

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA

CIVIL CASE NO. 3 OF 2017

J.S. KHAMBAITA LTD PLAINTIFF

VERSUS

SNOWCREST HOTEL AND WILDLIFE SAFARIS LTD DEFENDANT

JUDGMENT

ROBERT, J:-

The Plaintiff, J.S. Khambaita LTD filed a suit in this court against the Defendant Snow crest Hotel and Wildlife Safaris Ltd claiming for the sum of TZS 1,460,757,531.00/= being the outstanding payment for construction of Snow Crest Hotel on Plot No. 39 and 58 Block BB Kwangulelo – Arusha, together with interest thereof.

Briefly, facts relevant to the filing of this suit reveals that the Plaintiff and defendant entered into a contract on 26th February, 2006 in which the plaintiff undertook to construct a hotel hereinafter known as Snow crest on Plot No. 39 and 58 Block BB Kwangukelo – Arusha for consideration of TZS 2,752,017,257/=.

The plaintiff discharged her contractual obligations and accomplished the construction on 31st August, 2008 as agreed but the Defendant failed to pay the plaintiff contrary to the agreement. In an attempt to settle the claims parties entered into agreement on 30th December, 2014 and agreed, among others, to bargain the payments and reached to a conclusion that the hotel owner shall pay the builders the sum of USD 200,000 which shall be paid into two equal installments. Despite this agreement and letters of reminder from the Plaintiff and her Debt Collector Agent, ACR the Defendant failed to pay the plaintiff.

The Defendant's previous owners sued the current owners in the High Court of Tanzania, Commercial Division at Arusha in Commercial Case No. 3/2016 in which the current owners of the hotel were ordered, among others, to take all liabilities of Snow crest hotel and Wildlife Safaris Limited to M/S J.S Khambaita in construction of Snow crest hotel, thus the new owners were ordered pay to the said M/S Khambaita Limited a total of USD 200,000 being the outstanding balance.

As a result, the plaintiff claimed from the Defendant for a sum of TZS 1,418,211,196.07/= which the plaintiff said was approximated to USD 200,000 together with the interest thereon at the rate of 2% per month from

the respective due dates of invoices until payment in full but the Defendant failed to pay.

As a result, the Plaintiff resolved to file this case claiming for Judgment and Decree against the Defendant for:

- (a) The Principal sum of TZS 1,460,757,531.00/=
- (b) An interest on delayed payments at 12% until payment in full as per the agreement
- (c) Costs of and incidental to the suit
- (d) Any other relief that the Honourable court may deem appropriate.

On her part, the Defendant in her Written Statement of Defence disputed everything except the jurisdiction of the court.

When the case came up for hearing and throughout the hearing of this case the Plaintiff was represented by Mr. Josephat Msuya, learned counsel, assisted by Mr. Frank Makishe, learned counsel whereas the Defendant was represented by Mr. Ephrahim Koisenge, learned counsel, assisted by Mr. Nicholas Senteu, learned counsel.

The court framed five issues for determination of this case. **One**, whether there was a contract between the plaintiff and the Defendant dated 26th

February, 2006. **Two**, whether there was a claim resulting from a breach of that contract. **Three**, whether there is an agreement between the Plaintiff and the Defendant entered on 30th December, 2014 to modify that of 26th February, 2006. **Four**, whether the defendant breached that contract dated 30th December, 2014. **Five**, what reliefs are the parties entitled to.

On the first issue, whether there was a contract between the plaintiff and the Defendant dated 26th February, 2006, the Plaintiff called one witness to prove their case. PW1, Msafiri Juma Mfinanga Plaintiff's Human Resource Officer stated that on 26th March, 2006 the Plaintiff and Defendant signed an agreement in which they agreed, among others, that the Plaintiff would construct a building to be known as Snow crest Hotel on plot No. 39B and 58B Kwangulelo, Arusha for a total consideration of TZS 2,752,017,257.00/=. To prove the existence of that agreement he tendered a document titled "Agreement and Schedule of Conditions of Building Contract between snow crest hotel and wildlife Safaris Ltd and J.S. Khambaita LTD" which was admitted in court as exhibit P1. He stated further that the agreement imposed an interest of 12% payable by the Defendant in case of delays in payment. Payment for construction was to be made by installments based on the certificates of payment issued by the Plaintiff. The

Plaintiff completed the construction of the hotel according to the terms of the agreement but the Defendant failed to pay the outstanding amount of TZS 1,250,782,239.

On the other hand, the Defendant presented two witnesses, that is, William Lucas Mollel (DW1) and Farida William Mollel (DW2). DW1, the Managing Director of Snow Crest Hotel denied to have knowledge of an agreement between the plaintiff and the Defendant dated 26th February, 2006. He gave a long narration on how he obtained ownership of Snow crest hotel. He informed the court that, he purchased Snow crest hotel from the previous owners Wilfred Lucas Tarimo and his family in 2013. At the time of purchasing the hotel the hotel was already sold to other buyers, Grand Alliance Limited, who were evicted by the Court order without being refunded. After the purchase, he was also evicted from the hotel in 2013 without being refunded on the explanation that the hotel was not for sale. The Hotel was sold again to a company called Hotels and Lodges who were also evicted in April, 2014. He testified that, later he came to know that Mr. Wilfred Lucas Tarimo and his family were using the company to defraud people. He stated further that, when the bank which financed construction of the said hotel heard about the problems at the hotel they removed all

people and placed the hotel under receivership until August, 2014 when the receivership was removed by an order of the court.

Later the Defendant took over the hotel after buying off the shares of former Directors Wilfred Lucas Tarimo and his family. When he took over the management of the hotel, he signed a memorandum of understanding with the previous management of the hotel which, among others, indicated the creditors and suppliers who were required to be paid by the hotel and the Plaintiff was not in the list.

