

**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. 66 OF 2020

**THE REGISTERED TRUSTEES OF
THE MISSION INTERNATIONAL TANZANIA PLAINTIFF**

VERSUS

ENEO AGENCY LIMITED 1ST DEFENDANT

AKHAN TOMSON NTAHENA 2ND DEFENDANT

JUDGMENT

23rd June & 28th July, 2022

KISANYA, J.:

The Plaintiff, the Registered Trustees of the Mission International Tanzania, instituted a suit against the Defendants, Eneo Agency Limited and Akhan Tomson Ntahena claiming for the following reliefs:-

- a) payment of TZS 185,000,000/=;*
- b) payment of loss of use equivalent to 30% of the TZS 185,000,000 for four years the defendants have retained and used the money;*
- c) payment of interest at the rate of 30% per annum from the date of institution of the suit;*
- d) payment of interest at the rate of 12% per annum from the date of judgment to the date of full settlement of the decretal sum;*

e) costs of the suit; and

f) any other relief which the Honourable court shall deem fit to grant.

The facts giving rise to this suit are that the 1st defendant was the plaintiff's agent. It is alleged that the plaintiff entered into an agency agreement with the 1st defendant in which the latter was engaged to sale the plaintiff's land known as Plot No. 457, Block MM, located at Lilungu, Mtwara Township with Certificate of Title No. 1758MTW (henceforth "the landed property"). It is the Plaintiff's case that the agreement was oral and later on executed through a memorandum of understanding and special power of attorney.

Furthermore, it is the plaintiff's case that upon selling the suit premises to the Local Authorities Provident Fund (LAPF), the defendants retained some of the sale proceeds to the tune of TZS 185,000,000/=. It is further claimed that the defendants failed to honour their promises of paying the outstanding sum as expressed in their letters dated 16th June, 2016, 6th February, 2017 and 17th May, 2017. According to the plaintiff, on 7th August, 2017, the 1st defendant issued a cheque of TZS 30,000,000 as part payment of the outstanding amount. It is however, stated that the said cheque was returned by the banker for insufficient funds. As the

defendants failed to pay the outstanding amount of TZS 185,000,000/=, the plaintiff had no option than instituting the present suit.

The Defendants filed a joint written statement of defence contesting the plaintiff's claims. Upon the defendants failing to appear when the matter was called for first pre-trial conference, their defence was struck out under Order VIII, Rule 20(1)(b) of the Civil Procedure Code, Cap. 33, R.E. 2019 (the CPC). In consequence, the case proceeded *ex-parte* against the defendants. And in the light of the plaintiff's claim, the issues for determination are:

- 1) Whether there was an agency agreement for sale of the suit premises.
- 2) Whether there was a breach of contract by any of the party.
- 3) Whether the defendants owe the plaintiff a sum of TZS 185,000,000/=
- 4) To what reliefs are the parties entitled.

During the hearing of the suit, the plaintiff was represented by Mr. Daimu Halfan and Ms. Loveness Denis, learned advocates.

In pursuing its claim, the plaintiff summoned Kwan Jin Lee (PW1) and Franko Angelo Wolfram (PW2). PW1 informed the court that he is

the director and trustee of the plaintiff's registered trustees. He tendered in evidence the Memorandum of Understanding between the Plaintiff and 1st Defendant (Exhibit P1) and a copy of Certificate of Title No. 1758MTW in relation to Plot No. 547, Block MM, Lilungu, Mtwara (Exhibit P2). On his part, PW2 introduced himself as the secretary to the plaintiff's Board of Trustees. His oral testimony was supplemented by copies of application for filing a power of attorney and a Special Power Attorney (Exhibit P3 collectively), the handing over note dated 2nd December, 2015 in relation to the certificate of title of the landed property (Exhibit P4 collectively), Two documents dated 31st May, 2016 and 19th June, 2019 (Exhibit P5 collectively), one cheque in the name of Remnant Academy (Exhibit P6) and a letter dated 6th February, 2016 from Hellar & Co Advocates (Exhibit P7).

