IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

CIVIL CASE NO. 21 OF 2018

ROBANDA VILLAGE COUNCIL ..... PLAINTIFF

VERSUS

NGOME SAFARI CAMP LIMITED ..... DEFENDANT

JUDGEMENT

Date of last Order: 19.11. 2020

Date of Judgment: 26.11.2020

A.Z.MGEYEKWA, J

The plaintiffs in this application, ROBANDA VILLAGE COUNCIL being the Local Government established under the Local Government (District Authorities) Act, Cap. 287, filed this case against the defendant, NGOME SAFARI CAMP LIMITED, a legal entity carrying tourism activities throughout Tanzania Mainland.

The plaintiff prays for Judgment and Decree against the defendants as follows:-

1. *US $ 15,000 as unpaid rent arrears due to the defendant facility at Buraranyota hamlet at Robanda Village effectively from 1st Day of 2013 up to the 31st day of December 2017.*
2. *Tshs. 10,000,000/= as catering contribution fee due from 01.01.2012 to 31.12.2017.*
3. *US $10,000 as contribution fee for Robanda Village.*
4. *US $130,000 as tourism payment fee for the 5 years from 01.01.2012 to 31.12.2017.*
5. *Tshs. 100,000,000/= as general damages.*
6. *Costs of this suit*
7. *Any other relief that this court may deem fit and just to grant in the circumstances.*

The suit was argued before me on 19th November, 2020. It was argued *exparte*, the defendant having been failed to enter appearance despite being properly served. The defendant, by way of publication in Kiswahili tabloids – Mwananchi of, respectively, 10th August, 2019, 24th January, 2020, 13th February, 2020 was served. I am alive to the fact that the defendant was notified through the said publication to appear on 13th March, 2020 when this

case was fixed for hearing and the defendant was so informed through the said publication. However, the defendant did not appear on the slated date and the case was fixed for orders on five times during which, again, the defendants did not appear. Having regard to the entire circumstances of this case, I am of the considered view that the defendant was duly being served therefore I grant the plaintiff prayer to proceed *exparte* against the defendant.

Upon completion of all the pleadings, the following issues were framed and the same was adopted by this Court as follows:-

1. *Whether there was a lease agreement between the plaintiff and the defendant*
2. *Whether the defendant breached the agreement.*
3. *What relief if any are parties entitled.*

To prove the above issues, the plaintiff's side summoned two witnesses, Mrobanda Japan Mkome who testified as **PW1**, and Jumanne Mahiti Giriba PW2 who testified as **PW2**. The plaintiff's side tendered a total of *one (1) documentary Exhibit to wit*; **Exhibit P1** a contract dated 01st January, 2013.

In the course of determining this case, I will be guided by the canon of civil justice which suggests that; *'He who alleges must prove the allegation"*

as it was held in the case of **Jeremiah Shemweta v Republic** (1985) TLR 228.

In his effort to prove this case, Mrobanda Japan Mkome testified that he resides in Robanda Village, Serengeti District in Mara Region. PW1 went on to testify that he is farmer and pastoralist and apart from that he was the Chariman of Robanda Village for 11 years. PW1 testified that he knows the defendant, Ngome Safari Camp Ltd, invested in tourism and constructed a tourist Camp at Robanda Village. He testied that the parties entered into a contract on 01st January, 2013 and the contract was ending on 31st December, 2017. To substantiate his testimony PW1 tendered a contract between the plaintiff and the defendant, the same was admitted and marked as Exhibit P1.

PW1 further testified that the parties agreed the defendant to pay land rent in a tune of USD 3,000 per year which makes USD 1 5,000 for 5 years. He went on to testify that the defendant did not pay the land rent. He further testified that the defendant was required to donate USD 2,000/= every year for water project which makes a total of USD 10,000 for 5 years which he did not pay. PW1 continued to testify that the defendant was also required to

pay for each guest who arrived at the said camp. PW1 testified that the defendant did not furnish the contract thus, he breached the contract.

In conclusion, PW1 urged this court to order the defendant to pay the monies owed as prayed, declare that the area belongs to the plaintiff and declare that the contract is terminated. He did not stop there, he urged this court to order the defendant to pay the costs of the case and disturbances costs as the court may think fit to grant.

PW2, one Jumanne Mahiti Kiriba, the current Chairmn Robanda Village. He testified that he resides in Robanda Village, Serengeti District in Mara Region and he is the Chairman of Robanda Village since 06th April, 2020. PW2 testified that the defendant is an investor who invested in their Village. He testified that the defendant had a temporary tourism campsite at their Village. He went on to testify that according to the contract, the defendant was supposed to pay land rent in a total sum of USD 15,000 and USD 10,000 for water project. He testified that the defendant did not made any payment as stated in the terms of the contract. He went on to testify that the defendant has breached the contract.

