

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 189 OF 2021

PRIMI ALOYCE MUSHI.....PLAINTIFF

VERSUS

**ASHURA HUSSEIN MWASA (As former Administratrix of the
estate of the late HUSSEIN OMARY MWASA.....1ST DEFENDANT**

**SAKINA M. HUSSEIN (As Administratrix of the
estate of the late HUSSEIN OMARY MWASA2ND DEFENDANT**

JUDGMENT

Date of last Order: 16th June, 2023.

Date of Judgment: 30th June, 2023.

E.E. KAKOLAKI, J.

The plaintiff herein by way of plaint which was later on amended and filed in Court on 05/04/2022, is suing the 1st and 2nd defendants claiming for payment of Tanzanian Shillings Seven Hundred and Eighty Five Million (785,000,000/=) for breach of sale agreement of the house property situated on Plot No. 27, Block '20', Kipata/Nyamwezi Street, Kariakoo in Dar es salaam. He is therefore praying for judgment and decree for payment of Tanzanian Shillings Six Hundred Eighty Six Million and Seven Hundred Thousand (686,700,000/=) being the money paid to the defendants and all other beneficiaries of the late Hussein Omary Mwasa as consideration for the

sale house property situated on Plot No. 27, Block '20', Kipata/Nyamwezi Street, Kariakoo in Dar es salaam, interest on the claimed money at commercial rate from the date of judgment to the date of full payment, general damages at the tune of Tshs. 200,000,000/=, cost of the suit and any other reliefs this Court deem fit and just to grant.

The facts of the case are simple to tell. On the 21st day of March, 2019, the plaintiff executed a sale agreement with the 1st defendant for purchase of house situated on Plot No. 27, Block '20', Kipata/Nyawezi street, Kariakoo within Dar es salaam region, for consideration of Tanzanian Shillings One Billion and Five Hundred million (Tshs. 1,500,000/=) only to be paid in two instalments. It is averred that, the terms of agreement were to the effect that, Tshs. 500,000,000/- was to be paid as advance payment as the remaining balance would be paid in two (2) months' time, upon the 1st defendant handing to the plaintiff the original certificate of title which was not in her possession at the time of executing the contract as its follow up was to be made at the Ministry for Lands. It is the plaintiff's further contention that, he executed the terms of agreement on his part by effecting advance payment of Tshs. 500,000/= to the 1st defendant through her two different accounts run under NMB Bank and Azania Commercial Bank and

additional amount through other beneficiaries of the estate of the late Hussein Omary Mwasa, but it turned out that, the said certificate of title was not secured and handed to him within the agreed time of two months, despite of his several follow ups as he later on upon conducting search at the Ministry for Lands established that, the said plot did not belong to the defendants rather the ownership was on Hussein Ibrahim Sadik. Believing that the sale agreement was breached by the defendant, the plaintiff made effortless to recover his money despite of several demands hence the present suit.

When served with the plaint in their joint amended Written Statement of Defence, while the 1st defendant admitting to have received Tshs. 505,000,000/= in her two different bank accounts, both defendants denied to have spent the whole amount as Tshs. 200,000,000/= was given back to the plaintiff as facilitation fee as he took responsibility of processing and securing the original certificate of title, hence there was no breach of contract on their part as it is the plaintiff who breached it for failure to secure the said certificate of title timely and discharge his obligation of effecting payment of the outstanding balance of Tanzanian Shillings One Billion (Tshs. 1,000,000,000/=). Further to that, the 2nd defendant raised a counter claim that, after advance payment possession of the said house was immediately

put into hand of the plaintiff who unlawfully collected rent of Tshs. 120,000,000/= from tenants in the house in dispute for a period of ten (10) months from 21st March, 2019 to 10th January, 2020, thus as the current administratrix of estate of the late Hussein Omary Mwasa is claiming back the said money from the plaintiff. Further to that, 2nd defendant claimed for general damages to the tune of Tanzanian Shillings Sixty Million (Tshs. 60,000,000/=), cost of the suit (counter claim) and any other reliefs grantable by the Court.

