

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE SUB-REGISTRY OF DAR ES SALAM**

**AT DAR ES SALAAM**

**CIVIL CASE NO. 5 OF 2017**

**M/S JALDEEP ENTERPRISES LIMITED ..... PLAINTIFF**

***VERSUS***

**NATIONAL HOUSING CORPORATION ..... DEFENDANT**

**JUDGMENT**

25<sup>th</sup> February & 30<sup>th</sup> March, 2022

**KISANYA, J.:**

In this suit, M/S Jaldeep Enterprises Limited (the plaintiff) is praying for judgment and decree against National Housing Corporation (the defendant) as follows:-

- 1. Declaration that by failure to indemnify the Plaintiff the Defendant has breached the terms of Joint Venture dated 18<sup>th</sup> May, 2008 also breached her commitment with the Plaintiff made on 14<sup>th</sup> August, 2014.*
- 2. An Order that the Defendant pay the Plaintiff a total sum of Tshs. 1,023,280,136.00 equal to the amount already spent in the project.*
- 3. An Order that the Plaintiff be paid a total sum of Tshs. 800,000 per month being security guards' costs at the suit.*

- 4. The Defendant be ordered to pay the costs of the suit.*
- 5. Any other relief order as this Court may deem fit and just to grant.*

It is alleged in the plaint that, on 19<sup>th</sup> May, 2008, the plaintiff and defendant entered into an Agreement for a Joint Venture in Re-development and Joint Ownership of Property on Plots No. 2620/73 and 2099/72 India Street (henceforth "the joint venture agreement"). It is further alleged that the plaintiff undertook to redevelop the defendant's landed properties to wit Plots No. 2620/73 and 2099/72, India Street, Dar es Salaam (henceforth "the project landed property"). It is also claimed that the plaintiff's and defendant's respective shares in the project were agreed to be 75% and 25% for 12 years, and that each partner was to own 50% shares after expiry of the said period.

The plaintiff went on to allege that, the building permits were obtained on 27<sup>th</sup> October, 2010. She claimed that the delay to commence construction work was attributed by the defendant's failure to hand over the project property due to cases filed against the defendant by the existing tenants. That, the landed property was handed over to the plaintiff at the time when there was substantial devaluation of Tanzania shillings in the world market. The plaintiff claimed that, in 2012 she failed

to fund the construction activities from her own savings and that when the defendant was consulted, the latter refused to surrender the title deed for purposes of using it as collateral for a loan for the project.

It was stated that, on 23<sup>rd</sup> January, 2013, the plaintiff proposed to surrender her shares to the defendant. In so doing, she asked the defendant to take over the project on a condition of paying her a sum TZS 1,200,000,000 VAT exclusive being the total costs incurred. She also proposed to be given one flat and one shop.

The plaintiff alleged that, on 14<sup>th</sup> March, 2014, the defendant undertook to take over the project and pay her (plaintiff) TZS 847,089,467 VAT exclusive and that the said amount was premised on the valuation made by defendant's team as a total cost for the project. The plaintiff further alleged that she submitted the contractor's claim for unpaid sum of TZS 340,000,000 VAT exclusive, for the work already done and that the defendant committed to settle the payment of the contractors.

The plaintiff also alleged that she was surprised to receive the defendant's letter dated 30<sup>th</sup> November, 2015 requiring her to proceed with the construction. Believing that the defendant had defaulted to

honor her obligation in terms of the Joint Venture Agreement and the commitment made on 14<sup>th</sup> August, 2014, the plaintiff issued her with a demand notice. As there was no positive response from the defendant, the plaintiff resolved to institute this suit for the above stated reliefs.