Finally, PW2 urged this court to terminate the contract between the parties and ordered the defendant to pay his dues as agreed on the contract

from 01st January, 2013 to 31st December, 2017 when the contract ended. The learned counsel for the plaintiff marked their case closed.

The foregoing said, let me now confront the issue framed by the court in the determination of the present dispute between the parties.

In determining the first issues, whether there was a lease agreement between the plaintiff and the defendant. The bone of contention here is the question that whether the contract between the parties existed. It is on the record that the plaintiff entered into a contract with the defendant and PW1 tendered the contract in court which was admitted as Exhibit P1. In determining this issue, I had first to ascertain whether the agreement between the plaintiffs and the defendant was valid. Under our law, all agreements are contracts if they are made by the free consent of the parties who are competent to contract, for a lawful consideration and with a lawful object and are not on the verge of being declared void. That is the essence of section 10 of the Law of Contract Act, Cap.345 [R.E 2019].

Moreover, the contract is legally enforceable if both parties were willing to agree and if they were not forced in any way as stated under section 13 of the Law of Contract Act Cap.345 [R.E 2019]. Also, a contract is valid if none of the parties was induced to enter into the contractual agreement, and

if both parties were of sound mind thus automatically the contract abide both parties.

I have scrutinized the contract *"Mkataba wa Upangaji wa Ardhi"* and found that there is no dispute that the lease agreement which was duly executed started to operate from 01st January, 2013 for a period of 5 years untill 31st December, 2017. It was between Robanda Village Council, the plaintiff, and Ngome Safari Camp, the defendant. From the above discussion, I am convinced that all the ingredients of a valid contract were fulfilled. Thus, the contract between Robanda Village and Ngome Safari Camp was valid. Therefore, the first issue is thus answered in affirmative.

Next for consideration is the second issue of whether the defendant breached the agreement. Breach of contract is defined in the **Black's Law Dictionary, 9th Edition, Page 213** defines breach of contract as a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. In the case of **Ronald Kasibante v Shell Uganda Ltd** HCCS No. 542 of 2006 breach of contract was defined as:-

" The breaking of the obligation which a contract imposes which confers a right of action for damages on the injured party."

In the instant case, the plaintiff alleges breach of contract on the part of the defendant. It was PW1 and PW2 undisputed evidence that the defendant entered into a lease agreement of 5 hectares to construct permanent tented camps to lease by the defendant. As a result, the defendant had failed to fulfil his obligation under the contract. Exhbit P1, the lease agreement, was signed by both parties, the terms of the contract were honoured. However, the defendant did not pay the plaintiff what was agreed during the contract year.

It was PW1 and PW2 testimonies that the defendant for unknown reasons did not pay the payment of USD 15,000 for 5 years being land rent arrears, USD 10,000/= for contribution fee for Robanda Village community water fund, Catering contribution fee in a tune of Tshs. 10,000,000USD 130,000 for tourist payment fee for 5 years, Tshs. 100,000,000/= for general damage at Robanda Village twice a year for the period of the contract. The same is reflected in Exhibit P1 specifically Clause 3. Reading the contract

and the evidence on record it is clear that the defendant breached the contract.

It is the testimonies of the plaintiff's witnesses, PW1 and PW2 that the contract was never performed by the defendant. Revisiting the law applicable, I find that the law gives an obligation to parties to perform the contract as agreed. Section 37 (1) of the Law of Contract Act, Cap. 345 [R.E 2019] provides that:-

> *" 37.-(1) The parties to a contract must perform their respective promises unless such performance is dispensed with or excuse under the provisions of this Act or any other law."*

From the above excerpt, it is clear that the defendant did not perform his promise and the plaintiff's testimonies did not indicate that the performance of the contract was in any way dispensed with or excuse under the law, rather it was defaulted by the defendant.

In the instant case, PW1 and PW2 have proved that the defendant has breached the agreed terms and the entire amount is due. However, failure to furnish the said contract means the contract came to an end at the end on 13th December, 2014.

After the breach of contract, the status of the defendant changed to a trespasser or unlawful occupier and he failed to pay the said rents. From the second year to the fourth year of the contract. Therefore, since the defendant was a trespasser, the plaintiff has the right to profits received by the tenant in wrongful possession which are recoverable by the landlord. It is trite law that wrongful possession of the defendant is the very essence of a claim for *mense* profit. In the case of **Elliot v Baynton** [1924] Ch.236 (CA) Warrington, LJ, at page 250 it was held that:-

> *" Now damages by way of mesne profits are awarded in cases where the Defendant has wrongfully withheld possession of the land from the plaintiff."*

Applying the above principle to the instant case, it is clear that the defendant is in wrongful possession of the suit property therefore I find it appropriate to grant this remedy. Therefore, this issue is answered in the affirmative.