In response to the counter claim the plaintiff disclaimed the claims by the 2nd defendant stating that, they are referring her personal knowledge and information which he called her to strict proof of the same. He insisted on his compliance with the terms of agreement in the main suit in which a total amount of Tanzanian Shillings Six Hundred Eighty Six Million and Seven Hundred Thousand (686,700,000/=) was paid to the 1st defendant and other beneficiaries of the late Hussein Omary Mwasa on demand/request by the defendants for their own consumption, which was never paid back to him, hence prayed for dismissal of all prayers in the counter claim with costs.

Before hearing could start the Court with assistance of both parties framed four issues for determination in this matter. The same go thus:

1. Whether there was breach of contract by the Plaintiff against the defendant and/or vice versa?
2. Who breached the contract between the parties?
3. What loss occasioned to the injured party?
4. What reliefs are the parties entitled to?

During the trial the plaintiff paraded in court two witnesses, the plaintiff himself as PW1 and Francis Makota (PW2) the advocate who witnessed their sale agreement and relied on four (4) documentary exhibits. These are sale agreement titled " Mkataba wa Mauziano ya Nyumba "between Ashura Hussein Mwasa (as administratrix of the Estate of the late Hussein Omary Mwasa and Primi Aloyce Mushi dated 21/03/2019 admitted as exhibit PE1 and Tshs. 46,000,000/= cash deposit slip of 22/03/2019 in Account No. 10400571967 in the names of Ashura Hussein Mwasa (Akiba Commercial Bank), Bank Fund transfer fo Tshs. 230,000,000/= effected on 21/03/2019 from Account No. 10400541618 in the name of Primi Aloyce Mushi to Account No. 10400571967 in the name of Ashura Hussein Mwasa maintained by Akiba Commercial Bank, Funds transfer slip dated 15/04/2019 and to the same accounts of Prime Aloyce Mushi and Ashura Hussein Mwasa of Tshs. 30,000,000, Fund Transfer slip of Tshs. 100,000,000/= for 25/03/2019 from Account No. 20410000664 of NMB Bank Account No. 10400571967 in the

name of Ashura Hussein Mwasaa maintained at Akiba Commercial Bank and Bank Transfer slip of 22/03/2019 of Tshs. 124,000,000/= from Bank Account No. 20410000664 B=NMB Bank in the name of Primi Aloyce Mushi, to Account No. 20410013604 NMB Bank in the names of Ashura Hussein Mwasa, all admitted as exhibit PE2 Collectively. Other exhibits are the documents titled HATI YA MAKABIDHIANO YA PESA of 05/04/2019 between Primi Aloyce Mushi for Tshs. 40,000,0000/=, A sheet with names, signature and amount of money and phone numbers titled "Hesabu ya nyumba – Gerezani" and a sheet of paper in the names of Maulid Hussein Mwasa exhibiting receipt of Tshs. 500,000/= from Primi Aloyce Mushi on the 16/10/2019 are collectively admitted as exhibits PE3 and the judgment in Civil Case No. 251 of 1994 between Hussein Ibrahim and Salma Hussein dated 26/11/1999 and the search result issued by Land Registry on 10/04/2019, admitted as exhibit PE4 collectively.

On the defence side the defendants had two witnesses only, the 1st defendant as DW1 and 2nd defendant as DW2 and tendered in Court three (3) documentary exhibits namely Bank statements of Account No. 10400571967 in the name of Ashura Hussein Mwasa from Akiba Commercial Bank printed on 12/04/2022 and Account No. 20410013604 in the names of

Ashura Hussein Mwasa from NMB Bank printed on 12/04/2022, admitted as exhibit DE1 collectively, Fund Transfer Request Form from NMB Bank Kariakoo Branch of 06/04/2019 transferring Tshs. 100,000,000/= for Account No. 20410013604 in the name of Ashura Hussein Mwasa to Account No. 01512214081200 in the names of Francis Nael Makota, admitted as exhibit DE2 and a ruling in Execution No. 11 of 2018 between **Hussein Ibrahim Vs. Salma Hussein** of 09/07/2019, admitted as exhibit DE3.