Upon being served with the plaint, the defendant filed a written statement of defence and denied the plaintiff's claims. Her written statement of defence faced a preliminary objection on the following point of law:-

*"That the verification clause of the Defendant's Written Statement of Defense is incurably defective for the same contradicts the provision of Order VI, Rule 15(3) of the Civil Procedure Code [Cap. 33, R.E. 2002]."*

The defendant conceded to the preliminary objection. With leave of the Court, she was granted leave to file an amended written statement of defence. It was ordered that the amended written statement of defence be filed before 24<sup>th</sup> October, 2018. However, the defendant defaulted to file the amended written statement of defence in accordance with the Court's order. She also failed to appear when the matter was called for first pretrial conference on 25<sup>th</sup> February, 2019. Therefore, Mr.

Michale Chahe, learned counsel for the plaintiff prayed to prove the case *ex-parte*. His prayer was made under Order VI Rule 18 of the CPC read together with Order VIII, rule 14 (1) of the CPC. The predecessor judge readily granted the prayer. The case was fixed for hearing *ex-parte* on 25<sup>th</sup> April, 2019.

Thereafter, the defendant unsuccessfully filed an application (Misc. Civil Application No. 158 of 2019) to set aside the order to proceed *ex-parte*. As a result, the following issues were framed for determination of this matter:-

- 1. Whether the Defendant breached the joint venture agreement with the plaintiff.*
- 2. If the answer in (1) is in affirmative, whether the Plaintiff suffered any financial loss as a result of such breach.*
- 3. To what relief(s) are the parties entitled.*

Before the hearing could commence, the Hon. Attorney General prayed to be joined. In its ruling dated 23<sup>rd</sup> July, 2021, this Court found no merit in the said prayer and dismissed it. Thus, the suit proceeded *ex-parte*.

During the trial, the plaintiff was represented by Mr. Michael Chahe, learned advocate. One witness was paraded to prove the plaintiff's claim.

His name Arunkumpa Gokaldas Jiwan (PW1). He introduced himself as a self-employed person who conducts business in the name of M/S Jaldeep Enterprises Limited (the plaintiff). His oral evidence was supported by a total of 36 documentary evidence (Exhibits P1 to P36). At the end of the trial, her counsel filed final written submissions. He urged the Court to consider that the plaintiff had proved her case on the required standard.

Having gone through the pleadings, evidence adduced by the sole witness called by the plaintiff and the submissions made by the learned counsel for the plaintiff, I will proceed to determine the merits of this case by addressing the above framed issues.

At the outset, it is worth noting that, this being a civil case, the court's duty is to find out whether the plaintiff has proved her case on the balance of probabilities. [See the case of **Peter Nghomango vs Gerson M.K Mwanga and Another**, Civil Appeal No. 10 of 1999, CAT (unreported). In terms of the pleadings, the plaintiff filed a suit alleging breach of the joint venture agreement by the defendant. Although the suit proceeded *ex-parte*, this court is still enjoined to consider whether the plaintiff proved her claims.

The first issue is whether the defendant breached the joint venture agreement. PW1 tendered the joint venture agreement which was admitted in evidence as Exhibit P1. According to evidence of PW1 and the submissions made by Mr. Chahe, the defendant breached the joint venture agreement by: *One*, delaying to hand over the project landed property to the plaintiff. *Two*, refusing to give the plaintiff the title deed of the project landed property for purposes of securing a loan to complete the project. *Three*, refusing to take over the project and pay the costs incurred by the plaintiff.

Starting with the delay to hand over the project landed property, PW1 testified that it was handed over to the plaintiff more than two years from the date of signing of the joint venture agreement. He labored much on the reasons for the delay as the case instituted by the then tenants against the defendant. According to PW1 and Exhibit P2, the case lodged by the existing tenants was terminated in favour of the defendant on 3<sup>rd</sup> March, 2010.

