

**IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MTWARA)**

AT MTWARA

LAND CASE NO. 3 OF 2020

AHMED ABDALLAH MOHAMED.....PLAINTIFF

VERSUS

EDGA MUSSA MAKOTA.....DEFENDANT

JUDGMENT

MURUKE, J

The plaintiff herein sues the Defendant and prays for judgment and decree as follows:-

- I. Declaratory order that Defendant is in breach of the contract for the purchase of land duly executed between the Plaintiff and Defendant.
- II. An Order declaring Plaintiff as the lawful owner of the land located at plot 5 Mbae area Mtwara with Certificate of title number 30062.
- III. Payment of 260,000,000 (Two hundred and sixty million only) being a total purchase price for the land of 18 acres, following defendant denial of vacant possession.
- IV. General damages and cost of the suit.

Fact of this case are briefly that; Plaintiff and Defendant concluded sale agreement of 18 acres farm of Mbae area in Mtwara region on 28 June 2009, for consideration of 260,000,000 to be paid in three instalments namely 147,000,000 upon execution of contract, Tsh. 103,000,000 and

Tsh. 10,000,000 to be paid later. Further, to the signing of contract for the purchase of land, Plaintiff and defendant subsequently executed Escrow agreement with Ms Trustmark Attorney (Escrow agent) assigned to be custodian of the title documents and would release the title document to the purchaser upon receiving a written instruction from the vendor after confirmation from the vender that he has received the amount agreed. Both Plaintiff and Defendant signed land form number 29, 30 and 35 for equally so, transfer to be effected on the same date of signing the contract.

On 13th May of 2010, the Plaintiff through his legal representative Ms Nakchamy Nailane signed a deed of satisfaction with advocate Peter Kibatala of Trust Mark Attorneys (appointed by both Plaintiff and Defendant in the Escrow agreement to hold the title documents) acknowledging that the Plaintiff has discharged all his financial obligation to the Defendant. On 25 August 2015, the Defendant advocate one Suleiman Khamis Haji, through his representative said Awadhi, handled the title documents to the Plaintiff advocate one Joseph Tadayo, of Dar es Salaam and duly signed the document titled receipt of documents.

Plaintiff received demand notice on 30th March 2017, through Defendant Attorney Mr Nelson Samson, requesting the plaintiff to return the title documents of land he bought to the Defendant, within 14 days from the date of receipt of demand notice. The plaintiff had bought the land in dispute in favour of ALMUSTAQBAL INTERNATIONAL COMPANY LIMITED, incorporated in Tanzania for the investment purpose intended to establish a poultry farm and crops farming project.

While Defendant was claiming back his land within 14 days, Plaintiff was in house arrest following political misunderstanding in his country. After

a trial to resolve dispute out of court having failed, then this suit was filed, on 8th December 2020, by Alex Mushumbusi advocate of optimum Associates, Chole road Masaki, Dar es Salaam. Defendant was served by publications on 15 July 2021 on Mwananchi newspaper.

However on 10th November 2021 advocate Rainay Songea who was representing plaintiff requested for amendment of the plaint to plead BENARD KAMILIUS MEMBE, who had power of Attorney from the plaintiff to prosecute and give evidence for the plaintiff. Mr Steven Lekey who appeared for the first time for the defendant, did not object, only requested to be served to be able to file written statement of defence.

Amended plaint was filed according to the court order, however , no defence that was filed. Surprisingly on 10th March 2022, Defendant counsel Steven Lekey, withdraw himself and his firm from representing Defendant for what he called lack of corporation from his client Edga Musa Makota. Following withdraw of Mr Steven Lekey as defence counsel, in the absence of his client, court issued order for publication to serve Defendant .It was effected on Mwananchi Newspaper dated 30th March 2022. Despite publication for the second time, Defendant did not appear and no defence filed. It was followed then with this court order to proceed exparte against the Defendant ,after being satisfied that the service by publication has been effected and Newspaper is in court record.

At the commencement of hearing, following issue were registered by the court for determination.

- i. Whether there was a contract of sale between the Plaintiff and Defendant of plot no 5 located at Mbae area Mtwara.
- ii. Whether Defendant breached the terms of the contract.
- iii. What are the relief Parties entitled.

Advocate Rainey Songea represented plaintiff who in total paraded 3 witness who tendered five exhibits.

