

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**CIVIL CASE NO. 5 OF 2019**

**EMANUEL KAMUNGA ..... PLAINTIFF**

**VERSUS**

**HERITAGE FINANCING LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MANGWEMBE 2011 CO. LIMITED .....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

07/12/2021 & 16/02/2022

**KAMUZORA J,**

The Plaintiff herein sued the Defendants jointly and severally for payment of Tshs 222,995,300/= (two hundred twenty-two million nine hundred ninety-five thousand, three hundred shillings) being specific damaged incurred by the Plaintiff due to the Defendant's breach of contract resulting from the failure to hand over an immovable property which was sold by the Defendants to the Plaintiff in a public auction. The Plaintiff also claims for general damages which are to be assessed by the court, interest and costs of the suit.

The brief background of the suit as depicted from the pleadings and evidence on record is that, on 31<sup>st</sup> day of March 2017 the 2<sup>nd</sup> Defendant while acting under the instruction of the 1<sup>st</sup> Defendant conducted a public auction to which the Plaintiff emerged the highest bidder and purchased a residential house built on a land measuring 32 meters in length and 22 meters in width situated at Oltulelei Street, Ilboru Ward in Arusha city for a price of Tshs. 49,000,000/= . The Plaintiff paid the full purchase price on the same date.

On 05<sup>th</sup> April 2017 the 2<sup>nd</sup> Defendant verbally undertook to physically handover to Plaintiff the auctioned property. On the same day the 2<sup>nd</sup> Defendant did issue the Plaintiff with a certificate of sale and promised to conduct an official handover of the property sold. It was alleged that, the Plaintiff after receiving the said certificate of sale from the 2<sup>nd</sup> Defendant did enter a joint venture agreement with one Ms. Temitayo Faulkner for the establishment and management of a tourist lodge. Under that agreement, the Plaintiff was obligated to provide the house he bought in consideration of an annual financial return for a term of 5 years at the tune of US\$ 73,940= equivalent to Tshs 165,995,300/= payable at the end of each year at an increased scale. It was also alleged that, in executing the joint venture agreement, the

Plaintiff received from Temitayo Faulkner the payment of Tshs. 8,000,000 as part of the condition in the joint venture agreement.

The Plaintiff claim that, despite various demands from the Plaintiff, the Defendants failed to physically handover the property to the Plaintiff hence preferred this case against the two Defendants. The summonses were issue to both the Defendants but only the 1<sup>st</sup> Defendant appeared and filed a defence and the suit proceeded ex- parte against the 2<sup>nd</sup> Defendant.

During hearing of the suit, the Plaintiff was represented by Mr. Andrew Mosses Maganga leaned advocate and paraded a total of four witnesses to prove the case. The 1<sup>st</sup> Defendant enjoyed the legal service of Mr. Moses Mahuna, learned advocate and presented a total of two witnesses for defence case. Two issues were proposed and agreed by the parties as follows: -

- 1) Whether the Defendants failed to handover the auctioned immovable property to the Plaintiff.*
- 2) If the 1<sup>st</sup> issue is answered in affirmative, what reliefs are the parties entitled to.*

Starting with the first issue on whether the Defendants failed to handover the auctioned property to the Plaintiff, it is the Plaintiffs claim

through the evidence of PW1, Emmanuel Kamunga Mollel @ Emmanuel Kamunga that, upon reading the news paper and hearing advertisement from the moving vehicle he became aware that the Defendants were conducting a public auction on 31/03/2017. That, on the material date PW1 attended the auction and emerged to be the highest bidder of the auctioned property at the price of Tshs 49,000,000/=. That, pursuant to exhibit PE1 (receipts) he paid the full purchase price of the immovable property to the 1<sup>st</sup> Defendant on the same date.

PW1 further testified that, he was informed by the Defendants that the physical hand over of the purchased property will be done on 05/04/2017 and on that material date he went to the office of the 2<sup>nd</sup> Defendant where they executed a hand over certificate as well as a sale agreement which indicated that the Plaintiff successful purchased a house through an auction. The certificate of sale was tendered and admitted in court as Exhibit PE2.

PW1 went on to state that, the Defendants in two different occasions tried to handover the auctioned property to the Plaintiff in vain as on the 1<sup>st</sup> occasion the watchman was instructed not to let anyone in the premise and on the second occasion the village leaders were not there hence the handover could not be done.

PW2 Wilbert Olais Lekasio and PW3 Justine Loyi Lukumai the hamlet chairman and the ten cell leaders of Oltulelei Hamlet supported the fact that they did not participate in any event of physical handover of the immovable property auctioned to the Plaintiff by the Defendants. To them, the procedure required their full participation in the handover of the auctioned property to the buyer.