However, PW1 did not depose on the time within which the project landed property was required be handed over to the plaintiff. In terms of Article 16.1(a) of Exhibit P1, parties agreed that the joint venture

agreement would be terminated or determined if the construction works had not commenced from within three years from the date of execution of the joint venture agreement. This Court was not told as to when the construction works commenced. However, Exhibits P4 and P5 show that the building permit and commencement notice were issued on 27<sup>th</sup> November, 2010. Since the joint venture agreement was executed on 19<sup>th</sup> May, 2008, the building permit were issued before expiry of three years. As indicated earlier, PW1 did not testify that the construction works were delayed and not commenced within three years in order for this Court to hold that the joint venture was determined in terms of Article 16.1(a) of Exhibit P1.

It is further deduced from clause I of the recitals of Exhibit P1 that the construction works were required to be completed within three years and six months "upon obtaining vacant possession of the project." However, as I have stated herein above that, Exhibit P1 does not state the time within which the project landed property was supposed to be handed over to the plaintiff.

Upon further reading of Exhibit P1, I have observed that Clause G of recitals stipulated that the joint venture agreement would frustrate if



“preparation for construction works” would not be completed within two years from the date of signing the agreement. The said clause provides:

*"If without any reasonable cause, preparation for construction works shall not be completed within a period of two (2) years from the date of signing the joint venture agreement, then the same shall be taken to have been frustrated and the agreement will be determined upon service of one month."*

The phrase “preparation for construction works” was not defined in Exhibit P1. It is my considered view that, handing over the project landed property was one of the preparations for construction works. In that regard, failure to hand over the project landed property within two (2) years from the date of signing the joint venture agreement amounted to frustration of contract if there was no reasonable cause.

In this case, PW1 deposed that the construction delayed to commence due to the existing tenants who instituted a case against the defendant. He stated and tendered the judgment (Exhibit P2) which is to the effect that the case was terminated in favour of the defendant on 3<sup>rd</sup> March, 2010. However, PW1 did not tell the Court or produce evidence as to exact date when the project landed property was handed over to the plaintiff. According to him, the vacant possession was given to the

plaintiff in May or June 2010. Later on, PW1 deposed that it was after two (2) years and six (6) months after signing of the joint venture agreement.

Even if it is considered that the site project was handed over to the plaintiff after two years (in Late May 2010 or June, 2010), evidence of PW1 shows that there was reasonable cause to wit, a case instituted by the defendant's tenants. It appears that, before signing the joint venture agreement, the plaintiff was aware of the existing tenants on the project landed property. This is reflected in Article 7 of the joint venture agreement in which the plaintiff agreed that she would cooperate with the defendant to remove the existing and pay the required costs.

Pursuant to the joint venture agreement, the plaintiff was required to exercise her right under clause G of the recital of Exhibit P1 by serving the defendant with a one month's notice of having the agreement "determined" due to the delay to hand over the project landed property. In alternative, the plaintiff was required to serve the defendant with a written notice specifying the default and demanding the same to be remedied within 60 days as provided for under Article X of Exhibit.

In this case, the plaintiff did not produce the notice served to the defendant in accordance with Clause G of the recitals and Article X of Exhibit P1. That implies that the alleged default, if any, was not communicated to the defendant as agreed to in the joint venture agreement.

From the foregoing, I respectfully disagree with Mr. Chahe who was of the view that, the defendant breached the agreement by delaying to hand over the project landed property. It is my considered view that the joint venture agreement was not breached on the aspect of delaying to hand over the project landed property.

With regard to the defendant's refusal to give the plaintiff a title deed of the project landed property for purposes of securing loan to finance the project, I have observed that, the plaintiff committed herself that she had such "capability, capacity and access to the resources necessary to complete the project". She also undertook to contribute 100% funding of the development of the said project to its completion as per Clause F of the recitals and Article 6.1 of Exhibit P1. Reading from Exhibit P1 and evidence adduced by PW1, nothing suggesting that parties had agreed that the defendant would give the plaintiff, title deed of the

project landed property in order the latter to secure loan or funds for the project. It is also gleaned from Exhibit P6 that, when the plaintiff prayed for the title deed, she was duly notified that the defendant was under no obligation to surrender the said title deed. Therefore, considering that the defendant was under no obligation to give the plaintiff the title deed of the project landed property, I am of the view that the plaintiff has failed to prove how the joint venture agreement was breached on the issue under consideration.

