

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(ARUSHA DISTRICT REGISTRY)**

**AT ARUSHA**

**LAND CASE NO. 50 OF 2016**

**SIFAEEL CLEOPA LOBULU .....PLAINTIFF**

**VERSUS**

**EMANUEL AYUBU ZELOTHE .....DEFENDANT**

**EX-PARTE JUDGMENT**

**Last Order.....5/2/2020**

**Judgment delivered..26/3/2020**

**GWAE, J**

The Plaintiff, Sifael Cleopa Lobulu filed this civil suit subject of this judgment, against the defendant, Emanuel Ayubu Zelothe. According to the plaintiff's plaint and slightly the defendant's written statement of defence the gist of this suit being that, the defendant and plaintiff entered into a sale agreement on 5<sup>th</sup> May 2012. The plaintiff agreed to purchase a piece of land measuring 60 x 29 paces with Certificate of Title No. 23265 located Siwandeti–Mengori Ward area within Arumeru District in Arusha Region and the defendant accepted Tshs. **16,000,000/=** as a consideration for the sale of the suit land.

However on the 6<sup>th</sup> May 2016, the plaintiff discovered that the parcel of land that he bought from the defendant was subject of a public auction following the alleged defendant's default to repay a loan lent to him by a financial institution, Mfuko wa Pembejeo. The plaintiff's awareness that the suit land was mortgaged to the said Mfuko wa Pembejeo was through an advertisement in the Habari Leo Newspapers dated 22<sup>nd</sup> July 2015 (PE2) which was after a former advertisement.

Having discovered that the suit land was to be auctioned by Ubapa Tribunal Broker on behalf of Mfuko wa Pembejeo in order the said Fund to recover the debts from the defendant, the plaintiff was disappointed as he was not made aware of the encumbrances, he therefore felt to have been deceived by the defendant in the sale agreement. Consequently, he filed a caveat in the office of the Assistant Registrar of Titles-Northern Zone at Moshi followed by his institution of this case in which the plaintiff through his plaint is now praying for judgment and decree against the defendant as follows:

- i. Declaration that, the plaintiff be restored into the original position upon being paid damages for breach of contract
- ii. An order that, the sale transactions is a nullity for was done while the defendant had no better title because the suit land had encumbrances during the time of the sale
- iii. An order against the defendant to pay the plaintiff the sum of Tshs. **56,000,000/**=(Fifty six million) being specific damages

- iv. In alternative to the relief (i), (ii) and (iii) above the plaintiff be declared a lawful owner of the suit land and authorized District Land Officer together with the Registrar of Titles be ordered to re-survey, demarcate and effect sub-division of CT. No.23265 Land–Registry Moshi and register the plaintiff owner of the suit land measuring 60x29 paces
- v. Costs of the suit to follow the event

The defendant in his written statement of defence admittedly stated that the contract of sale of the suit land was made while the plaintiff was aware of the encumbrances on the subject matter nevertheless he also stated that the plaintiff had a duty of exercising due diligence before he entered into the sale agreement. The defendant further refuted that, the plaintiff's allegation that the suit land is liable for attachment and sale since he has been repaying the loan since 2012 to date.

Issues framed for determination immediately before the trial of the plaintiff's case commenced, these were;

1. Whether the defendant disclosed to the plaintiff that, the Suitland was used to secure a loan.
2. Whether the sale of the suit land by the defendant to the defendant was done under deceit.
3. Who is the lawful owner of the Suitland
4. To what reliefs are the parties entitled to.

During commencement of the hearing before the trial predecessor **(Hon. Maige, J)** on the 12<sup>th</sup> December 2018, the plaintiff and defendant and their respective advocates that is **Mr. Lengai Morinyo** and **Daud**

**Seimalie** respectively entered the necessary appearance and one plaintiff (PW1) was able to testify. Immediately after close of the plaintiff's case the defendant and his advocate sought indulgence of the court to allow the parties settle out of the court (**Gwae, J**), that was on 26/08/2019, leave was granted, parties and their advocate were to jointly prepare a deed of settlement regarding the plaintiff's 2<sup>nd</sup> prayer. However for the reason best known by the defendant and his advocate, no appearance was entered for three court's sessions consecutively that is on 5/12/2019, 28/01/2020 and 5/02/2020.

