

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

LAND CASE NO. 11 OF 2019

M/S. TOURISM PROMOTION

SERVICES (TANZANIA) LIMITED..... PLAINTIFF

VERSUS

M/S GREEN APPARTMENTS LIMITED DEFENDANT

JUDGMENT

10/12/2021 & 21/02/2022

KAMUZORA, J.

The Plaintiff's claims against the Defendant are based on the specific performance arising out of a sale agreement for the Defendant failure to deliver to the Plaintiff a title over a land measuring 3.24 acres being part of the Farm No. 98/2/1 at Tengeru Area comprised in a certificate of Tittle No 24111. The Plaintiff also claims against the Defendant for the procurement of a letter from Meru District Council undertaking to pay compensation over a piece of land measuring 0.4 acres to the Plaintiff following the compulsory acquisition of the said parcel of land by the Government for road expansion. The Plaintiff also claims for payment of general damages for the breach of land sale

agreement as may be assessed by the court, cost of the suit and any other relief as may be assessed by the court.

In their written statement of defence, the Defendant disputes the Plaintiff's claim stating that it has already carried out survey of the parcel land and the certificate of title thereto is pending re-parcellation of the land comprised in certificate of Title Number 24111. That, the undertaking to secure a letter from the Meru district council is subject to the approval of the re-parcellation of the land. The Defendant claim that the Plaintiff has no cause of action for specific performance against the Defendant as the subject matter of the sale agreement does not exist.

Briefly, the Plaintiff entered into a contract with the Defendant to purchase a piece of land measuring 3.24 acres which is part of the farm No. 98/2/1 which is held under a certificate of title No. 24111 situated at Tengeru within Meru District. There was government road project intending to expand the road bay taking and compensating owners of the land. Part of the purchased land was in the area intended to be compensated for road expansion project. Pursuant to the sale agreement, the Defendant was supposed within 30 days to inform Meru District council that the compensation ought to be paid to the Plaintiff. They also agreed for the Defendant to carry on survey with its own cost

to enable the issuance of a title deed of the purchased piece of land in the name of the Plaintiff. It was alleged that the Defendant failed to comply to the terms of agreement hence the Plaintiff opted to file a suit to this court claiming for a specific performance of the contract by the Defendant. In their defence evidence, the Defendant claimed that they were unable to comply to the terms of the sale agreement as there is a pending case before the court of law over the same land. That was however not pleaded in the written statement of defence.

Considering the above facts, the following issues were agreed and framed for determination.

- 1. Whether there was a sale agreement between the parties herein with respect to the suit land.*
- 2. If issue one is answered in affirmative, whether the Defendant breached terms of the said agreement.*
- 3. To what reliefs parties are entitled to.*

During the hearing of the suit and on the request of the parties, this court was aided by three assessors by the names of; Mathayo Kisioki Mollel, Agness Mollel and Elisifa Simon Mollel. Upon visiting the High Court Registries (Amendment) Rules 2005, GN. No. 364 of 2005 we discovered that the court needed to be aided by two assessors. We

however did not find any prejudice caused to any party to the case for the appearance of three assessors in the proceedings.

As a matter of legal representation, the Plaintiff enjoyed the service of Mr. Gwakisa Sambo, learned advocate while the Defendant enjoyed the service of Mr. Emmanuel Kinabo, learned advocate. At the closure of the defence case both parties with the leave of this court filled their closing submissions which will be considered in this judgment.

In his closing submission, the counsel for the Plaintiff reframed the issues differently from what was proposed and agreed by the parties when the matter came for final pre-trial conference. For purposes of consistence, we will deliberate on this suit based on the issues that were proposed and agreed by the parties during final pre-trial conference as already listed above.

On the first issue on whether there was a sale agreement between the parties, PW1 Godfrey Wafina Mikisi testified that on 26/08/2013 the Plaintiff and the Defendant entered into a contract to buy a piece of land measuring 3.2 acres which is part of farm No. 98/2/1 which is held under a certificate of title No. 24111 situated at Tengeru within Meru District. The sale agreement was admitted as exhibit PE 2.