Next for consideration is the claim that the defendant breached the joint venture agreement by refusing to take over the project and pay the costs incurred by the plaintiff. PW1 admitted that the plaintiff failed to complete the project to financial constraint. Referring to Clause J of the recitals, he testified that the plaintiff was entitled to hand over project to the defendant and recover the costs that had been incurred.

Relying on Exhibit P32, PW1 deposed that the defendant had agreed to pay the plaintiff a sum of Tshs. 847,089.467.00 (without VAT) based on the valuation done by her (defendant) team. He, also, testified that the defendant defaulted to pay the said amount and informed the

plaintiff via Exhibit P33 that she (the defendant) was not going to compensate her.

At this juncture, this Court has noted that the plaintiff does not dispute that she did not complete the construction in accordance with the joint venture agreement. It is also clear that the plaintiff's claim for refund of the costs incurred is based on Clause J of the recitals of Exhibit P1 and the commitment alleged to have been made the defendant vide Exhibit P31. For better understanding of the discussion at hand, I find it appropriate to reproduce clause J of the recitals of Exhibit P1. It stipulates:-

*"In the event that the Partner shall not be able to complete the project as per schedule of works provided in Clause I above, thereby causing undue delays, **the NHC shall have the right to take over and complete the project in the manner it shall deem fit and appropriate.** In this case, the costs already expended by the partner shall be ascertained against the bill of quantities by a professional Quantity Surveyor and these costs shall constitute his shares in the property."*(Emphasize supplied)

Referring the Court to the above cited clause, Mr. Chahe submitted that the intention of the parties was for the defendant to take over and

complete the project. Once again, I, respectfully, disagree with the learned counsel for the plaintiff. In my considered view, the above cited clause gives the defendant right to take over and complete the project which is not completed within the agreed period, which is three years and six months from the date of commencement. The said clause does not provide that the defendant must take over and complete the said project. That being the case, the defendant cannot be held responsible for breaching the joint venture agreement if she does not exercise her right of taking over and completing the project.

The question is whether the defendant exercised the above right. It is in evidence that vide letters dated 23<sup>rd</sup> January, 2013 and 26<sup>th</sup> July, 2013 (Exhibit P7 and P8), the plaintiff informed the defendant that she had failed to complete the project due financial constraints. She also expressed his intention to surrender the deferred 25% shares to the defendant, on the condition that the latter would inject the financial support to the project. PW1 informed the Court the plaintiff and defendant held as a series of meetings including the meeting held on 1<sup>st</sup> November, 2013 as per Exhibit P30. Upon conducting valuation of the work already done, the defendant informed the plaintiff as follows, in her letter dated 14<sup>th</sup> August 2014 (Exhibit P31):-

*"This is to inform you that valuation was conducted and a valuation report prepared on January, 2014, reflecting the value of work executed at the aforementioned plot amounting Tshs. 847,089.467.00 only (without VAT) and that it has been reviewed and accepted by the management as the value work executed.*

*Kindly note that your payment shall be effected once we have the necessary approvals from the relevant authorities based on our internal process. We will try to fast track this process as soon as possible so that we conclude this matter once and for all."*

The above cited letter was referred to in the plaint as the defendant's commitment. Also, in his evidence, PW1 stated that the defendant undertook to pay the plaintiff the said sum of Tshs. 847,089.467.00 only (without VAT).

On my part, the defendant is a body corporate established by the National Housing Corporation Act [Cap. 295, R.E. 2019]. Pursuant to section 6 of Cap. 295, the defendant's business and affairs are carried out by the Board of Directors. Although the plaintiff was informed vide Exhibit 31 that, the defendant's management had reviewed and accepted Tshs. 847,089.467.00 (without VAT) as the value of work executed, she was duly notified that the management was waiting for further approval.

