Limited & Viovena Company Limited** Commercial Case No. 60 Of 2016); **Wolfgango Dourado v. Toto Da Costa,** Civil Appeal No. 102 of 2002 CAT (unreported), and **Antony M. Masanga v. Penina (Mama Mgesi) & Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014, CAT (unreported).

Having stated the key principles, let me now turn to the first issue on whether or not plot 194 was sold to the defendant. The fundamental evidence before court in respect of this issue is the testimony of PW1 and DW1 as well as exhibit D1 (A letter of offer dated 22nd July 2014), Exhibit P4 (the sale agreement). In Exhibit D1, the plaintiff is offering to sale three plots: Plot No 194, 195 and 196 at Tshs 900,000,000/=. The sale agreement Exhibit P4 indicates that plaintiff sold the three plots at a price of Tshs 660,420,000/=. According to Exhibit D1 and Exhibit P4, as corroborated by oral testimony of PW1 and DW1, at the material time, the two plots (Plots 195 and 196) were registered whereas Plot 194 was yet to be registered. The question lingering in my mind is whether or not this evidence is sufficient to establish that Plot 194 was part of the transaction.

Our Law of contract recognizes oral and written forms of contract (see section 10 of the Law of the Contract Act, Cap 345). Thus, a contract may be oral or written. Under normal order of business, just as in the instant case contracts start by negotiation and upon completion of negotiation the parties reduce the terms of their negotiation in writing to form a formal contract. When, as in the instant case, the contract is reduced into writing but later there arise a dispute between the parties as to the terms or content of the agreement and one of parties is seeking to dispute to controvert the terms therein, recourse has to be sought from section 100 of the Law of Evidence Act, Cap 6 RE 2002 which provides as follows:

> 100-.(I) When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein before contained.

Thus, in the instant case, Exhibit P4 would be sufficient to prove the terms of the agreement between the parties with regards to the number of plots involved and the consideration there to. The law however provides a room for flexibility in exceptional cases where, for example, as in the instant case, one of the parties is alleging existence of fraud. The exception is provided for under section 101 which states that:

> 101. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 100, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from its term
> Provided that
> (a) any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law [emphasis added].

Considering that the Plaintiff in this case assets that Plot No. 194 was fraudulently inserted into the contract and that the consideration price was fraudulently devalued, the duty rests on him to provide the court with proof that indeed the said details were fraudulently altered. Since the allegation leveled by the Plaintiff are of criminal nature it is a cardinal rule that the standard of proof expected is higher than the normal standard of proof in civil cases. As held in Court, to a case of **Ratialal Gordhanbhai Patel v Lalji Makanji** (1957) EA 314

> "allegation of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something

more than a mere balance of probabilities is required".

The issue therefore is whether or not the evidence tendered by the plaintiff satisfies this test. I will answer this question in the negative. The only evidence in support of the plaintiff's allegation of fraud is her oral testimony and (Exhibit P5) minutes of the defendant's Board of Directors which in my considered view supports the defendant's assertion that the consideration price per square meter was reduced from Tshs 17,000/= to Tshs 15,000/= a reduction which the plaintiff claims that it was fraudulently inserted in the agreement. The fact that there is a difference on the total amount and the actual amount paid to the plaintiff although raises some concern, does not by any standard provide proof that the defendant fraudulently inserted the price consideration in the agreement and cannot as such be used to undo the terms of the contract dully executed by the parties. If in any event fraud was committed is between the defendant's management and its Board of Directors, which is not part of the impugned agreement. The minutes does not provide concrete evidence to the alleged fraud.