On the defence side DW2 Harold Jacob Mushi who is the director of the Defendant testified that in year 2013 the Defendant and the Plaintiff entered into a sale and exchanged a parcel of land to which the Defendant. He however claimed that the parcel of land sold to the Defendant was in the name of Arusha Duluti Limited in which Green Apartment had entered into agreement to buy the said land from Arusha Duluti Limited. DW1 Joseph Abel Rwakeza also acknowledged that he was aware of the sale agreement entered between the parties.

From the evidence in records the first issue is answered in affirmative that the parties entered into a sale agreement over the suit land measuring 3.24 acres being part of Farm No 98/2/1 situated at Tengeru area within the Meru District comprised in Certificate of Tittle No 24111. It is also clear from the evidence and exhibit PE2 that the selling price of the land was United States Dollars One Hundred Sixty-Two Thousand (USD162,000).

The second issue is whether the Defendant breached the terms of the said agreement. The Plaintiff claims that the Defendant breached the terms of the said agreement specifically Article 4 of the agreement (exhibit PE2). The evidence of PW1 Godfrey Wafina Mikisi reveals that under Article 4.1.1 at page 5 the agreement the vendor was supposed

within 30 days to inform Meru District that compensation be paid to the Purchaser for the part of land to be included in the road reserve measuring 0.4 acre. That, Article 4.1.2 of the contract required the vendor to conduct survey of the piece of land at his own costs to enable the issuance of title deed of that piece of land. That, the title was to be issued in the name of the buyer Tourism Promotion Services Tanzania Ltd.

PW1 testified further that, as per the contract of sale Green Apartment failed to comply three conditions stipulated in the sale agreement which are: -

- 1) To issue formal undertaking from Meru District to show that in case compensation is issued for the road reserve, the same be paid to the owner who is Tourism Promotion Services.
- 2) To conduct survey at his own cost for the piece of land.
- 3) To issue certificate of title of that piece of land in the name of buyer who is Tourism Promotion Services Tanzania Ltd.

That, the above conditions were to be complied within one month from the date of signing the contract.

PW1 testified further that, the consideration amount was paid by the Plaintiff on 04/10/2013 and the contract indicated that the buyer

was to retain USD 20,000 until when the vendor will produce the documents agreed in the contract which are, formal undertaking from Meru District and title deed in the name of the buyer. PW1 added that the Plaintiff is ready to pay that amount if the vendor is ready to comply to the terms of the contract.

On the defence the evidence, DW1 and DW2 did not dispute to the fact that the consideration amount was paid by the Plaintiff. PW2 however testified that the parcel of land sold to the Plaintiff is in the name of Arusha Duluti Ltd in which the Defendant had entered into agreement to buy the said land from Arusha Duluti Limited and that the Defendant had failed to issue a title to the Plaintiff because of the pending case No. 3 of 2018 concerning the same land.

Reading through the Defendants written statement of defence at paragraph 6, the Defendant stated that it has already conducted a survey of the parcel land and that the certificate of title thereto is pending re-parcellation of the land comprised in the certificate of Title No 24111. It also reveals that the undertaking to secure a letter from the Meru District council is subject to approval of the latter.

From the evidence in record, the Defendant does not dispute any terms of the agreement. The written statement of defence does not

indicate that the Defendant was unable to comply to the terms of the agreement merely because the title was in the name of another owner by the name of Arusha Duluti Limited or that, there was a pending case over the same piece of land. I find that evidence not supporting the pleadings filed by the Defendant thus an afterthought. In their defence no exhibit was tendered to justify the claim that there existed any pending issue with the Defendant or any pending case that could vitiated the performance of the terms of the sale agreement. No pleadings for alleged case No. 3 of 2018 was attached to prove the existence of that case and even if that case existed, it cannot invalidate the sale agreement entered on 2013. By the time the sale agreement was executed, the plaintiff was assured that the property was free of encumbrances.

The sale agreement between the parties (Exhibit PE2) does not indicate if the title was not in the possession of the vendor. Under Article 5.1.1 of exhibit PE2 the Defendant warranted to the Plaintiff to have good marketable title to the property and that the property was not subject to any mortgage, charge, lien, lease or other encumbrance of any nature whatsoever. With those wordings in the agreement, the Defendant assured the Plaintiff that he had a better title in respect of

the suit land thus, cannot claim that the title was under another person without even justifying the same.

