IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY

AT TABORA

PC. CIVIL APPEAL NO. 25 OF 2020

(Arising from Tabora District Court Civil Appeal No. 18 of 2021 and original Civil Case No. 12 of 2020 Tabora Urban Primary Court)

MWITA CHACHA ....APPELLANT

VERSUS

BERTHA VICENT ....RESPONDENT

JUDGMENT

Date: 27/4/2022 & 1/7/2022

BAHATI SALEMA, J.:

This is the second appeal. The appellant, **Mwita Chacha Manga,** being aggrieved by the decision of the District Court in (PC) Appeal No. 25 of 2020 before Mzige SI, RM preferred this appeal against the judgment and the decree on the following grounds;

1. *Both the Primary court and the District Court erred in law and fact in deciding the case in favour of the respondent.*

2. *Both the Primary and the District Court erred in fact and law by not considering that the respondent was the first to breach the*

contract dated 30/11/2016 and required to make final payment on 31 /12/2016 but she failed herself.

3. *That both the Primary Court and the District Court erred in law and fact in believing credit of TZS 4,000,000/= which was not signed before the advocate in the sale agreement, while the amount of TZS 2,000,000/= was signed by both parties and witnessed by the advocate.*

4. *Both the Primary and District Court grossly erred in law and fact for not taking into account section 7(a) of the sale agreement which stated no amount will be added but the court added TZS 4,000,000/= which however the respondent who alleged to owe young brother of the appellant was denied.*

5. *Both the primary court and the District Court erred in law and fact in the decision by ignoring that the appellant was intending to refund to the respondent TZS 2,000,000/= before an advocate but the respondent refused to receive that amount and still had not made the final payment of TZS 22,000,000/= as an outstanding balance.*

To better appreciate what prompted the filing of this appeal, it is important to show a brief background. On 25/11/2016 the appellant Mwita Chacha went to the respondent's grocery, Bertha Vicent, for a

drink. While drinking, the appellant told the respondent that he was selling an unfinished house called "pagala". They both agreed to visit the place on 28/11/2016 so that the respondent could see the area. Upon seeing the respondent, Bertha agreed to buy the unfinished house from Mwita Chacha for the price of TZS 24,000,000/=. Since the respondent owed the appellant's brother TZS 4,000,000, the appellant agreed to pay his brother's debt upon completion of the contract. It was further agreed that the respondent would buy the unfinished house for TZS 20,000/= instead of TZS 24,000.000/= to cover the appellant brother's debt. On 30/11/2016 they went to a lawyer and signed a contract, and the respondent paid TZS 2,000,000/=, and then the respondent was required to complete the remaining balance of TZS 18,000,000/= on 31/12/2016. The respondent failed to pay the money on 31/12/2016. On 5/2/2017 both parties met at the lawyer's office. The respondent promised to pay after two days, but she failed. The appellant refunded the respondent TZS 2,000,000/= but she declined to receive it. She needed to be paid TZS 6,000,000/=, which is the dispute in this case.

When this appeal was scheduled for hearing on 27th April, 2022 both parties were present self-represented.

The appellant submitted that both courts were not right to decide in favour of the respondent in the contract, since there was no place

written that if she failed to pay the appellant, he should pay her TZS. 6,000,000/=. He stated that according to his contract, which has been admitted, it is only TZS. 2,000,000/= which has been written in the contract and a photo. In their contract, it was agreed that in the event of failure to pay the remaining, he would give back her TZS. 2,000,000/=

On the second ground of appeal, he submitted that it was the respondent who breached the said contract since she did not comply with the dates that were agreed upon.

As to the third ground of appeal, he submitted that it was only TZS 2,000,000/= that was signed before the advocate, while TZS 4,000,000/= was not signed.

On the fourth ground of appeal, he submitted that there was no contract for paying TZS. 4,000,000/= and there was no agreement that the respondent first sells the property and pay the money.

On the fifth, ground he submitted that he had decided to pay her back TZS. 2,000,000/= but she refused to accept it, He further stated that he has only TZS. 2,000,000/= to pay right now, but he cannot pay her TZS. 6,000,000/=

In her response, the respondent submitted that the court did not error as they agreed with the appellant, Mwita Chacha to pay the amount she owed his younger brother.

