IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

LAND CASE NO. 19 OF 2018

REX INVESTMENT LIMITED.. PLAINTIFF

VERSUS

CF BUILDERS LIMITED.. DEFENDANT

JUDGMENT

Date of last Order: 08/06/2022

Date of Judgment: 08/07/2022

E.E.KAKOLAKI,J

The plaintiff herein Rex Investment Limited sued the defendant CF Buliders Limited for the declarations that; she is the owner of the suit land registered under Title No.11032 in Plots No. 49 -55 Block 79 Kisarawe Street, Dar es salaam Region, and that the defendant is not entitled to enter into or use the suit land, eviction of the defendant from the suit premises and an order for permanent injunction restraining the defendant or her servants, agents or otherwise howsoever from entering, or using the suit land/building, or trespassing upon suit premises. He further prayed for USD 691,200 being mesne profits as pleaded, damages, costs and any other relief as this Court seems just to grant.

Briefly both plaintiff and defendant are companies duly incorporated under the Companies Act, [Cap. 212 R.E 2002] as amended. Their dispute over the suit premises as gathered from the pleadings and the evidence tendered in court can be told as hereunder. The suit premises formerly owned by the Building Hardware and Electrical Supplies Company Limited (BHESCO) was placed under liquidation program of one Claude R. Shikonyi (DW1) from BACCON Certified Public Accountants firm who was duly delegated that function by the Loans and Advances Realization Trust (LART) a government institution mandated with liquidation of all Government Parastatals. It appears in the course of exercising his function as liquidator DW1 floated a tender for the purchase of BHESCO property registered under Title No.11032 in Plots No. 49 -55 Block 79 Kisarawe Street, Dar es salaam Region, in which both parties in this suit through their letter dated 9/08/2004 (exh. DE1) duly signed by Francis Kibisa (PW1) and F.M Chacha (DW2) managing directors for the plaintiff and defendant respectively, submitted their bid for Tshs. 500 million. At that time both parties were occupying part of the said building as tenants. The tender was awarded to the plaintiff by DW1 through his letter dated 17/01/2005 (exhibit PE4) calling her to pay 25% of the purchase price of TShs. 500 million by 31/01/2005 and 75% be fully paid by 30/04/2005.

It is claimed the said 25% of the purchase price was by large paid by the defendant before the two agreed to secure loan from of Tshs. 300 million as exhibited in the facility letter issued to the plaintiff dated 15/04/2005 dully signed by PW1 and John Maijo Magesa, the money which settled the outstanding 75% of the purchase price. In that process the plaintiff signed and issued with the copies of sale agreement and contract for disposition of right of occupancy (exh. PE1 collectively) before she (the plaintiff) requested from the liquidator and obtained the Certificate of Title of the purchased property (exh.PE2) and pledged as security to CRDB Bank for the obtained loan facility. It transpired that the said purchased property was handed to the plaintiff and introduced to some of the tenants in the said building such as the Regional Weights and Measures through exhibit PE6.

It is claimed by the plaintiff that, the defendant who also continued to be a tenant in the said building was not paying rent on the reason that she is a co-owner of the property. This was learnt upon receipt of response letter from the defendant's attorney dated 12/03/2018 (exh.PE3) upon a call for payment of rent, hence the present suit to recant her assertion as co-owner. It is the defendant's contention through DW2 that, the two had signed and entered into Joint Venture agreement through memorandum of

understanding (MoU Exh. DE2) to jointly secure loan of Tshs. 300 Million for repayment of the outstanding balance of 75% of the purchase price, the loan to be re-serviced by both of them. It is the defendant's further evidence that, it was their term of agreement under clause 3.2 of the MoU that upon repayment of bank loan fully the certificate of title shall be surrendered to the Registrar of titles for subdivision into two separate title deeds to be owned by each party and registered into a joint names of REX Investment (plaintiff) and C.F Builders (defendant) respectively as co-owners. The defendant also had it through DW2 that, she used to contribute to the repayment of loan and renovation of the building as a co-owner and two receipts worth Tshs. 2,300,000/= proving for renovation costs contribution as issued by the plaintiff were received as exhibit DE 3 collectively. Through that evidence the defendant was submitting that she is not the tenant as claimed by the plaintiff but rather a co-owner hence a prayer for dismissal of the suit with costs.