At the beginning of 2015 the Plaintiff started to demand the outstanding money for construction of the hotel. When the Defendant linked up with the previous management in order to find a solution to the problem they informed her that they did not owe the plaintiff any money. Eventually, to find a solution to the problem, PW1 called a tripartite meeting between him, Mr. Tarimo, who was the previous owner and the Plaintiff. He asked Mr. Tarimo and the Plaintiff to settle their dispute. Later, PW1 decided that he would give the Plaintiff USD 200,000 which earlier on he had promised to give to Mr. Tarimo as a handshake in order to resolve the matter. However, due to other matters he asked for more time to pay the said USD 200,000

because there were two other cases filed by the Plaintiff and Mr. Tarimo in the court at that time.

Further to that, PW2, Faidha William Mollel, one of the three directors of snow crest hotel, stated that they came to know the plaintiff after buying the hotel. The plaintiff informed them that the hotel owed them some money at a tune of USD 200,000. They accepted to pay the money because they had already accepted to pay other debts connected to the hotel. However, before they could pay the plaintiff, another creditor, the National Social Security Fund (NSSF) claimed for the payment of 480,000,000/= instead of TZS 48,000,000/= which was indicated earlier to be money owed to this creditor. Whilst dealing with this issue, the hotel was partly demolished to pave way for construction of public road which caused further delay in the payment of USD 200,000 to the Plaintiff. She denied any other claims by the plaintiff saying the Plaintiff was never part of the sale agreement of the hotel.

This court has given deserving consideration to the testimony of both parties and the exhibit tendered in court to prove the existence of an agreement between the Plaintiff and the Defendant on 26th February, 2006. The court has observed that Exhibit P1 tendered by PW1 as proof of a contract entered on 26th February, 2006 between the Plaintiff and the Defendant does not

indicate the date of signing of this agreement making it difficult for the court to ascertain the actual date when the alleged agreement was signed. This court finds it unsafe to rely on exhibit P1 as proof of a contract entered on 26th February, 2006 between the Plaintiff and Defendant. This is particularly important considering too much time elapsed between the alleged contract and the making of these claims and the alleged changes of ownership of the said hotel. That said, this court finds no evidence to establish existence of a contract between the plaintiff and the defendant signed on 26th February, 2006.

Coming to the second issue, whether there was a claim resulting from a breach of that contract. In the absence of evidence to establish the existence of a contract entered between the plaintiff and the Defendant on 26th February, 2006 there would be no breach of contract and certainly no claim arising therefrom.

This court is also invited to make a determination on the third issue, whether there is an agreement between the plaintiff and the defendant entered on 30/12/2014 to modify that of 26/2/2006. PW1 testified that by 31/8/2008 when the Plaintiff completed construction of the hotel the Defendant had not paid the last instalment for the construction at a tune of TZS

1,250,782,239/=. Parties signed another contract to rectify the previous contract on 30/12/2014 whereby the Defendant agreed to pay the Plaintiff USD 200,000 in two instalments, the first one on 28/1/2015 and the second one on 31/12/2015. The agreement for outstanding payment of construction between the Plaintiff and the Defendant was admitted in court as exhibit P5.

On the defence side, DW1 during cross examination stated that there was no any prior agreement between the plaintiff and defendant which wanted them to pay the claimed amount from the beginning. He stated further that he did not agree that the terms of exhibit P5 binds the Defendant. Both DW1 and DW2 admitted that they owe the Plaintiff USD 200,000 which according to PW1, he had promised to give the plaintiff. The said amount does not arise from the breach of contract. PW1 stated that there was no agreement to the effect that if USD 200,000 was not paid parties would revert back to the claim of TZS 1,250,782,239/=.

It appears to this court that the Defendant does not oppose the existence of the contract between the Plaintiff and the Defendant entered on 30/12/2014 (exhibit P5). However, the defendant objects that the said contract does not modify the contract alleged to take place on 26/2/2006 (exhibit P1). Having looked at the contents of exhibit P5, this court is in agreement with the

argument made by the Defendant. Exhibit P5 does not make reference or modify any prior agreement made between the Plaintiff and the defendant.


Coming to the next question whether the Defendant breached the contract dated 30/12/2014. Exhibit P5 imposed an obligation on the part of the Defendant to pay a sum of USD 200,000 payable in two equal installments. The first installment was supposed to be paid on or before 28th January, 2015 whereas the second installment was supposed to be paid on or before 31st December, 2015. The Defendant was required to perform her respective promise under the contract as required under section 37(1) of the Law of Contract Act, Cap. 345. Since DW1 and DW2 have admitted that the Defendant did not pay the claimed amount and given that there is no evidence of payment of the said amount, the defendant is obviously in breach of the contract.

This takes us to the next question, what reliefs are the parties entitled to. This court having decided that the Defendant breached the contract dated 30th December, 2014 (exhibit P5), the Plaintiff, as a party who suffered as a result of the said breach is entitled to compensation for any loss or damage caused thereby as provided for under section 73(1) of the Law of Contract Act, Cap. 345. Exhibit P5 provided that payment of USD 200,000 by the

Defendant to the Plaintiff marks the final and conclusive demand of TZS 1,250,782,239/= demanded by the Plaintiff as outstanding building costs. In the circumstances, taking into account the terms of exhibit P5 and reliefs sought by the Plaintiff, this court awards the Plaintiff a sum of United States Dollars (USD) 200,000 as compensation for breach of contract entered between the Plaintiff and Defendant on 30th December, 2014. Plaintiff shall have their costs.

It is so ordered.




K.N. ROBERT
JUDGE
24/11/2020