On the second ground, she submitted that she had not complied with the contract since the plot had been in dispute; when she went to the place, she found the appellant was already living there.

As to the third ground of appeal, there was an agreement for him to pay TZS 6,000,000, whereas TZS 4,000,000 and TZS 2,000,000, and the balance was TZS. 18,000,000/=

On the fourth ground, she submitted that the agreement is well written.

On the 5th ground, the respondent stated that she was never called to be repaid TZS. 2,000,000/= and no payment of TZS. 22,000,000/= has been made.

In his rejoinder, the appellant reiterated his submission in chief, insisting that there was nowhere agreed that he should pay her TZS. 6,000,000/= since she was the one who breached the contract.

Having carefully considered the arguments of both parties and gone through the evidence in the court record. The issue is whether the appeal has merit.

Since the grounds raised are only based on the sale agreement. I will thus combine and consider them together based on the evidence available on record to see whether the grounds are meritorious.

I am aware of one established salutary principle of law which will guide me in deciding on this second appeal. The first appellate court, therefore, has a duty to re-evaluate the entire evidence on record by reading it together, subjecting it to critical scrutiny, and, if warranted, arriving at its own conclusions of fact. This is an imperative where the trial court failed to discharge this duty, as was the case here.

This court being a second appeal, the duty of this court is explained well by the Court of Appeal in **Amratlal D. M. t/a Zanzibar Silk Stores v A. H. Jariwara t/a Zanzibar Hotel** [1980] TLR 31**, and Neli Manase Foya v Damian Mlinga [2005] TLR 167** cited in **Martin Kikombe v. Emmanuel Kunyumba,** Civil Appeal No. 201 of 2017(Unreported). In **Neli Manase Foya (Supra),** the Court had the following to say:

> *"...It has often been stated that a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such a finding of fact."*

The case of **Michael Y. Simkoko versus Elia Robson Myala, PC Civil Appeal No. 31/2019 at Mbeya** (unreported) is cited thus:

> *"The law has been settled to the effect that an appellate court cannot interfere with the assessment of the evidence of the trial court unless there are compelling reasons to do so. These are such as where there are* ***serious misdirections, none-directions (sic), misapprehensions, or miscarriages of justice."***

Guided by the above, I would have expected the first appellate court to have painstakingly carried out this duty in the determination of the appellant's appeal. Unfortunately, it did not do so. With all due respect, it fell into the same error as the trial court.

Beginning with the first ground of appeal that the primary and the district court erred in fact and law by not considering that the respondent was the first to breach the contract dated 30/11/2016 and required to make final payment on 31 /12/2016 but she failed herself.

Having perused through the record, in this case, there is no dispute that there was a sale agreement between the appellant and the respondent. The agreement between them was that the appellant would sell the unfinished house and the respondent would buy it for TZS 20,000,000/=. They signed a contract and the respondent paid TZS 2,000,000/= on the same day. The remaining balance was TZS

18,000,000/= which was supposed to be paid by 31/12/2016. However, the respondent failed to discharge her obligation as agreed. The Court of Appeal ruled in **Millen Richard vs. Ayub Bakari Hoza,** [1992] TLR 385-388, that;

> *"Failure to pay the balance within a reasonable time constitutes a breach."*

It was submitted by both parties that they entered into the sale agreement, which was tendered and admitted as Exhibit "A" before the court of law. Section 10 of the Law of Contract Act, Cap. 345 [R.E. 2019] defines what agreements can be legally termed as:

> *"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void."*

After traversing through the court records, I noted that the respondent entered into the contract to purchase the unfinished building from the appellant, as proved by the sale agreement on 30/11/2016 tendered in the trial court. The evidence of both parties that Bertha Vicent proved that the agreement was made before Noel Kombe advocate. For ease of reference, I find it prudent to reproduce it verbatim;

MKATABA WA MAUZO YA KIWANJA

2. *Kwamba fedha ya mauzo italipwa kwa Muuzaji kwa awamu mbili yaani;-*

3. *Kwamba shillingi za kitanzania milioni mbili tu TZS 2,000,000/ mara baada ya pande zote mbili kusaini mkataba huu*