It is worth noting also that, the defendant when filed her written statement of defence also raised a counter claim against the plaintiff for specific performance of the MoU (exh. DE2), transfer of equal share of ownership of the suit property to her, payment of specific damages USD 700,000 or the

equivalent of Tshs. 1,592,500,000/= and costs of the suit. A preliminary objection was raised by the plaintiff challenging the same to be filed out of time, the objection which was sustained, hence the said counter claim struck out.

It is to be further noted that, upon completion of the pleadings and the mediation process failed, the following issues were framed for determination by this court after consultation with both parties' counsels:

1. Whether the suit property was jointly purchased and owned by the parties.
2. Whether the defendant is the plaintiff's tenant.
3. Whether the plaintiff claims rent arrears from the defendant.
4. To what reliefs are the parties entitled?

Throughout the hearing, both plaintiff and defendant were represented by Mr. Nyaronyo Kichele and Mr. George Nyangusu assisted by Mr. Edwin Nkalane, learned advocate respectively and each paraded two witnesses while tendering seven (7) to three (3) exhibits respectively, in a bid to prove and disprove the claims. At the conclusion of hearing, both parties were availed with opportunity to prepare and file their final submission in which

they complied with. I commend them for their efforts to guide the court on important issues to be considered during determination of this matter. As it can be noted above, the summary of the case is briefly narrated therefore in this judgment, I am not intending to reproduce the evidence as presented by each witness but rather apply and evaluate it in the course of determining the issues above raised.

To start with the first issue as to whether the suit property was jointly purchased and owned by the parties, the defendant relies on the joint bid letter (exhibit DE1) tendered by DW1, clause 3.1 of the MoU (exhibit DE2) and the receipts for renovation of the building at dispute dully tendered by DW2 as exhibit DE3. It was Mr. Nyangusu's submission that, since the purchase process of disputed property was initiated jointly by both parties vide exhibit DE1, the bare assertion by the plaintiff that she submitted the single bid alone without involvement of the defendant is a total lie and should not be believed by this Court. He further submitted that, the said joint purchase is cemented by exhibit PE4, a letter from the liquidator (DW1) making reference to exhibit DE1 received by him in the year 2004, hence a proof that the said property is jointly owned. He invited the Court to invoke the equitable principle stating that *"equity regards as done that which ought*

to have been done" to find that, under the MoU the defendant has equitable right recognised under the law hence answer the issue in positive that, the property was purchased and owned jointly.

On the other hand the plaintiff denied the allegation of joint ownership by the defendant, testifying through PW1 and without tendering any evidence that, the bid for the purchase of the suit property was done by the plaintiff alone before the response was made by DW1 vide the letter exhibit PE4, directed to the Managing Director of the plaintiff indicating that the bid was officially awarded to the plaintiff. Submitting on the acquisition of the suit premises Mr. Kicheere for the plaintiff contended that, it is the sale agreement exh. PE1, dully signed by the plaintiff alone and not jointly with the defendant who passed the title to the plaintiff. And that, that fact is not disputed by the defendant's director (DW2). Further submitted that, in proof of sole purchase and ownership of the disputed property, the plaintiff obtained from the liquidator the certificate of title (exh.PE1), in which she was later registered by Registrar of Title as the sole owner thereof. And that, that fact is supported by PW2 the Land Registration officer who confirmed the said transfer of suit property by the BHESCO liquidator (DW1) to the plaintiff and its registration at their office on 28/10/2005. Since the

disposition of right of occupancy is enforceable when the contract is in writing, exhibits PE1 and PE2 were the proof that transfer and ownership the suit property rested on the plaintiff alone. Mr. Kicheere went further to submit that, even the loan of Tshs. 300 Million secured by the plaintiff alone from CRDB Bank (exh.PE5) to settle the outstanding purchase price is also a strong evidence to prove that the plaintiff is the true and sole owner of the suit property. He added, even if it is to believed which is not true that, the defendant advanced money to the plaintiff for the purposes of purchasing the suit property, still that fact would not in view of section 33 of Land Registration Act, [Cap. 334 R.E 2019] legally constitute the defendant the co-owner or joint owner as even the counter claim of USD 700,000 was struck out. Thus the first issue is disproved by the fact that the property is owned by the plaintiff alone and not jointly by the defendant, Mr. Kicheere submitted.