The 1<sup>st</sup> Defendant in his defence disputed the Plaintiffs. DW1 Watson Godfrey Mbesigwe the general Manager of the 1<sup>st</sup> Defendant testified that, pursuant to exhibit DE1 (the handover certificate), the 2<sup>nd</sup> Defendant on 05/04/2017 did make a physical handover of the auctioned property to the Plaintiff. Being the general manager, DW1 claimed to have received a report on the handover. On being cross examined DW1 testified that he was not informed if the house keys and the purchase documents of the previous owner were handled to the Plaintiff.

DW2 John Greyson Mshana is the company Director of the 2<sup>nd</sup> Defendant but testified for the 1<sup>st</sup> Defendant's case. He acknowledged the fact the Plaintiff purchased property through auction and was issued with the certificate of sale by the 2<sup>nd</sup> Defendant. He testified that the Plaintiff was supposed to submit the certificate of sale to the 1<sup>st</sup>

Defendant so that the Plaintiff be issued with documents in respect of the house he had purchased. DW2 testified further that, the house was handed over to the Plaintiff on the same date in the presence of the Plaintiff's witness by the name of Abel Mollel.

Basing on the above facts it is undisputed fact that the Defendants conducted a public auction of the house situated at Elikurei here in Arusha and the Plaintiff emerged as the highest bidder. It is with no dispute that two receipts were issued to the Plaintiff acknowledging receipt of the full purchase amount and a certificate of sale was also issued evidencing that the Plaintiff was a successful buyer of the auctioned property. The Plaintiff also admits signing the handover certificate (exhibit DE1) evidencing that the property was handed over to him but deny being physically handled with the purchased property.

Now the question is whether the Plaintiff was handled with the purchased property. In order to know if the Plaintiff was handled with the property, it is imperative to know what handover entails. In my view, handing over entails giving control or possession of something to another person. Handing over is also associated with delivering, relinquish or surrender something to another person.

With that in mind, signing handover document in itself cannot prove handover. In my view, handover document is a proof that there was handover, but physical handover proves the existence of control over property handled. In the present matter there is proof of signing the handover document but no proof physical handover. The evidence by PW1 was also supported by PW2 and PW3 who are leaders to where the property is question is located. They did not evidence the handover of the purchased property. The defence side insisted that the Plaintiff was physically handled over with the auctioned immovable property, but no evidence of the physical handover was brought to court. As the Plaintiff discharged his burden of proving that no physical handover was conducted by the Defendants, the evidential burden to prove that there was physical handover shift to the Defendant.

It is the firm stand of this court and the requirement of the law that, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. In this, I refer the provision of section 110 and 111 of the Evidence Act Cap 6 R.E 2019 and the case of **Anthony M. Masanga vs. Penina (Mama Ngesi) and another, Civil Appeal No. 118 of 2014** (unreported), which also cited with approval the case

of **In Re B [2008] UKHL 35**, where Lord Hoffman in defining the term balance of probabilities states that: -

*"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates in a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened if he does discharge it, a value of 1 is returned to and the fact is treated as having happened."*

Similarly in the case of **Barelia Karangirangi Vs Asteria Nyalwambwa, Civil Appeal No 237/2017** (Unreported) CAT at Mwanza held 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."*

Looking at the defence evidence, there is no clear evidence showing or indicating that the physical handover was done and if done by who and when. DW2 in his evidence stated that, he was present during the physical handover of the property conducted on 05/04/2017 but it is unfortunate that, the handover document (exhibit



DE1) does not state if he was present. It is unfortunate that the witnesses mentioned in the handover document Jackline Mushi and Angle Shuma were not called in court to verify the mode of handover between the parties.

DW1 acknowledges that the procedure required the 2<sup>nd</sup> Defendant to effect the physical handover of the property to the Plaintiff before signing of the handover document. But the facts in this case are different as the handover documents were issued to the Plaintiff prior to the physical handover of the auctioned property. DW1 admitted having never witnessed the said handover but he was only informed through the handover report. He also admitted that he was not informed if the house keys were handed to the Plaintiff. DW1 suggested that since the Plaintiff is the owner of the house, he is responsible to engage people to evict those in occupation of the house.

Looking on the evidence, the handover document was a mere procedure to which does not prove the physical handover. After the Defendant had made the Plaintiff to sign the handover documents, they did not bother to ensure full control of the house by the Plaintiff by evicting whoever was occupying the house and handover the house to the Plaintiff. This court cannot anticipate that apart from signing the

handover document the 1<sup>st</sup> Defendant or his agent (the 2<sup>nd</sup> Defendant) proceeded on with the physical handover. The Defendants were actually duty bound to prove that they did physically handle over the auctioned property to the Plaintiff. To my view, the 1<sup>st</sup> Defendant has failed to discharge that burden.

I believe that, if the physical handover was conducted, the Plaintiff could have taken control of the property and no claim against the Defendant could arouse. As the Defendants assumed handover through the document signed in the office, the Plaintiff was unable to take control of the purchased property.

