IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

LAND CASE APPEAL NO. 16 OF 2018

(Arising from the decision of the District Land and Housing Tribunal for Mtwara at Mtwara in Application No. 14 of 2016)

HASHIM OMARI LIKUNGWA.....APPELLANT

VERSUS

MOHAMED MTONDO.....1ST RESPONDENT

SHAHA SAID NAMWAMBE.....2ND RESPONDENT

26 May,&16 June 2020

JUDGMENT

DYANSOBERA, J.:

This appeal filed by appellant herein, is against the decision of the District Land and Housing Tribunal of Mtwara District at Mtwara in Application No. 14 of 2016 which was delivered on 26th day of May, 2017. The suit at the trial Tribunal was initiated by the appellant against initially, the 1st respondent on grounds of breach of contract in which he was claiming, inter alia, Tshs. 25, 000,000/= being damages for breach of

contract and Tshs. 3, 000,000 being payment taken by the respondent as advance payment. The 2nd respondent was then impleaded as a necessary party.

In his defence, the respondents denied the claims, put the appellant to strict proof. The 1st respondent averred that he and the appellant had agreed to conclude the contract upon the appellant's paying the whole purchase sum of Tshs 10,240,000/= but that the appellant failed to live to his word and this prompted the respondent to sell the suit land to the 2nd respondent.

At the close of the hearings, the District Land and Housing Tribunal, in its judgment, found for the respondent but ordered the appellant to get back Tshs. 3,000,000/= he had paid to the respondent as advance payment. The appellant was also condemned to pay costs to the respondent.

It is the said decision that triggered this present appeal. The appellant seeks to impugn the decision on two main grounds of appeal, that is:

1. That the trial District Land and Housing Tribunal erred both in law and fact when it failed to analyse properly the evidence on record as a result it reached at a wrong decision.
2. That the trial District Land and Housing Tribunal erred both in law and fact when he did not take into consideration of the material contradiction of the testimonials of the respondent that the sale agreement expired on September, 2016 while the appellant claims that on October, 2016, paid 1,000,000/= to the 1st respondent as a second installment.

In summary, the plaintiff, led by Mr. Ngonyani, learned counsel, testified that in 2015 Barnabas @ Polisi informed him of the farm that was being sold and took him to that farm so that the appellant had its view. The farm was estimated between 8 to 9 acres. The price of the farm according to Barnabas was 10.240, 000/= and the farm was intended to be sold to Baranabas but since he had not money, he had to act as a "dalali". Upon meeting the 1st respondent, the appellant and respondent discussed and agreed on the sale at Tshs. 10,000,000/=. It would seem the 1st respondent required the appellant to pay cash money but the appellant had not such money. The appellant argued that the 1st respondent had to

fumigate and weed the farm and after the harvest, the appellant would be ready to pay the agreed purchase money to the 1st respondent and therefore, could conclude the sale agreement the following year. It was the further argument of the appellant that the 1st respondent told him that he had no means to cultivate the suit land and proposed to hand it over to the appellant lest it be gutted by fire and asked the appellant to go to him the following day so that the 1st respondent showed him the boundaries in the presence of the 1st respondent's neighbours. The parties met as agreed and in the presence of Madonji, Baba Foto and Barnabas, the 1st respondent told them that the farm was no longer in his (1st respondent's) possession and that he was handing it over to the appellant. The appellant then took a loan of Tshs. 6,000,000/= from Mohamed Chilapete pledging his house Plot No. 936 Block A situated at Ligula B, Coco- Beach area in Mtwara. The appellant produced a Certificate/loan agreement dated 18th April, 2016 (exhibit P. 1). The appellant then took Tshs. 7,240,000/= to the 1st respondent to finalize the payment but the latter refused to accept the money and argued that he had already sold the suit land to Shaha Said Namwembe, the 2nd respondent. The appellant took the matter to Kitangali

Primary Court, then to the police and ultimately to the Ward Executive Officer. The matter then landed in the District Land Tribunal.

It was not disputed that earlier on, the appellant had paid Tshs. 3,000,000/= to the 1st respondent by installment. There was also an issue of the appellant having harvested some cashewnuts from the suit

Omary Hemed Likungwa (PW 2), the appellant's father supported the appellant's evidence. He recalled that on 19th April, 2016 when the appellant went to the 1st respondent to pay the remainder, the latter not only refused to receive the money but also returned back the sum of Tshs. 3, 000,000/= the appellant had already paid as part payment.