The plaintiff (**PW1**), through the lead of his advocate reiterated what is contained in his plaint adding that he had started developing the suit land since 15/2/2015 and managed to produce a sale agreement (PE1) and that the defendant did not give him a certificate of title (CT) at the time of sale he came to learn that the CT was mortgaged to the Mfuko wa Pembejeo and therefore it was with the Fund as a lender. The plaintiff's testimony as to the sale was supported by two witnesses (PW2 & PW3) who testified to the effect that the purchase price paid to the defendant was Tshs. 16 million and not ten million.

Similarly, in support of his case, the plaintiff also tendered a Habari Leo Newspapers dated 22.7.2015 which was admitted and marked "**PE2**" and that of 6/5/2016 (**PE3**). The plaintiff also testified that the auction was to be carried on May 2016 but he filed a successfully caveat (**PE4**) dated 4.8.2016.

The plaintiff went on testifying that he has been denied use of the suit land and that he had incurred costs in planting the crops amounting to

Tzs 56,000,000/= . He added that he would earn Tshs. 5,000,000 per year (Tshs. 20,000,000/=from 2012 to 2016), he consequently sought for an order for a sub-title and compensation or if no land he be paid damages

This is what in a nut shell transpired during hearing of the plaintiff's suit, now, it is for determination of the framed issues herein above;

In the **first issue** on whether the defendant disclosed to the plaintiff that, the Suitland was used to secure a loan. In order to safely respond to this issue, it is necessary to carefully look at the sale agreement (PE1) and the plaintiff's evidence. The sale agreement clearly provides that the sale of the suit land was free from encumbrances whatsoever and in the even there be would any dispute over the same parcel of land by his family member any person he would return the principal sum (purchase price plus payment of interest and payment of damages at 100 %, for sake of clarity a clause (a) where terms and conditions of the parties' agreement are provided is reproduced;

"Muuzaji anamhakikishia mnunujaji kwamba eneo la shamba la lenye kuhusika halihusiani na mtu mwingine zaidi yake wala watoto wake wala halina mgogoro wa aina yoyote pamoja na kuahidi endapo itatokea mgogoro katikq siku za baadae itakuwa tayari kushulikia kwa gharama zake mwenyewe hadi kufikia mwisho wake na ikishindikana atakuwa tayari kurudisha fedha zote taslimu kwa mnunuzi pamoja na kufidia gharama na hasara kwa asilimia mia moja ".

Looking at the wording of clause (a) of the contract above, it is plainly clear, to my considered view that, the defendant did not disclose to

the plaintiff if he mortgaged the suit land by depositing the certificate of Title with the said fund in order to secure a loan from Pembejeo Fund (Mfuko Pembejeo). The 1<sup>st</sup> issue is therefore answered in affirmative.

The **2<sup>nd</sup> issue**, whether the sale by the defendant to the plaintiff was done under deceit, as determined in the first issue, the defendant is found to have failed to disclose all material facts in respect of the suit land and since the plaintiff was made to believe that the land in dispute was free from encumbrances, it follows therefore the plaintiff was deceived by the defendant. The defendant's defence in WSD as appearing in paragraph 2 and 3 that the plaintiff was furnished with all necessary information over the suit land is found to be unfounded since the sale agreement which was admitted without any objection, glaringly indicates, that the suit land was free from any encumbrances.

More so the defendant's assertion in his WSD that, the plaintiff was aware of the loan secured by the suit property since he was told that part of the purchase price was to be used in the repayment of the loan is contradictory to his assertion which is to the effect that the plaintiff ought to be more diligent. The plaintiff's oral evidence and documentary evidence (PW1 & PE1, PE2, and PE3) has therefore satisfactorily established that the defendant certainly deceived the plaintiff or fraudulently sold the suit land.

In **Coker v. Ajewole** [1976] 1 ALR Comm. 230 at 235, Idebje JSC stated:

"It is settled law that a person seeking to enforce a contract must show that all the conditions precedent have been fulfilled and that he has either performed or is ready and willing to perform all the terms which ought to have been performed by him"

In our present case, it is clear from the PE1 that the plaintiff vividly paid the purchase price in consideration of being given the suit land free from any encumbrances whereas according to the plaintiff's testimony the defendant had not availed the plaintiff with a certificate of title (CT) as the same was and is still withheld by the Fund indicating that there was a deceit on the part of the defendant as to the sale agreement entered by the parties.