In this case it is the plaintiff's claim that, the defendants breached the sale agreement of the house in dispute, hence suffered him damages as demonstrated in the reliefs above prayed. In a bid to discharge his duty of proving it was his evidence as PW1 that, he executed a sale agreement with the 1st defendant as administrator of the estate of the late Hussein Omary Mwasa for purchase of house property situated on Plot No. 27, Block '20', Kipata/Nyamwezi Street, Kariakoo in Dar es salaam, under consideration of Tshs. 1,500,000,000/- in which he paid advance payment of Tshs. 500,000,000/- in the 1st defendant's two accounts maintained by NMB Bank and Akiba Commercial Bank as exhibited in exhibits PE1 and PE2 collectively, as the remaining balance of Tshs. 1,000,000,000/= was to be paid in two months' time but after handing the original certificate of title to him in which

the defendant failed to do. Further to that he said, in the course of awaiting for handing of the original certificate of title to him Tshs. 40,000,000/- and Tshs. 500,000/= were also paid at different time to beneficiaries of the estate of the late Hussein Omary Mwasa as part of the purchase price of the said house as exhibited in exhibit PE3 before he came to realize after search to the Ministry of Land that, the land subject of sale agreement did not belong to the late Hussen Omary Mwasa but rather Hussein Ibrahim as at the Ministry was issued with the Judgment between **Hussein Ibrahim Vs. Salama Hussein**, Civil Case No. 251 of 1994 which declared Hussein Ibrahim as the owner of the land. The search result and said judgment were admitted in Court as exhibit PE4 collectively. It was his further testimony that, having noted that the land did not belong to the vendor he demanded back his money without success and thus prayed the court to grant the prayers sought so that he recovers his money.

When subjected to cross examination as to who was responsible to make a follow up of the certificate of title PW1 said, it was the vendor as he could not pay the remaining balance without being handed with the title first. On further examination as to whether Tshs. 200,000,000/= out of the advance payment of Tshs. 500,000,000/= was not paid back to him through his

advocate one Makota as facilitation fee for processing and obtaining the original certificate title, PW1 denied any knowledge of the alleged payments. He also denounced the assertion that, he received rent from tenants of the said house for ten (10) months in which he came into possession soon after execution of the sale agreement and in pendency of securing the original certificate of title.

PW2 who happened to attest the sale agreement between PW1 and the 1st defendant told the Court that, apart from witnessing the signing of sale agreement which he was paid for, he never received the alleged Tshs. 200,000,000/= from the 1st defendant as facilitation fee for obtaining the original certificate of title. He confirmed PW1's testimony that, after the signing of sale agreement of the land between PW1 and 1st defendant, an initial payment of Tshs. 500,000,000/- was made to her as the purchase price was Tshs. 1,000,000,000/-. He added the vendor said the original certificate of title went lost but the same could be obtained within two months of the signing of sale agreement. When subjected to cross examination as to whether he had never received any money from the 1st defendant at all, this witness admitted to have been paid Tshs. 100,000,000/= by her as consideration for the farm land he had sold to her

located at Chanika area within Ilala District, Dar es salaam region. On further cross he disclosed that, he never prepared the plaint nor was his law firm engaged for that purpose and further that, on failure by the defendant to obtain the land title the information was passed to him by his client (PW1).

As alluded to above the defence relied on testimony of two witnesses and three (3) documentary exhibits. It was the 1st defendant's evidence (DW1) that, being administratrix of the estate of the late Hussein Omary Mwasu, on 21/03/2019 she executed a sale agreement of the house with the plaintiff, which its certificate of title was in the name of Salma Hussein one of the heirs of the late Hussein Omary Mwasu as his wife, for consideration of Tshs. 1,500,000,000/= in which advance payment of Tshs. 500,000,000/= was paid to her through two bank accounts as evidenced in the two bank statements exhibits D1. She said the remaining balance of Tshs. 1,000,000,000/= was to be paid in two months' time from the date of agreement, but eight (8) months passed without the plaintiff honouring the terms of agreement before she was informed by him that, he could not settle the balance because there was a pending case in Court concerning the sad house between Salma Hussein and Ibrahim Hussein. She also informed the court that, due to that information the agreement was frustrated and later