I have taken time to consider both fighting arguments from parties' submissions as well as the evidence adduced during the hearing of the matter. It is the law where there are two competing party in litigation, the one with heavier evidence must win. (See the case of **Hemedi Saidi vs. Mohamed Mbilu** [1984] TLR 113 (HC). Under section 110 and 111 of the

Evidence Act, [Cap. 6 R.E 2019], that he who alleges must prove and the onus of so proving rests on the party who would lose if the fact alleged is not so proved. And the standard of proof of civil case under section 3(2) of evidence Act, is on the balance of probability. The above position was adumbrated by the Court of Appeal in the case of **Barelia Karangirangi Vs. Asteria Nyalwambwa**, civil appeal No.237 of 2017 (CAT-unreported) where the Court stated that:

> *"It is similarly that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities."*

In this case the defendant alleges, it's the biding letter which initiated the purchasing process of the suit property that proves joint ownership of the same. Upon a close look the said bidding letter (exh.DE1), I fully agree with Mr. Nyangusu that, it was jointly executed by both plaintiff and defendant, as t its admission was neither challenged by the plaintiff nor did she cross examine DW1 on its genuineness. Nevertheless, I differ with his proposition that, the said letter should act as the proof of joint acquisition and ownership of the surveyed suit property, which in my firm view its disposition must be

in writing as provided under section 64(1)(a) of the Land Act, [Cap. 113 R.E 2019]. Section 64(1) of the Land Act, reads:

> *64.-(I)* ***A contract for the disposition of a right of occupancy*** *or any derivative right in it or a mortgage is enforceable in a proceeding only if-*
> *(a)* ***the contract is in writing*** *or* ***there is a written memorandum of its terms****; (Emphasis supplied)*

In this matter as rightly submitted by Mr. Kicheere the plaintiff was issued with letter of award to the bid submitted to the liquidator (DW1) which is exhibit PE4 and later on executed sale agreement between the two (exh. PE1) before the Contract for a disposition of a right of occupancy (exhibit PE1- Land form No. 38) was also issued to the plaintiff alone and in exclusion of the defendant as provided under section 64(2) of the Land Act. Further to that upon payment of the initial payments the liquidator (DW1) transferred right of occupancy to the plaintiff by issuing her with Certificate of Title (exh.PE1) as the sole owner, the fact which was not challenged by DW1. Section 40 of the Land Registration Act, [Cap. 334 R.E 2019] provides that the Certificate of Title shall be admissible and therefore serve as evidence on several matters contained therein such as who is the lawful owner of the property. The said section 40 of Land Registration reads thus:

40. A certificate of title shall be admissible as evidence of the several matter therein contained.

Now looking at the sale agreement and contract for disposition of the right of occupancy (exhibit PE1 collectively), the contracts which are in writing, as well as the certificate of title (exh.PE1), it is evident to me that, the said disposition of suit property was in favour of the plaintiff alone and not jointly with the defendant. In view of the above, I discount the proposition by Mr. Nyangusu that, clause 3.2 of MoU (exh. DE2) intended to have the said certificate of title subdivided and registered in joint ownership of both parties as co-owners. I so hold as the same has several deficiencies that makes it invalid hence unreliable. The said anomalies are, One, it does not bear the date in which it was executed. Second, it only indicates the date in which it was attested by the defendant and not by the plaintiff. Third, the page bearing signatures of defendant's directors seem to be a photocopy page duly signed in original ink by the first director only as that of second director is not in original ink. As the said MoU lacks evidential value the defendant remains with oral evidence that she is a co-owner with the plaintiff as she has since then been in co-occupancy of the suit premises with the plaintiff. It is a settled law in our jurisdiction that documentary evidence is the best

evidence and cannot be displaced by oral evidence unless contradicted by another documentary evidence. Hence, Oral testimonies against the contents of the existing document is inadmissible. See the case of **CRDB Bank Pcl Vs. Nokwim Investment Co Ltd & Another**,Civil Appeal No. 105 of 2020. With regard to the assertion that, the defendant contributed the initial payment of the purchase price, I hold the defendant failed to prove it as DW1's evidence on that fact was without supporting document, since the only evidence submitted by the defendant on payments was two receipts (exhibit DE3) issued by the plaintiff to her showing that, the payment of Tshs. 2,300,000/- done were meant for renovation of plaintiff's building and not otherwise.