According to section 110 of Tanzania Evidence Act, Cap 6 R. E, 2002 provides for an obligation on a party who alleges existence of certain facts to prove, for the sake of clarity the same is hereby quoted:

"110 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

Presently, the plaintiff, to my considered view, has proved that the defendant used a deceit to obtain Tshs. 10, 000,000/=from the plaintiff pretending that the land in question was free from any encumbrances and more so he did not disclose at the time of sale if the suit land has been registered and that, the issuance of the certificate of title regarding the suit land seemingly to come to be into the knowledge of the plaintiff after advertisement of the intended public auction by the tribunal broker.

As to the **third issue**, without undo, it is sufficiently established by the plaintiff as well as by the defendant through his written statement of defence that the land in question originally belonged to the defendant and he used the same to secure a loan that is why its CT is still withheld by the Mfuko wa Pembejeo. To my view, the transfer from the defendant to the

plaintiff could not be made while the land in question was mortgaged to the Fund prior to the sale agreement dated 5<sup>th</sup> May 2012. Worse still the plaintiff has not joined the said Mfuko wa Pembejeo, hence this court cannot be in a good position to know if the defendant has already discharged his loan obligations or not. To make an order adverse to the third party is against the principles of natural justice.

Last but not the least issue on reliefs the parties are entitled, since the plaintiff the plaintiff has produced the sale agreement which expressly indicates that the sale price of the suit land was ten million shillings only (says Tshs.10,000,000/= "Shilingi milioni kumi tu ambazo ni uuzaji. Amelipwa zote taslim na anathibitisha kuzipokea kwa kuweka saini yake katika mkataba huu") and not Tshs. 16,000, 000/= as wrongly attempted to be established by the plaintiff. If the plaintiff paid Tshs. 6,000,000/= more than actual price as per his assertion that payment, that in law does not carry weight as the same remains mere assertion, equally the six million appearing on the bottom of the PE1.

That being the court's finding, the plaintiff is entitled to refund of the principle sum that is Tshs.10,000, 000/= following the defendant's breach and non-performance of the sale agreement, the plaintiff is inevitably entitled to a fair compensatory amount of damages;

However I am not legally persuaded if the plaintiff's claim of Tshs. 56, 000,000/=being specific damages is proved to the required standard. I am saying so simply because the plaintiff was required to specifically prove such claim and not mere assertions. This position has been consistently stressed by our courts for instance in **Registrar of Buildings v. Bwogi**



(1986–1989) 1 EA 487, Court of Appeal Tanzania sitting at its main Registry- Dar es salaam held among other things that:-

“It is trite law that special damages cannot be recovered unless specifically pleaded and specifically proved. It is thus not fair for the trial court to award compensation for loss not specifically alleged in the pleadings”.

See also **Zuberi Ugustino v. Anicet Mugabe** (1992) TLR 3, **Maritim and another v Anjere** (1990–1994) 1 EA 312 (CAT) and **Bolag Hutchison** (1950) A. C at 515

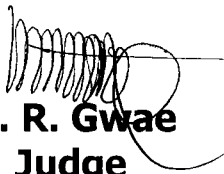
In our instant suit, the plaintiff has scantily stated that he planted trees and crops worth Tshs.**16, 000, 000/=** and that he would be earning Tshs. **5, 000, 000/=**per annum. The pieces of evidence is not sufficient to justify to award the plaintiff’s claim on specific damages

In the final results, the plaintiff is awarded the following reliefs;

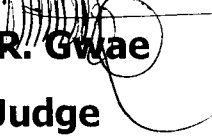
- i. That, the sale agreement dated 5<sup>th</sup> May 2012 is declared a nullity as the same was entered while the defendant had no better title because the suit land had encumbrances during the time of the sale
- ii. That, the plaintiff shall be paid the purchase price in the tune of Tshs. 10,000,000/=by the defendant

- iii. That, the defendant shall also pay the plaintiff the sum of Tshs. 16,000,000/=being a compensation for breach of contact
- iv. Costs of the suit

Order ordered.

  
**M. R. Gwae**  
**Judge**  
**26/03/2020**

Right of Appeal or any right for an aggrieved party is open and explained

  
**M. R. Gwae**  
**Judge**  
**26/03/2020**