I have had time to consider the plaintiff's claims of TZS 185,000,000 and the evidence adduced to prove the same. It is trite law that, under section 110 (1) and (2) of the Evidence Act, Cap 6 R.E. 2019, a person who alleges on existence of certain facts must prove the same. Therefore, although the case proceeded *ex-parte* against the defendants, the plaintiff has the burden to prove the claim and a level of proof is that of balance of probability.

Reverting to this case, first for consideration is whether there was an agency agreement for sale of the suit premises. It is a general principle set out under section 10 of the Law of Contract Act, Cap. 345, R.E 2019 that, a contract arises when one party makes an offer or proposal, and the other party reciprocates that offer by an acceptance.

In the instant case, PW1 tendered in evidence the copy of title (Exhibit P2) to prove that the plaintiff was the lawful owner of the suit premises. In their respective evidence, PW1 and PW2 testified that the plaintiff the 1st defendant was engaged to sell the suit premises on behalf of the plaintiff. This evidence was supported by the memorandum of understanding (Exhibit P1) signed by the plaintiff and 1st defendant on 7th July, 2015. Indeed, the recitals and clause 1.1 of Exhibit P1 show that the 1st defendant was engaged to sell the landed property in consideration of TZS 800,000,000. It is further deduced from clause 1.2 of Exhibit P2 that the parties agreed that the 1st defendant would not be paid commission by the plaintiff.

In addition, PW2 tendered in evidence a handing over note dated 2nd December, 2015 (Exhibit P4) in which the 2nd defendant as director of the 1st defendant, acknowledged receipt of the title deed of the landed

property for purposes of showing the intended buyer. Another evidence is the special power of attorney (part of Exhibit P4) which shows that the 1st defendant was engaged to sell the land property on behalf on the plaintiff. In the light of the foregoing, I am satisfied that that there was an agency agreement between the plaintiff and 1st defendant.

The second issue is whether there was a breach of contract by any of the party. As stated earlier, the recitals and clause 1.1 of the Memorandum of Understanding are to the effect that the 1st defendant agreed to sell the landed property in consideration of TZS 800,000,000. From the testimonies of PW1 and PW2, it is clear the 1st defendant retained a sum of TZS 185,000,000 after selling the landed property. It is also in evidence that the 1st defendant acting through the 2nd defendant admitted the outstanding amount claimed by the plaintiff and undertook to pay the same. For instance, on 6th February, 2017, the 1st defendant's counsel one, Peter Hellar wrote a letter (Exhibit P7) requesting for extension time for the payment of the remaining balance. The relevant passage of the said letter reads: -

"We Hellar & Co. Advocate acting under instruction of Eneo Agency Limited P.O. Box 7524, Dar es Salaam (hereinafter referred as "Our Client") do hereby request

for extension of time limited to sixty days in order to settled the remained balance.

That our client do hereby confirming has liability against you which was the result of business of selling the land at Mtwara Plot on behalf of the Registered Trust of Mission International Tanzania who was acting through the Power of Attorney which was vested to Our Client.

Our Client has failed to make the payment on the remained balance on agreed time because of the incontinent reasons which faces the Bank Account which is involved in the said business..."

As it can be glanced from the above evidence, the 1st defendant admitted having not paid the whole consideration of selling the landed property. That is why it asked for extension to pay the same. It was the evidence of PW1 and PW2 that the 1st defendant has not honoured its promise of paying the remaining balance. In that regard, the second plaintiff is in breach of the agency agreement executed through Exhibit P1. Thus, the second issue is answered in affirmative.

There comes the issue whether the defendants owe the plaintiff a sum of TZS 185,000,000/=. I have held in the previous issue that the plaintiff admitted to have not paid some of the amount received after

selling the landed property. Although Exhibit P7 does not indicate the outstanding amount, PW1 and PW2 testified that the said amount is TZS 185,000,000/=. Their evidence is supported by the commitment or undertaking signed by the 2nd defendant and the plaintiff on 19th June, 2017(Exhibit P5). In terms of Exhibit P5, the 2nd defendant acknowledged the outstanding sum of TZS 185,000,000/=. He then promised to pay TZS 50,000,000/= within thirty days from 19th June, 2017. Let relevant passage of Exhibit P5 paints the picture. It reads.