In view of the above and in the absence of any other evidence or claim of fraud as provided under section 33 of Land Registration Act, to disprove the plaintiff's solid evidence on disposition of the said property, I hold the same is solely owned by the plaintiff. I so hold as the principle of equity cannot apply to displace the solid documentary evidence. Thus the first issue is answered in negative.

Next for determination is the second issue as to whether the defendant is the plaintiff's tenant. Mr. Kicheere submits that, as defendant is not the

owner of the suit property she does not have legal right to freely occupy the same without paying rent. In other words the plaintiff claims there was oral lease agreement. Mr. Nyangusu is of the contrary view that the plaintiff failed to discharge the burden of prove his claim that, the defendant is a tenant under him as provided by section 112 of the Evidence Act. He said the plaintiff could not have tolerated the tenant not paying rent for twelve (12) years without issuing her a demand notice or institute eviction suit. If it is to be believed the defendant is the tenant in the suit property which is not the case, how could she be courageous to issue the plaintiff with a demand letter (exh.PE3) to stop the ongoing renovation or construction without prior round table discussion with the defendant as the said property was jointly owned under the terms of clause 3.2 of the MoU (exh.DE2). Section 112 of Evidence Act reads:

> *112. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person.*

It is true as submitted by Mr. Nyangusu that, under section 112 of the Evidence Act, the plaintiff was duty bound to prove to the court that, there existed lease agreement between her and the defendant. PW1 in his

evidence informed this court that, during bidding process the defendant offices were accommodated in SIDO building situated at Nyerere road before she shifted into the suit building in 2007 following oral lease agreement executed between him (PW1) and defendant company's director (DW2). And that, her stay was peaceful until 2018 when sought to stop the plaintiff to renovate the building through the demand letter exhibit PE3. With due respect I do not find cogent evidence to prove to this court on the balance of probability the plaintiff's assertion that, there existed oral lease agreement between the parties. Under section 10 of the Law of Contract Act, [Cap. 345 R.E 2019], one of the ingredient of a contract is the lawful consideration. The plaintiff in paragraph 6 of the plaint averred that, the plaintiff's company allowed and consented to let the defendant to occupy 500 sq.m of the building erected on the suit land at unfixed rent and for unspecified period. The said paragraph reads:

> *6.That at all times the* ***Plaintiff Company allowed and consented to let the defendant to occupy 500 sq.m of the building erected on the suit land at a rent that was not fixed and for a period that was not specified.*** *In the premises the Defendant was a tenant at will, or at sufferance. The economic rent of the premises is USD 8 per sq.m per*

month and the Defendant has not paid any rent nor any sum for water or electricity services since 2007 when she took possession to date. Hence, the plaintiff is entitled to USD 691,200 being mense profits at the rate of USD 8 X 600 sq.m for the 12 years she has been in possession. (Emphasis supplied)

What is gleaned from the above cited paragraph of the plaint is the plaintiff's consent and permission to let the defendant occupy the space in the suit property for unspecified time and consideration (rent if any) which connotes that she was let to stay there freely. It is the law that parties are bound by their pleadings. This position of the law and its object was stated in the case of **Charles Richard Kombe t/a Building Vs. Evarani Mtungi and 2 Others**, Civil Appeal No. 38 of 2012 (CAT-unreported) where the Court had this to say:

"It is cardinal principle of pleadings that the parties to the suit should always adhere to what is contained in their pleadings unless an amendment is permitted by the Court. The rationale behind this proposition is to bring the parties to an issue and not to take the other party by surprise. Since no amendment of pleadings was sought and granted the defence ought not to have been accorded any weight."