Again, there is no proof that after the handover, the Plaintiff was availed with the purchase documents evidencing ownership of the mortgaged property that were kept as security to the 1<sup>st</sup> Defendant by the original owner one Wilfred Justine Mollé. While DW2 claim that the he was informed by the Plaintiff that the 1<sup>st</sup> Defendant gave him the purchase documents, DW1, an officer of the 1<sup>st</sup> Defendant did not confirm that fact. When he was cross examined DW1 testified that, he was not aware if the Plaintiff was issued with the purchase document that was used as security for loan by the original owner of the house. He alleged that the documents were brought to court but no records

showing that the purchase documents were tendered as evidence in this case. This proves the incomplete procedures of ensuring full control of the property by the Plaintiff.

In final analysis, it is my settled view that the Defendants did not accomplish their duties associated with the auction thus leading to ensuring full possession of the purchased property by a successful buyer. The Defendant acted fraudulent by making the Plaintiff to sign handover documents without physical handing over the purchased property. The first issue is therefore answered in affirmative that the Defendants failed to hand over the immovable property auctioned to the Plaintiff.

This takes me to the second issue as to what reliefs are the parties entitled to. It is in record and undisputed by the Defendants that the Plaintiff upon emerging the highest bidder in public auction conducted by the Defendant, the Plaintiff paid in full the bid price of Tshs. 49,000,000/= . This is also evidenced by the payment receipts (exhibit PE1) and certificate of sale (exhibit PE2). The Defendants were duty bound to hand over the purchased property to the Plaintiff but failed to do so.

The PW1 testified that, as a result of failure to hand over the property, the Plaintiff suffered loss of Tshs. 49,000,000/= paid as bid price and the amount of Tshs.222,995,300/= as specific damage for what was expected to be earned from the tourist lodge business to be conducted in the purchased house. PW1 further testified that, in a belief that he successfully purchased the auctioned house, he executed a five-year joint venture agreement (exhibit PE3) which amongst other things required him to give the purchased property to be used in operation of a tourist lodge. That, in consideration of giving a house, the Plaintiff was entitled to be paid USD 78,940 for five years. That, in execution of the joint venture agreement, the Plaintiff received the initial payments to the tune of Tshs. 8,000,000/= as security deposit in respect of the operation of the joint venture. PW1 further testified that, as the Defendant could not hand over the house, the joint venture partner requested for refund of the security amount deposited with the Plaintiff. That, the Plaintiff was forced to return such amount, but his credibility was damaged as he could not be trusted among the diasporas who intended to invest with him here in Tanzania.

Basing on the Plaintiff evidence it is my reasoning that, through a certificate for sale issued to the Plaintiff, the Plaintiff had in one way or

another believed to be lawful owner of the auctioned property and that is why he executed a joint venture. The evidence of PW4 one John Kasenganya, advocate for one Temitayo Faulkner (a part to the joint venture) reveal that, after the Plaintiff and his client entered in to a joint venture he was instructed to make a follow up to the Plaintiff so that he could handover the house for joint venture business but the same could not be done as the Plaintiff himself was not handled over the house by the Defendants. Upon such failure, PW4 was instructed by Temitayo Faulkner to claim for the refund of the money (Tshs. 8,000,000/=) deposited to the Plaintiff as a security pursuant to the conditions of the joint venture.

From that evidence, I am convinced to believe that the Defendants' conduct of not handling over the purchased immovable property to the Plaintiff has occasioned to the financial loss on the part of the Plaintiff. DW1 in his evidence admitted that through a letter issued by the Plaintiff, the 1<sup>st</sup> Defendant was duly informed on the complaint for failure to handle over the property and on the financial loss incurred by the Plaintiff for their failure to handle over the house to the Plaintiff. However, the Defendants did not bother to clear the complaint to remedy the situation.

In my view, had it been that the Defendant handled the property on time, the Plaintiff's joint venture agreement could have taken place and the Plaintiff could have enjoyed from the benefit of the terms of the joint venture. But, as the Defendant did not handover the property on time, the Plaintiff lost the opportunity which was already tabled to him. Thus, the Defendants are jointly liable for the loss suffered by the Plaintiff.

In the upshot, this court is satisfied that the Plaintiff was able to prove his case of balance of probabilities as required by the law. The judgment is therefore entered in favour of the Plaintiff. The Plaintiff is entitled to the payment of the specific damage to the tune of Tshs. 49,000,000/= being the amount paid for the auctioned property, Tshs. 173,995,300/= being the money he would earn in the event the joint venture would operate and this include Tshs.165,999,300/= and Tshs 8,000,000/= that the Plaintiff refunded to the joint venture partner after the joint venture failed to take off. This court also award general damage at the tune of Tshs. 10,000,000 for the anguish and distorted credibility the Plaintiff suffered. The Defendants shall also pay 7% interest on the decretal sum from the date of judgment to its satisfaction in full and costs of the suit.

**DATED** at **ARUSHA** this 16<sup>th</sup> Day of February 2022



A handwritten signature in blue ink, appearing to read "D.C. Kamuzora".

D.C. KAMUZORA,

JUDGE.