"Mimi ALKAN Thomson Ntahena Mkurugnezi wa Eneo Agency ninakili kudaiwa kiasi cha Tshs milioni mia moja na themanini na tano tu (185,000,000) na Mission International Tanzania kutokana na mauzo ya eneo I lililipo Mtwara."

Flowing from the above, I have no flicker of doubt that the defendants owe the plaintiff a sum of TZS 185,000,000/=. Thus, the third issue is answered in affirmative as well.

The last issue is on the reliefs to which the parties are entitled to. The first relief prayed in the plaint is for payment of Tshs. 185,000,000/=. As alluded held herein above, the defendants are in breach of the agency agreement as per Memorandum of understanding (Exhibit P1) and Power

of Attorney (Exhibit P3). Therefore, in view of section 73 of the Law of Contract, the plaintiff is entitled to compensation arising from the breach of the contract. Given the evidence of PW1, PW2 and Exhibit P4, the amount which the defendants owes the plaintiff is TZS 185,000,000/=, I grant the first prayer.

The second prayer is payment of loss of use equivalent to 30% of the TZS 185,000,000 for four years the defendants have retained and used the money. It is my considered view that this prayer is in form of general damages. The law is settled general damages is granted at the discretion of the court when the injuries suffered cannot be assessed in a monetary term. Pursuant to evidence of PW1 and PW2, it is clear that defendant have been in possession of the outstanding sum of TZS 185,000,000/= for more than four years now. In that regard, the plaintiff has been denied to use the said money and thus, entitled to general damages. However, it is my considered view that the rate of 30% prayed by the plaintiff suggests that the outstanding amount attracts commercial interest. In absence of agreement to that, I find no justification of subjecting the outstanding amount to the interest at commercial rate. That being the case and considering the circumstances of this case, I find

it just to grant general damages of TZS 10,000,000/= in favour of the plaintiff.

The third and fourth prayers are for payment of interest on decretal sum at the commercial rate of 21 % per annum from the date of institution of the suit and 12% per annum from the date of judgment to the date of full settlement respectively. Having gone through Order XX, Rule 21(1) of the CPC, I am of the view that, this Court is enjoined to award interest at the rate of 7% per annum from the date of judgment until satisfaction of the decree or such other rate not exceeding 12% agreed upon by the parties before or after the delivery of judgment. It was not deposed whether the parties agreed on the rate of interest. On the foresaid reasons, I award interest on the decretal sum, at the rate of 7% per annum from the date of judgment until satisfaction of the decree.

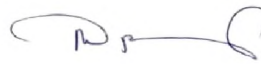
The last prayer is cost of the suit. It is settled law under section 30 of the CPC that costs follow the event and that the same is awarded at the discretion of the court. Since the plaintiff has proved its case, the defendants are condemned to pay costs of this suit.

In the final analysis, the plaintiff is entitled to the following reliefs/orders:

1. The Defendant is to pay the Plaintiff a sum of *TZS 185,000,000/= being the outstanding sum.*
2. The Defendant is to pay the Plaintiff TZS 10,000,000 as general damages.
3. The Defendant shall pay interest on the decretal sum at the court rate of 7% per annum from the date of judgment to the date of full satisfaction.
4. The defendants shall pay costs of the suit.

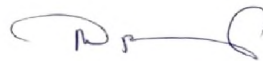
It is so ordered.

DATED at DAR ES SALAAM this 28th day of July, 2022.



S.E. Kisanya
JUDGE

COURT: Judgement delivered this 28th day of July, 2022 in the presence of Ms. Loveness Denis, learned advocate for the plaintiff and in the absence of the defendant.



S.E. Kisanya
JUDGE
28/07/2022