Next to consideration is the reliefs to which the parties are entitled to. I have listed at the beginning of this judgment a list of prayers made by the plaintiff in the plaint and reiterated in PW1's and PW2's evidence in chief. Guided by the observations and analysis of the issues which were

determined by this court. I am in accord with the plaintiffs' submissions that the defendant breached the contract. In the case of **Thomas Peter @ Chacha Marwa v. Republic, Criminal Appeal No. 322 of 2013** (unreported), the Court of Appeal of Tanzania observed that where there is a right, there is a remedy.

Under the law of contract, every breach gives rise to a claim for damages and may give rise to other remedies. It is stipulated under Section 73 (1) of the Law of Contract Act, Cap. 345 [R.E 2019] that a party is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him. Section 73(3) of the Law of Contract Act Cap. 345 [R.E 2019], provides that:-

> *" Section 73 (3) "where an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract."*

In the circumstances of this case and the above provision, the plaintiff has a right, therefore, entitled to a remedy as he managed to establish that the defendant failed to perform the contract and therefore was injured. In

the determination of what are the reliefs the plaintiff is entitled to, I find out that the Plaintiff is entitled to be paid land arrears for one year.

Starting from the first prayer, the plaintiff claimed from the defendant USD 15,000 as unpaid rent arrears due to the defendant facility at Buraranyota hamlet at Robanda Village effectively from 1st day of 2013 up to the 31st day of December 2017, as I have pointed earlier the plaintiff is entitled to be paid land arrears for one year in a tune of USD 3,000/= and water funds in a tune of USD. 2,000/=.

Additionally, the plaintiff is also entitled for *mense profit* the same amount as land rent and Robanda Village Community water fund whereas for four years. Therefore, the plaintiff is entitled to be paid USD 12,000/= for land rent arrears and USD 8,000/= for community water funds.

The plaintiff claimed for tourism payment fee for the 5 years from 01.01.2012 to 31.12.2017 to a tune of USD 130,000. Although the same is stipulated under Clause 4.1 and Clause 4.2 of the lease agreement but the total of 130,000 USD was not proved by the plaintiff in terms of the number of tourists who paid the said fees. Therefore, the same is not granted.

The plaintiff also claimed for Tshs. 10,000,000/= as meals contribution to Robanda school due from 01st January, 2012 to 31st December, 2017, and the same is reflected under Clause 1.3 (a), (i) of the lease agreement. I find that the amount is pleaded for under the contract and it was a fixed amount therefore the plaintiff is entitled to recover from the defendant.

Regarding, general damages the plaintiff claimed for Tshs. 100,000,000/= as general damages. It is the trite law that general damages must be averred that such damage has been suffered by the plaintiff after the consideration and deliberation on the evidence on recordable to justify the award. The general damage is never quantified, as they are paid at the discretion of the court as it is the court that decides which amount to award, and in doing so, the court has to assign reasons in awarding the same. See **Alfred Fundi vs Geled Mango & 2 Others** Civil Appeal No. 49 Of 2017 CAT Mwanza, **YARA Tanzania Limited versus Charles Aloyce Msemwa and 2 Others;** Commercial Case No. 5 of 2013: HC of Tanzania (Commercial Division) at Dar es Salaam (Unreported).

From the above analyses, I find that the general damages in a tune of Tshs. 100,000,000/= is excessive because the reliefs prayed suffice to cover the loss suffered by the plaintiff. However, I have considered the fact that the

defendant has never appeared before the court and thus the plaintiff have incurred extra costs to run the case in his absence. Therefore, in my view the plaintiff are entitled for 10,000,000/= only as general damages.

In the upshot the case is decided in favour of the plaintiff, I proceed to declare and decree as follows:-

Orders:

1. The defendant to pay the plaintiff a sum of USD 3,000/= being the land rent arrears for one year.
2. The defendant shall pay the plaintiff the plaintiff a sum of USD 2,000/= for Robanda Village Community Water Fund.
3. The defendant shall pay the plaintiff a sum of USD 12,000/= being the land rent arrears for 4 years *mense profit.*
4. The defendant shall pay the plaintiff a sum of USD 8,000/ for Robanda Village Community water funds project for 4 years *mense profit.*
5. The defendant shall pay the plaintiff Tshs. 10,000,000/= for catering contribution fee.

6. The defendant shall pay the plaintiff a general damage in a tune of Tshs. 10, 000,000/=.

7. The defendant to pay the plaintiff interest to the tune of 12% per annum from the date of the accrual of the cause of action to the date of the judgment.

8. The defendant to pay the plaintiff interest on the decretal sum at the rate of 7% per annum from the date of judgment till the date of satisfaction in full.

9. The defendant shall pay the plaintiff costs of this suit.

Order accordingly.

DATED at MWANZA this 26th November, 2020.

A.Z.MGEYEKWA

JUDGE

26.11.2020

Judgment delivered on 26th November, 2020 in the presence of the plaintiff.

A.Z.MGEYEKWA

JUDGE

26.11.2020

Right to appeal fully explained.