Even if I were to find that the minutes are in support of fraud allegations, the plaintiff's case would still be seriously wanting in that, in her testimony and even in the course of cross examination, PW1 told the court that the agreement was prepared by the defendant but before it was executed it was availed to the plaintiff and his counsel Mr. Kheri Rajab Mbiro and both had an opportunity to vet it prior to execution. It is beyond common imagination that such vital details of the agreement as the plots subject to the sale and

the consideration thereto escaped the attention of the vendor and his dully instructed counsel and especially considering that Plot No. 194 appears on the cover page of the agreement and is in the same line and in uniform ink with Plot 195 and 196. In further scrutiny of the Exhibit P4, I have observed that the preamble to the impugned contract bears the following words:

> " the vendor is the rightful owner of the plots No. 194, 195, and 196 BOLOCK 25 located at Gezaulole Kigamboni, Temeke district in Dar es Salaam Region Plot No. 195 is registered with Title deed No. 130674 and Plot No. 196 with Title Deed No. 130740 respectively. Plot No. 194 has no title deed but particulars of which have been verified by the purchaser. All the Plots containing and being the land comprised together with unexhausted improvements carried and undertaken thereon (the said piece of land together with improvements shall herein after together be referred to as the **"Property".** [emphasis added]:

Further, in Paragraph 2(a) and (b), is it states as follows:

> **IT IS HEREBY AGREED AND DECLARED AS FOLLOWS:**
>
> a. Upon and subject to the terms and conditions of this agreement the Vendor as legal and beneficial owner hereby sells to the purchaser and the purchaser purchases and acquires the **Property** for the price set out below
> b. The vendor shall sell to the purchaser the **Property** at the purchase price herein under mentioned
> c. The purchase price for the **Property** is Tanzania Shillings 660,420,000/..... [emphasis added]

A combination of all these renders the defendant's story more probable compared to the plaintiffs' story.

The defendant's case finds further support on the fact Mr Mbiro, the advocate who provided legal service during the sale transaction and who vetted the contract before it was signed was not called to testify in court. I am alive to the alive to the fact that calling of witness is in the purview of the parties and the law does not dictate the number or type of witness to be called, but, it is imperative that the fundamental witnesses be called to assist the court in dispensation of justice. This principle is well stated in **Aziz Abdallah vs R** [1991] TLR 71 where the Court of Appeal held that:

> "The general and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transactional question, are able to testify to material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution

The circumstances of this case dictate that Mr. Mbiro was a fundamental witness but for the reasons best known to the Plaintiff, he was not called to corroborate the PW1's testimony and assist the court in determining the alledeged fraud. In my settled view, the failure to call Mr. Mbiro entitles this court to draw an inference adverse to the Plaintiff's case. Based on these grounds, the first issue is answered in the affirmative.

Having answered the first issue in the affirmative, the answer to the second issue would naturally be in the affirmative. The Plaintiff is under contractual obligation to surrender the title deed for plot No. 194 to the defendant. Before I pen down on this issues, I must state however that I noted that in her testimony PW1 claimed that Plot 194 does not belong to the Plaintiff as it is her property which would imply that the plaintiff masquerading to be the legal owner of Plot 194 (as per exhibit D1) and fraudulent sold the same to the defendants. I want to underline here that this testimony was not only not supported by tangible evidence but was also misplaced. The conflict before the court is not about the ownership of Plot No. 194 but the issue is whether the same was sold by the plaintiff to the defendant. The doors of justice are wide open for PW1 on her personal capacity to sue the Plaintiff, the defendant or both to enforce her claim if any over Plot No. 194.

With regard to the reliefs, the plaintiff's prayers were for: a declaration that defendant is in breach of contract and an order for restoring the parties into their original position or in the alternative, an order against the defendant for payment of the outstanding balance of the purchase price at a tune of Tshs 179, 342,240/=; a monthly interest of 3% on the above amount from November 2014 to the date of judgment, an interest at the court rate of 7% from the date of judgment to the date of full payment; general damages to be determined by the court; costs of the suit and any other relief as the court may have deemed just and fit to grant.

However, based on what I endeavored to demonstrate above, the plaintiff has entirely failed to prove his claims against the defendant and, consequently, her entitlement to any of these remedies.

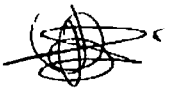
Accordingly, I find no merit in the suit and I proceed to dismiss it with cost.

DATED at DAR ES SALAAM this 16th day of December 2019.

J.L. MASABO

JUDGE

Ruling delivered this 16th day of December 2019 in the presence of Mr. Philemon Mganga representing Mr. Wabeya for the Plaintiff and Mr. Joel Maeda, learned state Attorney for the Defendant



J.L. MASABO

JUDGE