The Defendant was therefore responsible to honour the terms of their contract. That is the principle of sanctity of contract. It was held in the case of **Abualy Alibhai Azizi v. Bhatia Brothers Ltd [2000] T.L.R** 288 at page 289 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) or misrepresentation, and no principle of public policy prohibiting enforcement."

We also take cognizance of the authorities cited by the counsel for the Plaintiff in his closing submission. In the case cited by the counsel for the Plaintiff in his submission, the case of **Lulu Victor Kayombo v. Oceanic Bay Limited and another, Civil Appeal No 22 & 155 of 2020** the court emphasised on the duty of parties to honour the terms of their contract and duty of the court to enforce the parties' agreement. Again, in the case of **Simon Kichele Chacha Vs Aveline M. Kilawe, Civil Appeal, No. 160 of 2018** the Court of Appeal referred the principle of sanctity of contract and insisted that the cardinal principle of law of contract is that parties are bound by their agreement freely entered.

In this matter, the Defendant has not alleged any misrepresentation or fraud. We therefore agree with the counsel for the Plaintiff that the agreement was entered by the parties on their own free will thus bound by the terms of the sale agreement. Under Article 4 of the sale agreement, the vendor had obligations to fulfil including but not limited to obtaining a written undertaking from Meru District Counsel to the effect that the compensation be payable to the purchaser (Plaintiff), carry out survey as well as obtaining a separate certificate of title in the name of the Plaintiff but at the Defendant's costs and vacant possession of the said land. It is clear that the Defendant failed to comply with such obligation with no good reason. Thus, it is our settled mind that the Defendant breached the terms of the agreement.

Regarding the third issue as to what reliefs are the parties entitled to, it is our settled mind that the Plaintiff who has legal burden to prove her claim as per the case of **Barelia Karangi Rangi v Asteria Nyalwambwa, Civil Appeal No 237/2017** CAT at Mwanza (Unreported), was able to prove the case on the required standard in civil cases. We therefore enter judgment in favour of the Plaintiff.

It was contended by the counsel for the Defendant in his closing submission that the Plaintiff seeks for an order against the person that

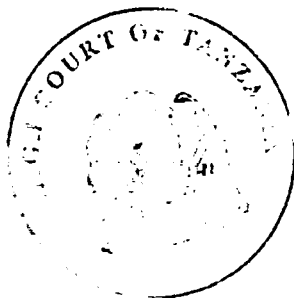
does not have the authority or capacity to perform the specific act in question. To him, the authority to survey the land in dispute and issue a title is mandated to the Commissioner for Land thus, an order for specific performance by the Defendant would be inappropriate. On the claim for procurement of the undertaking from Meru District Counsel, the counsel for the Defendant submitted that, the authority to issue such undertaking is vested on the Meru District Council and not the Defendant. That an order for specific performance is equally inappropriate.


We do not agree with the submission by the counsel for the Defendant because, the prayer by the Plaintiff is not for the Defendant to survey and issued title in respect of suit land or issue the undertaking. The prayers are very clear for the Defendant to cause the land to be survey and the title be issued by the respective authorities, Commissioner for Land. Likewise, as regard to the undertaking, the prayer is to cause the undertaking to be issued by the respective authority, Meru District Council. Thus, the terms of the contract required the Defendant to initiate the process and make follow up to ensure that the relevant documents are issued by the relevant authorities.

This court therefore is satisfied that the plaintiff was able to prove his claim on the required standards in civil suit. We thus enter Judgment in favour of the plaintiff and orders for specific performance of the sale agreement as follows: -

1. The Defendant is ordered to cause the land measuring 3.24 acres being part of Farm No 98/2/1 situated in Tengeru Area within Meru District comprised in Certificate of Tittle No 24111, to be surveyed and the tittle be issued in the name of the Plaintiff.
2. The Defendant is ordered to procure a letter from Meru District council undertaking to pay compensation to the Plaintiff in respect of parcel of land measuring 0.4 acres within farm No. 98/2/1 situated at Tengeru.
3. The Defendant is ordered to pay to the Plaintiff the sum of Tanzania Shillings Two Million (Tshs 2,000,000/=) being general damaged for the Defendant's act of breach of sale agreement.
4. The costs of the suit be borne by the Defendant.

DATED at ARUSHA this 21st day of February 2022.




D.C. KAMUZORA
JUDGE