The 1st respondent's defence was to the following effect. The appellant, through one Polisi offered to buy his suit farm at Tshs. 10, 000, 000/=. The 1st respondent required him to pay cash but the appellant said that he had no such money. He then offered Tshs. 3, 000,000/ paid by installment as an advance payment. The 1st respondent did not accept that amount and wanted the appellant to advance payment of at least Tshs. 8, 000,000/= so that the remaining amount of Tshs. 2,000,000/= would be paid later. The 1st respondent then received the money and put it aside

with the understanding that the contract of sale would be reduced in writing and concluded the moment the appellant paid the whole amount. The appellant defaulted paying the money as agreed. The 1st respondent's efforts to follow up the appellant so that he paid the remainder proved futile. From July to December, the appellant did not show up. This 1st respondent's version got full support from the evidence of Rehema Clemency (DW 2) and Juma Said Mohamed Mtondo (DW 3).

In January the following year, the 1st respondent advertised the sale of the suit farm to anyone else. It is in evidence that on 5th February, 2016 the 2nd respondent saw the advertisement and made a follow up to the owner. In April, 2016 the 2nd respondent offered to buy the suit land. The 1st and 2nd respondents then executed a sale agreement on 15th April, 2016 as evidenced by exhibit D 1. The suit land was sold at Tshs. 10,000, 000/=. This evidence was fully supported by the 2nd respondent who testified at the trial Tribunal as DW 4. Ahmad Sylvester Nyalu, the Luagala Village Executive Officer witnessed the sale between the two respondents. The same applied to Shafihi Bakari Abdallah (DW 6) and Shazili Hamis Mohamedi (DW 7).

At the commencement of hearing of the suit, the trial Tribunal framed three issues. First, whether the appellant bought the suit land from the 1st respondent or not. Second, if the first issue is resolved in favour of the applicant, then whether the sale of the suit land by the 1st respondent to the 2nd respondent was illegal and third, to what reliefs are the parties entitled.

Both parties agree that there was an agreement between the appellant and 1st respondent to sell the suit land at a price of Tshs. 10,240,000/=. The appellant managed to pay Tshs. 3,000,000/= only. The remaining Tshs. 7,240,000,000/= was to be paid later. The point of departure is whether there was fixed time for the appellant to pay the remainder. While the appellant argued that there was no such time fixed by the parties, the 1st respondent argued that the final payments were to be effected in September, 2015.

In answering the 1st issue, the Honourable Chairman found that since the contracting parties lacked meeting of their minds, there was no valid contract and further that, if any breach, it was the appellant who breached the contract by failing to pay the balance of Tshs.7,240,000/=.

On the 2nd issue, the Chairman was of the view that the appellant having failed to honour part of his obligation, the 1st respondent was justified in exercising the option of rescinding the agreement and sell the suit farm to the 2nd respondent.

The hearing of this appeal was conducted by way of written submissions which were presented in court in accordance with the set time frame.

Supporting the appeal, the appellant argued both grounds together. In his submission in chief presented to this court on 4th May, 2020, the appellant substantially contended that parties entered into an oral agreement of selling the suit shamba at the consideration of Tshs.10,240,000 and it was not disputed that the 1st respondent was already paid 3m/-. That the dispute was on whether there was a fixed time limit to effect the final payment. The appellant argued that the 1st respondent's argument that the time limit was fixed to be in September, 2015 was not supported. The appellant relied on section 110 of the Evidence Act [Cap.6 R.E.2002]. He insisted that the 1st respondent's receipt of 1m/- barred him from claiming for the performance of the terms of the

first contract which he waived. The appellant cited sections 46 and 63 of the Law of Contract Act [Cap.345 R.E.2002]. The appellant submitted further that there was no notification to him on the rescission of the contract by the 1st respondent

On their part, the respondents jointly submitted that there was no evidence of sale agreement between the 1st respondent and the appellant. they essentially concurred with the decision of the District Land and Housing Tribunal and contended that after the appellant failed to honour part of his contractual obligation, the 1st respondent had two options: one, to enforce the contract by way of suing for the recovery of the outstanding balance. Two, abandoning it altogether. The respondents argued that the 1st respondent opted the second. To buttress their argument, the respondents relied on the case of **Said Bakari Gubikira v. Mariamu Said**, (PC) Civil Appeal No. 22 of 1997.

Having summarized the evidence and the submissions of the parties, I am now in a position to answer the raised two grounds of appeal.