she was removed from the office of administration of the estate on the late Hussein Omary Mwasa in which Sakina Hussein and Maulid Hussein succeeded her and that, before her removal from the office she left the house in the possession of the plaintiff. It was her evidence that, she never engaged into any business transaction with Francis Makota while still in the office as administratrix and further that, when executing the sale agreement of the house at issue with the plaintiff was not aware that it was involved in any dispute or case. This witness testified that, Tshs. 200,000,000/= was paid to Francis Makota to facilitate the exercise of obtaining the original certificate of the house under sale, in which Tshs. 100,000,000/= was paid in to his bank account while the Tshs. 100,000,000/= was received in cash though nobody witnesses the handing over of that money and that, she never engaged in any transaction with him apart from that of processing the original title of the property subject of sale. She therefore prayed for justice on their part as they never enjoyed the said Tshs. 200,000,000/= out of the advance payment of Tshs. 500,000,000/= paid to her.

When pressed under cross examination on who was responsible for processing the original certificate of title it was her response that, there is no paragraph in the sale agreement exh. PE1 that, exclusively assigned to

the plaintiff or herself as vendor the duty of making a follow up of the original certificate of title, while stressing that it was not her responsibility to process it. On further cross examination on the alleged payment of Tshs. 40,000,000/= to the heirs of the late Hussein Omary Mwasu, DW2 denied any knowledge of exhibit PE4 (Makubaliano ya Kulipa Pesa) as the purported signature therein was not hers. When referred to exh. PE4 (the search) DW1 confessed that, the same was not disclosing Salma Hussein as owner of the land but was quick to counter that, the land/house sold to the plaintiff does not belong to Salma Hussein as the copy of the certificate of title during sale was in the names of Salma Hussein. According to her it is the plaintiff who breached the contract for failure to pay the outstanding amount of Tshs. 1,000,000,000/= as soon after execution of sale of agreement the said house was put in the possession of the plaintiff.

DW2, the successor of DW1 in the administration office of the estate of the late Hussein Omary Mwasu was very brief in her evidence as she confirmed execution of the sale agreement of the house on 21/03/2019 and that Tshs. 500,000,000/= was paid to DW1 as the outstanding amount of Tshs. 1,000,000,000/= was to be paid in two months' time but could not be paid as DW1 informed her that search result as conducted by the plaintiff

established the house was in the name of Salma Hussein, hence sale was frustrated. According to her, sale agreement was executed after the plaintiff was satisfied of the ownership through the search in the Probate case at Kinondoni Primary Court. As the plaintiff who was in possession of house for ten (10) months had failed to pay the outstanding balance of Tshs. 1,000,000,000/=, being the administratrix of the estate of the late Hussein Omary Mwasa who was in possession of the house since 1982, he was dispossessed the said house despite the fact that at all that time he was receiving rents from tenants therein which in total amounted to Tshs. 120,000,000, the money which the plaintiff never paid it back her as administratrix. She insisted the said house still belonged to them as an attempt to execute the decree in the case between Hussein Ibrahim Sadick & Sons Vs. Salma Hussein Mwasa proved futile as Execution No. 11 of 2018 to that effect was dismissed and exhibit DE3 was tendered and admitted to prove that fact. This witness testified that, the house subject of sale is now demolished by the plaintiff after his efforts to convince her to demolish the same so that he could build frames within two months of demolished had proved futile. As the reliefs in the counter claim DW2 prayed this Court to award her Tshs. 120,000,000/= as rent collected by the plaintiff from tenants

for ten (10) months he was in possession of the house, Tshs. 60,000,000/= as general damages for inconveniences caused to her as the tenants have sued him after demolition of the house they had rented the frames therein as well as costs of this suit. Regarding the main suit she prayed for dismissal of the same as there was contradiction in the evidence of PW1 and PW2. At the conclusion of the trial both parties prayed to file their final submission the prayer which was cordially granted and the same filed in time. I appreciate the efforts employed by both counsel for the parties in their preparations as they have assisted this Court to make possible this judgment.