In my opinion, the phrase "payment shall be effected once we have the necessary approvals from the relevant authorities based on our internal process" appearing in Exhibit P31 includes the Board's approval.

PW1 stated on oath that he was informed during the technical meeting held on 24<sup>th</sup> October, 2014 that the payment had been approved by the Board and that the matter was before the Director General for payment. However, he did not produce the minutes of that meeting or the defendant's letter to such effect. What was tendered in evidence is the defendant's letter (Exhibit P33) which made reference to Exhibit P31. The said letter (Exhibit P33) informed the plaintiff that the approval was not obtained:-

*"As you recall in our letter dated 14<sup>th</sup> August 2014 with reference number NHC/DSM/336/48/LBM in the last paragraph we stated that, we might consider paying you the compensation upon obtaining the necessary approvals from the relevant authorities.*

*Due to lapse of time, which resulted into change of strategic direction of the corporation that include construction of affordable houses and other projects **were not able to obtain the necessary approval of compensating you. Thus, we do advise you***



***to proceed with alternative means of ensuring the project is completed as planned.***

***In the meanwhile, upon receipt of this letter you are required to submit to us the appropriate strategies that will be used to rescue the project within thirty (30) days from the date of this letter.”***(Emphasize supplied].

PW1 deposed that he received Exhibit P33 on 15<sup>th</sup> March, 2016. He did not state whether the appropriate strategies of accomplishing the project were submitted to the defendant. It is in evidence that, the plaintiff decided to serve her with a demand notice dated 30<sup>th</sup> March, 2016 (Exhibit P34) which was disputed by the defendant as per Exhibit P35. Thereafter, the plaintiff was served with a notice of intention to terminate the agreement (Exhibit P35). She was notified to submit a written explanation as to why the defendant should not terminate the agreement.

PW1 did not testify on whether the written explanation was given by the plaintiff. That being the case, it is the finding of this Court that the defendant had not exercised its right of taking over and complete the project. In that regard, parties were required to agree on the way forward. It is evident that the case was instituted when the defendant

was waiting for the plaintiff's written explanation. In fact, PW1 admitted that it is the plaintiff who is in possession of the project site.

In the light of the foregoing, I am satisfied that the defendant is not in breach of the joint venture agreement. Thus, the first issue is not answered in affirmative.

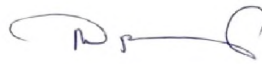
The second issue on whether the plaintiff suffered any financial loss is subject to the first issue being answered in affirmative. Now that the first issue is not resolved in affirmative, the second issue dies a natural death.

The last issue is on the reliefs to which the parties are entitled to. It is the finding of this Court that the reliefs sought by plaintiff are based on the contention that the defendant had breached the joint venture agreement. Therefore, upon holding that the defendant is not in breach of the joint venture agreement, the issue reliefs as prayed cannot be sustained. The plaintiff has failed to discharge her onus of proof of breach of the joint venture in order to be entitled to the reliefs prayed for. Had the defendant exercised her right of taking over the project, I would have decided, among others, that the plaintiff is entitled to costs incurred and ascertained against the bill of quantities by a professional Quantity

Surveyor as provided for by Clause J of the recitals of the joint venture agreement.

In the result, this suit fails in its entirety. It is accordingly dismissed. No order as to costs because the matter proceeded *ex-parte*.

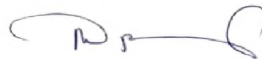
DATED at DAR ES SALAAM this 30<sup>th</sup> day of March, 2022.



S.E. Kisanya  
JUDGE

Court: Judgment delivered this 30<sup>th</sup> day of March, 2022 in the presence of Mr. Michael Chahe, learned advocate for the plaintiff and in the absence of the defendant.

Right of appeal explained.



S.E. Kisanya  
JUDGE  
30/03/2022