The first ground of appeal is on whether the trial District Land and Housing Tribunal failed to analyze properly the evidence and arrived at a

wrong decision, the record from page 5 of the typed judgment of the trial Tribunal, the Chairman considered the evidence of PW 1, PW 2, DW 1, DW 3 and DW 3 which was to the effect that the appellant and the 1st respondent had agreed to the sale of the suit land at a purchase price of Tshs. 10,240, 000/= in the year 2015. The evidence on record revealed that the appellant managed to pay only Tshs. 3, 000, 0000/= which was paid in two installments. The evidence also showed that the contracting parties, that is the appellant and 1st respondent had agreed that the sale transaction would be concluded upon the appellant paying the remaining sum of Tshs. 7, 240,000/=. The point of departure between these contracting parties was whether there was a time limit to pay the remainder fixed by these parties. While the appellant argued that there was no time limit fixed the 1st respondent argued that the agreed and fixed time was in September, 2015. Owing to this difference, the Chairman came to the finding that there was no meeting of mind to this essential term of contract. He relied on the provisions of sections 13, 46,47 and 50 of the Law of Contract Act and held that since the 1st respondent had an option of either enforcing the contract by way of suing for recovery of the

outstanding balance or abandoning it altogether, and opted the latter, the 1st respondent's sale of the suit premises was legal.

With respect, I agree. The time of paying the remainder was essential term of contract because it determined the existence of a valid contract. Since the appellant and 1st respondent's minds did not meet, there was no valid and enforceable contract between them.

Besides, it is trite that for the plaintiff to succeed in a claim for breach of contract, he must establish three elements.

First, he must prove that there existed a valid and binding contract. This aspect entails the presence of offer, acceptance, consideration and consensus ad idem. The appellant miserably failed to prove their minds met and mutually agreed on when the remainder was to be paid. The term of consent is defined under the law. It is provided under section 13 of the Law of Contract Act [Cap. 345 R.E.2002] that:-:

"13.-.

Two or more persons are said to consent when they agree upon the same thing in the same sense".

Second, the plaintiff must prove that he performed his obligations or had legitimate reason for not performing. The evidence on record shows that the appellant failed to pay the remainder within reasonable time. The 1st respondent was clear in his evidence that he took efforts to trace the appellant but in vain. As rightly observed by the Chairman, it is the appellant who was in breach of the contract as he failed to perform his obligation nor did he prove that he had legitimate reason for not performing his obligation.'

Third, the plaintiff must prove that the other party failed to perform their part of the contract. Here, the 1st respondent was waiting for the appellant to pay the sum of Tshs. 7,240,000/= so that they concluded the contract. That amount was not paid within a reasonable period of time. In view of the decision of this court in the cited case of **Said Bakari Gubikira v. Mariamu Said** (supra), the 1st respondent had two options to exercise. One, to enforce the contract by way of suing for the recovery of the outstanding balance of Tshs. 7,240,000/= or, two, abandoning it altogether. The 1st respondent opted for the latter. He cannot be blamed for exercising his legal right. As correctly found by the Chairman, the 1st

respondent was justified in selling his suit land to the 2nd respondent after the appellant failed to perform his contractual obligation.

I therefore find that the District Land and Housing correctly and properly analysed the evidence put before him and came to the correct conclusion which was justifiable in law and circumstances of the case.

In the view of the foregoing, I find the second ground of appeal lacking merit as the factual finding made by the trial Tribunal resulted from assessment of the credibility of the witnessed who appeared and testified before the Tribunal. The Tribunal had a good opportunity of seeing the witnesses testifying and observing their demeanours. It was placed in a better position to assess their credibility, the opportunity this court lacks.

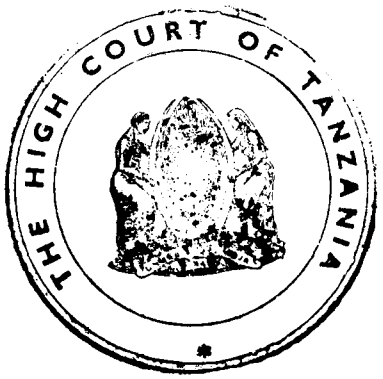
In the final analysis and for the reasons given, I am satisfied that this appeal is devoid of merit. I hereby dismiss it with costs to the 1st and 2nd respondents.

W.P.Dyansobera

JUDGE

16.6.2020

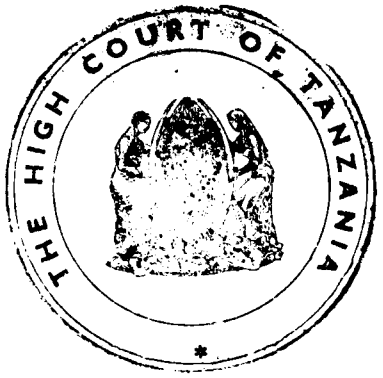
This judgment is delivered under my hand and the seal of this Court on this 16th day of June, 2020 in the presence of the appellant and the 2nd respondent and Mr. Zuberi Juma, the 1st respondent's representative.



W.P. Dyansobera

JUDGE

Dated and delivered at Mtwara this 16th day of June, 2020 in the presence of the appellant and the respondent.



W. P. Dyansobera

JUDGE