I have taken into consideration the said submissions by the parties as well as the evidence adduced in court. I also took time also to peruse the pleadings by both parties bearing in mind the principle that, parties are bound by their own pleadings. See also the cases of **Charles Richard Kombe t/a Building Vs. Evarani Mtungi and 2 Others**, Civil Appeal No. 38 of 2012 and **Astepro Investment Co. Ltd Vs. Jawinga Company Limited**, Civil appeal No. 8 of 2015 (Both CAT-unreported). Before venturing into determination of the said issues, I find it apposite to state the principles governing proof of civil cases. It is a principle of law enunciated under the provisions of sections 110(1) and (2), 112 and 3(2)(b) of Evidence Act that,

he who alleges existence of certain facts must so prove and further that, the standard of proof is on a balance of probabilities or preponderance of probabilities. See the cases of **Anthoni M. Masanga Vs. Penina (Mama Ngesi) and Another**, Civil Appeal No. 118 of 2014, **Paulina Samson Ndawavya Vs. Theresia Thomasi Madaha**, Civil Appeal No. 53 of 2017 and **Berelia Karangirangi Vs. Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017 (both CAT-unreported). In the case of **Berelia Karangirangi** (supra), on the standard of proof in civil cases the Court of Appeal had this to say:

"We think it is pertinent to state the principle governing proof of cases in civil suits. The general rule is that, he who alleges must prove....it is similar that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities."

Having laid down the principles on the standard of proof of civil matter, I now proceed to consider and determine the first issue as to whether there was breach of contract by the Plaintiff against the defendant and/or vice versa? From the adduced evidence by both parties there is no dispute that, it was one of terms of sale agreement (exh. PE1) that, out of consideration of Tshs. 1,500,000,000/=, Tshs. 500,000,000/= was to be paid as advance

payment for sale of the house property situated on Plot No. 27, Block '20', Kipata/Nyamwezi Street, Kariakoo in Dar es salaam, and the outstanding balance of Tshs. 1,000,000,000/= was to be finalized in two months of the executed agreement. The plaintiff (PW1) contends the same was to be paid after the original certificate of title is handed to him by the 1st defendant in which she failed to do hence breach of contract, while the 1st defendant is of the opposite view claiming that, it was the plaintiff's responsibility to obtain the said original certificate of title and pay the outstanding balance but failed to so do hence breached the contract. It is the principle of law that, the court's duty is to interpret parties' terms of agreement and not to re-draft them. See the cases of **Maria E. Maro Vs. Bank of Tanzania**, Civil Appeal No. 22 of 2017 and **Univeler Tanzania Ltd v. Benedict Mkasa t/a Bema Enterprises**, Civil Appeal No. 41 of 2009 (both CAT-unreported). In this case in the term of agreement in exhibit PE1, on when and how the remaining balance of Tshs. 1,000,000,000/= would be paid is found in paragraph 2(ii) but for clarity I find it imperative to quote whole paragraph:

2. wauzaji wanamuuzia Mnunuzi nyumba hiyo kwa bei ya fedha za kiatanzania Shilingi Bilioni Moja na Milioni Mia Tano (1,500,000/=) tu ambazo zitalipwa kwa utaratibu ufuatao:-

(i) Siku ya kusaini mkataba huu Mnunuzi atawalipa Wauzaji jumla ya fedha za kitanzania Shilingi Milioni Mia Tanno (500,000,000/=) tu, anzazo zitahesabika kama malipo ya awali ya mauziano haya.

(ii) Baada ya kukabidhiwa hati halisi ya nyumba husika, mnunuzi ataendelea and malipo ya fedha zilizo baki kwa makubaliano watakayokubliana baina ya muuzaji na mnunuzi.

From the above cited terms of sale agreement (exh.PE1) more particularly paragraph 2(ii), I find no difficulties in interpreting the same to be the intention of the parties that, the outstanding balance would be paid by the vendor (1st defendant) upon her handing the certificate of title of the concerned house to the plaintiff, which no doubt she failed to do as the same no doubt could not be obtained hence breached the contract. I therefore answer the first issue in that, there was breach of contract as it is the 1st defendant who was responsible to obtain the certificate of title of the house under sale and hand it to the plaintiff who breached the contract.