Basing on the above principle of the law on the need of parties to abide to their pleadings it was expected of the plaintiff to lead evidence in support of her averment in paragraph 6 of her plaint, that, she allowed the defendant to occupy the space in the disputed property for unspecified time and consideration (rent) if any was contemplated, hence no lease agreement but rather private arrangement which its terms are only known to the parties themselves. And if she wanted to state otherwise ought to have sought for an amendment of the plaint to bring in the fact of leasing the premises to the defendant, but she failed to so do. It is from that omission I disregard the plaintiff's assertion that there was oral lease agreement between her and the defendant as what was agreed is conspicuously seen in paragraph 6 of the plaint. Hence the second issue is answered in negative.

I now move to the third issue as to whether the plaintiff claims rent arrears from the defendant. I think this issue need not detain me much following a negative response to the second issue in that, the defendant was never the plaintiff's tenant as it seems there was another private arrangement between them whose terms are well known to themselves. I so conclude as it is beyond comprehension that, as to how the plaintiff could have tolerated the defendant for such long time of twelve (12) years without paying rent if at

all there existed lease agreement. Since there was neither oral nor written lease agreement executed by the parties and since it is already found the defendant was not a tenant for want of specified time and consideration (rent) to the alleged lease, I hold the claim of rent arrears by the plaintiff has no legs to stand on, thus it is dismissed. Hence the third issue is answered in negative too.

As regard to the mense profits of USD 691,200 at the rate of USD 8 X 600 sq.m for the 12 years claimed by the plaintiff, Mr. Kicheere submits that, since it is already proved the plaintiff is the lawful owner of the suit property, then she is entitled to such relief. With due respect to Mr. Kicheere, I also find no justification in this claim as mense profit is neither assumed nor automatically awarded, it has to be proved. **Black's Law Dictionary** (8th Edition), 2004 at page 3824 defines the term mesne profit to mean:

> *"The profits of an estate received by a tenant in wrongful possession between two dates."*

Similar definition is given by **Mintra's Legal & Commercial Dictionary**, 6th Edition at page 576 and expounds further that mesne profit are:

> *"Those profits which a person in wrongful possession of such property actually received or might with ordinary diligence*

have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession."

My interpretation of the term ***mesne profits*** from the above definition therefore is that, it is a sum of money paid to the landlord or claimant out of profits obtained by the party through unlawful usage, occupation or possession of land/immovable property without consent or prior permission of the landlord or claimant. For the plaintiff/claimant to successful claim for mense profit two conditions must established. **One**, that the defendant was in wrongful occupation or possession of the immovable property under contest. **Second**, that unlawful occupant obtained profits with or without interests out of such wrong possession or occupation of the property. In this case none of the two conditions were met by the plaintiff. I so hold as it is already determined in the second issue, that there was no lease agreement between the plaintiff and the defendant, hence no evidence to establish that the defendant was in wrong possession of the suit premises herein. Since wrongful possession or occupation of the suit premises is not established, I find there is also no evidence to prove that the defendant obtained advantage or profit out of her occupation of the suit property for all those

twelve (12) years allegedly occupied it. In view of those fact I also dismiss this claim.

With the above findings, I move to the last issue as what reliefs are the parties entitled to. This issue is not difficult to answer. In view of what has been discussed and decided herein above it is obvious that, the plaintiff has managed to prove to the required standard that, the suit property was purchased and is solely owned by her. As regard to the rest of the claims no doubt she has failed to prove them on the balance of probabilities. In the circumstances she only deserves the first relief in which judgment is entered in her favour. It therefore declared that, the plaintiff is the lawful owner of the suit land registered under Title No.11032 in Plots No. 49 -55 Block 79 Kisarawe Street, Dar es salaam Region. The rest of the reliefs sought have not been proved, hence the same are hereby dismissed as prayed by the defendant.

As regard to the costs, I refrain from granting the same given the nature of the case and the need to promote peace and harmony amongst the parties.

It is so ordered.

DATED at Dar es Salaam this 08th day of July, 2022.

E. E. KAKOLAKI

JUDGE

08/07/2022.

The Judgment has been delivered at Dar es Salaam today 08th day of July, 2022 in the presence of Ms. Bernadetha Shayo, advocate for the Plaintiff, Ms. Doroth Mkwizu, advocate for the Defendant and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
08/07/2022.