4. *Kwamba mnunuzi atatoa kiasi cha shilingi milioni nne ambazo zitatumika kulipa deni ambalo mnunuzi anamdai NICORAUSI CHACHA MANAGA ambaye ni mdogo wake*

5. *Kwamba shilingi milioni kumi na nane (TZS 18,000,000/=) zitalipwa tarehe 31/12/2016 au kabla ya kipindi hicho iwapo mnunuzi atapata fedha kabla ya kipindi hicho iwapo mnunuzi atapata fedha kabla ya kipindi hicho."*

In that sense, both parties willingly agreed to enter into that contract. The Law of Contract Act, Cap. 345 [R.E. 2019], provides in section 37 (1) that;

> *"For it is the duty of the parties to the contract to perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or any other law."*

The said promises are found in the terms specified in the said contract or are implied by the nature of it or by law. It is a cardinal principle of the law of contract that parties are bound by the agreements they freely enter into. Further, it is settled law that there should be the sanctity of contract. In the case of **Abualy Alibhai Azizi v. Bhatia Brothers Ltd** [2000] T.L.R 288, it was held that:

> *"The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) of misrepresentation, and no principle of a public policy prohibiting enforcement."*

Similarly, in the case of In **Millen Richard Vs. Ayub Bakari Hoza, [1992] TLR 385–388,** the Court of Appeal held that;

> *"Failure to pay the balance within reasonable time constitutes a breach."*

Therefore, in the present case, the evidence available in the record shows the condition in the said sale agreement was for the respondent to pay the said money before 31/12/2016. However, until that agreed time, a total of TZS 18,000,000/= was not paid. The respondent failed to meet the conditions as agreed in the said contract.

It is my considered view that the respondent never adhered to the agreed contract.

I have thoroughly re-visited the sale agreement, which was agreed upon and signed by both parties. The sale agreement stipulates clearly that; *Kwamba iwapo mnunuzi atashindwa kulipa kiasi cha fedha kilichobaki ya milioni kumi na nane tu (TZS 18,000,000/=) mpaka kufikia tarehe 31/12/2016, mnunuzi atakuwa amevunja mkataba na hivyo muuzaji anaweza kuchukua eneo lililouzwa baada ya kumrudishia mnunuzi shilingi za kitanzania milioni mbili tu.TZS 2,000,000/=*

In such circumstances, reading between the lines, I find justification for interfering with the concurrent findings of fact by the two courts below since there was violation of some principle of law or procedure which has occasioned a miscarriage of justice. I respectfully differ with both the trial court and the appellate court since there was a valid sale agreement. Consequently, having perused through the records of the sale agreement, the second clause, which reads *"Kwamba mnunuzi atatoa kiasi cha shilingi milioni nne tu (TZS 4,000,000/=) ambazo zitatumika kulipa deni ambalo mnunuzi anamdai*

Nicorausi Chacha Managa ambaye ni mdogo wake muuzaji" was upon fulfillment of such agreement.

It is quite clear, guided by the said provision and the case law, that there was a contract. However, the respondent failed to perform as agreed. I am of the view that since she failed to perform her promise, she has breached the said contract, and she would only be paid TZS 2,000,000/= and if she still insists on payment, the remaining TZS 4,000,000/= she would file a case against Nicolaus Mananga.

For the above-discussed reasons, I find that the appeal has merit and I allow it. The decision of the lower courts is hereby quashed and the order made therefrom set aside. Under the circumstances of this case, each party has to take care of its own costs.

Order accordingly.

A. BAHATI SALEMA

JUDGE

01/07/2022

Date: 01/07/2022

Coram: Hon. G. P. Ngaeje, Ag DR

Appellant: Present

Respondent: Present.

B/C Grace Mkemwa, RMA

Court: Judgment delivered in presence of both the appellant and respondent in the open court.

G.P.NGAEJE

Ag. DEPUTY REGISTRAR

01/07/2022

Court: Right of appeal fully explained.

G.P.NGAEJE

Ag. DEPUTY REGISTRAR

01/07/2022