With the above interpretation and findings, the second issue as to who breached the contract between the parties is also answered hence should not detain much this court. I hold it is the 1st defendant herein who breached the contract as there was no justification for her failure to secure the said original certificate of title and hand it to the plaintiff in compliance of their

term of agreement in paragraph 2(ii) of the sale agreement of the house so that they are paid the outstanding balance. The argument by Mr. Matongo that, the plaintiff ought to have proved that, the house was not under possession of the 1st defendant I find does not carry any weight to this case as whether it was under his possession or not, that does not give her the title to pass since she was duty bound to obtain the title so that the house could pass to the plaintiff. To hold otherwise in my opinion is tantamount to allowing her to benefit from her own wrong of selling the house without title to pass the plaintiff. Much as she is the one who breached the contract for failure to hand the certificate of title to the plaintiff, I distance myself from Mr. Matongo's submission that, it is the plaintiff who was responsible to obtain the original certificate of title but failed to secure it and later on pay the outstanding amount hence in breach of contract, as it is the party whose evidence is heavier than the other whom the court will find the case in favour of.

Next for determination is the third issue as to what loss occasioned to the injured party? In this issue two claims by the plaintiff and 2nd defendant in her counter claim are subject of consideration. To start with the plaintiff's claims a total of Tshs. 686,700,000/= as specific damages. It is the law as

pronounced in a number of cases that, specific or special damages must be specifically pleaded, particularized and strictly proved. See the cases of **Masolele General Agencies Vs. African Inland Church Tanzania** [1994] TLR 192 and **Reliance Insurance Company (T) Ltd and 2 Others Vs. Festo Mgomapayo**, Civil Appeal No. 23 of 2019 (CAT-unreported) the Court on proof of specific damages said:

"The law in specific damages is settled, the said damages must be specifically pleaded and strictly proved..."

It is Mr. Ally's submission that, the plaintiff managed to prove payment of Tshs. 500,000,000/= in which the 1st defendant also conceded to have received to the tune of Tshs. 505,000,000/= vide her bank accounts as advance payment for the sale of house, the house which was never been handed to him to date for want of certificate of title hence breach of contract. He thus suffered loss as the said money has never been paid back to him. I further hold he is entitled to interest of the said amount as he could have invested the same and produce profit therefrom had it been for the reason that, the same is withheld by the 1st defendant. Further to that, it was claimed by the plaintiff through PW1 that, another Tshs. 40,000,000/- and Tshs. 500,000/- was paid to the heirs of the late Hussein Omary Mwasa, as

part of purchase price of the said house as exhibited in exhibit PE3 collectively, hence the same must be paid back to him. It is true and I agree with Mr. Ally that, as the evidence leads there it is not disputed by the 1st defendant that she received Tshs. 505,000,000/= from the plaintiff as purchase price of the said house, save for the rest of the claimed money which she denies any knowledge of. The defence by the 1st and 2nd defendants that, Tshs. 200,000,000/= was paid to Makota under plaintiff's advocate, I find there is no evidence to support the 1st defendant contention that, the said Tshs. 100,000,000/= deposited in Makota's account No. 01512214081200 and the alleged cash paid of Tshs. 100,000,000/=, was meant to facilitate the processing and obtaining of the original certificate of title of the house under sale and it was actually paid to him under plaintiff's request. I so find as per the evidence of the said Makota (PW2), he never received the alleged cash of Tshs. 100,000,000/= except the other Tshs. 100,000,000/= paid in his bank account as consideration for sale of his farm (shamba) to the 1st defendant situated at Chanika within Ilala, Dar es salaam region. I therefore hold that, the plaintiff managed to prove that he suffered loss of Tshs. 505,000,000/= received by the 1st defendant as purchase price for said house sold to him as he never got its title deed to own the same.

Regarding the claim of Tshs. 40,000,000/= and Tshs. 500,000/= alleged paid by the plaintiff to the heirs of the late Hussein Omary Mwasu, I find is not proved for two good reasons. **One**, as per paragraphs 2(ii) of exhibit PE1 other payments part from the initial payments were to be effected after the plaintiff had received the title deed and not before. **Second**, as per exhibit PE3 collectively apart from being denied by the 1st defendant that it does not bear her signature the agreement titled 'Hati ya Makabidhiano ya Pesa' exhibit PE3 does not show the date in which it was attested on her part hence fall short of validity. As for another untitled document exhibiting payments to different persons, there is no evidence that the said payments were effected and if yes under the defendants' request. Regarding the claimed general damages though not prayed this court has powers of considering the same and quantify the amount to be award for basing on the materials supplied by the plaintiff as it is not requirement to have the suffered damages pleaded as it was held in the case of **Admiralty Commissioners Vs. SS Susqehanna** [1950] 1 ALL ER 392, quoted by the Court of Appeal in the case of **Peter Joseph Kilibika and Another Vs. Patric Aloyce Mlingi**, Civil Appeal No. 37 of 2009, where the court held thus:

"If the damage be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question."

General damages being compensatory in character and not enrichment scheme, they are intended to take care of the plaintiff's loss of reputation, as well as to act as a solarium for mental pain and suffering. See the case of **P.M. Jonathan Vs. Athuman Khalfan** [1980] TLR 175 (HC). In the instant case the plaintiff during his testimony in court did not supply any material evidence justifying this Court exercise its discretion and giving the basis for quantifying the amount to award him with general damages as prayed. I therefore refrain from granting the same.

I now move to consider the counter claim by the 2nd defendant for the specific claim of Tshs. 120,000,000/= in which I should state from the outset after considering the available evidence I find the same it not strictly proved. The reason I am so doing is not far-fetched as that claim was denied by the plaintiff when he testified that he had never received any rent from the tenants at the time which the house was under his possession awaiting to be handed with title deed, as he found the same was already paid to the defendants. It was therefore for the plaintiff in the counter claim to prove that claim. Apart from mere assertion by the 2nd defendant that, the claimed

rent was paid to the plaintiff there was no substantial evidence be it documentary or oral from either of the tenants exhibiting that, indeed rent of the frames in the said house was paid to the plaintiff. It was held by the Court of Appeal on proof of specific damages in the case of **Zuberi Augustino Vs. Anicet Mugabe**, [1992] TLR 137 (CA) thus:

"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved."

Guided by the above principle of law and given the fact that, the plaintiff in the counter claim has failed to prove by evidence that, the defendant in the counter claim received Tshs. 120,000,000/= from tenants as rent I find her claim has not been proved. Lastly it the claim of general damages in which she alleged that, she suffered inconveniences for being sued by tenants over the rent already paid as the house was demolished before their tenancy could come to an end. I think this claim also need not detain this Court as there is no proof that, the suits instituted by the tenants if any exist, were a result of the demolition of house caused by the plaintiff/defendant in the counter claim. I so view as no cogent evidence was placed before the Court to prove that, the defendant in the counter claim was involved in the demolition of the said house as even when cross examined the 2nd defendant confessed that, as per the search result (exh. PE4) the said alleged

demolished plot belonged to Ibrahim Hussein trading by the name and style of Hussein Ibrahim Sadick and Sons. Thus to me there is no possibility the defendant in the counter claim would have been involved in demolition of the said house. I thus refrain too from granting this relief. I therefore proceed to dismiss the counter claim by the 2nd defendant against the plaintiff in the main suit with costs.

With regard to the main suit I find the suit is proved against the 1st defendant who received money from the plaintiff to the extent explained above. In the premises, I enter judgment in favour of the plaintiff in the main suit and order the 1st defendant to do the following:

- (1) Immediately pay the plaintiff a total sum of Tanzanian Shillings Five Hundred and Five Million (Tshs. 505,000,000) being the payment received from him as advance payment for sale of house property situated on Plot No. 27, Block '20', Kipata/Nyamwezi Street, Kariakoo in Dar es salaam.
- (2) Payment of interest at the rate of 7% on the decretal amount from the date of judgment to the date of full payment.
- (3) Costs of the suit.

It is so ordered.

DATED at Dar es salaam this 30th June, 2023.



E. E. KAKOLAKI

JUDGE

30/06/2023.

The Judgment has been delivered at Dar es Salaam today 30th day of June, 2023 in the presence of Mr. Domina Mdashi, Advocate for the plaintiff, the 1st and 2nd defendants in person and Mr. Oscar Msaki, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

30/06/2023.