Issue number one, **Whether there was a contract of sale between the Plaintiff and the Defendant.**

PW1 Hamad Lila Mwikondo testified that, he knew Edga Musa Makota while working with him at Cashewnut Board. He was present while Plaintiff and Defendant were signing contract for sale of the disputed Plot, and witnessed first instalment being paid. He was the one who counted the money for the Defendant. On his own words he said as seen at page 9 – 10 of typed proceeding that:-

“On 28 June 2009 I was called by Edga Mussa Makota to take him to Sheraton Hotel, Dar es Salaam, for him to receive payments of his plot at Mbae, Mtwara, from Ahmed Abdallah Mohamed. We went up to 4th floor VIP area. We were received at verandah, at that time Ahmed Abdallah Mohamed was President of Comoro. On that day, Ahmed Abdallah Mohamed was with his advocate. Contract was read, then Plaintiff and Defendant signed the contact, it was followed with 147,000,000 payment in Tsh. I counted the money at the Bank on behalf of Edga Mussa Makota in his presence. After selling the disputed area he removed his

furniture, machine and other utensils including pigs to Bagamoyo where he stated living with another wife. The Plaintiff finalized payments and the plaintiff was handed title of Plot 5 Mbae, Mtwara. On 2017, Edga Mussa Makota claimed that the dispute plot is his, though he did not dispute to sell the same to the plaintiff."

Not only PW1 but also **PW2, Ally Salum Makarani**, who used to be Ahmad Abdallah Mohamed driver whenever he visited Mtwara. PW2 testified that, after plaintiff buying disputed plot, he was the one who supervised construction of fence. Upon completion, he was asked to be care taker of the disputed area in which he agreed and lived on the area until 1st May, of 2020, when forceful pushed to leave the place by police officer Afande Onyango the then OCS of Mtwara Central Police. When he tried to enquire, why such happening he was replied it was an order from the President at that time. Then forceful left the place at around 22 hours, of the same day 1st May 2020, leaving behind his chicken, goats, and food stuff as it was difficult to take them at once, and he had no specific place to go. From 2009, when the disputed area was bought it was the property of Ahmed Abdallah Mohamed and there was no dispute at all, everyone around knew it.

Not only the evidence of PW1 and PW2 that proved that there was a contract between Plaintiff and Defendant, but also PW3 Bernad Kamilius Membe who testified that, Plaintiff wanted to invest at Mtwara, following geographically located near Comoro. PW3 being foreign affair minister by then, he accompanied Plaintiff to Mtwara to look for an area to invest. Both went to Edga Mussa Makota, after being told by Mr Sheby Mohamed and Edga Mussa Makota was personally known by PW3, as

they used to hunt together both being Hunter. After discussion they agreed on sell of disputed plot Exhibit P2. Not only PW1, PW2 and PW3 proved existence of the contract but exhibit P3 collectively land form number 29, 30, and 35 in which Defendant signed the three form to request Commissioner for land to transfer land in dispute to the plaintiff, equally to exhibit P5 Escrow agreement. According to exhibit P6, Deed of satisfaction dated 13 May 2010, Plaintiff discharged his obligation of paying the purchase price as reflected on page one of exhibit P6 from paragraph 3 up to 5 reflected below.

WHEREAS; *The advocate was appointed as an escrow by the purchase and one Edga Mussa Makota to hold onto tittle documents relating to landed properties situated on plot 5 Mbae locality Mtwara Tanzania.*

WHEREAS; *the appointment called for the advocate to hold onto the tittle documents until the purchase has discharged all financial obligations by the purchaser to the vendor Edga Mussa Makota and* ***WHEREAS;*** *the parties have fully discharged their respective obligations and the vendor Edga Mussa Makota has instructed the advocate vide a written note annexed to this Deed, to release the tittle documents to the purchaser.*

NOW THIS DEED WITNESS AS FOLLOWS

The advocate hereby hands over the tittle documents afore referred to the purchaser in the manner aforerred. From part of content of exhibit P6 it is clear that Plaintiff discharged his obligation in turn he was handled the tittle by the Escrow advocate Mr Peter Kibatata.

That being the position in term of exhibit P6, there was nothing pending between the parties. Thus there is more than enough evidence to prove existence of sale agreement contract between Plaintiff and Defendant issue number one has been answered in the affirmative.

Second issue as to whether Defendant breached the agreement.

PW3 Bernard Kamilius Membe told this Court that until 2010 Plaintiff paid all the purchase price together with other related cost as also proved by exhibit P6, Deed of satisfaction. Unfortunately in March 2017 Plaintiff received demand notice requiring him to return all the documents and surrender the land to him.

PW3 insisted that, in 2017, Plaintiff was arrested and detained following political issue in his Country (Comoro) and Defendant knew, then took advantage of the situation. P3 tried to contact Defendant and asked as to why he is breaching the contract, reply was very negative. PW3 involved also Mr Paul Maokola and went to see Edga Mussa Makota, yet, he did not want to listen. He evicted Mr Ally Salum Makarani a care taker, by the help of Afande Onyango, the then Mtwara Central Police O.C.S. Mr Ally Salum Makarani, left leaving his belonging fearing police to arrest him in compliance of one day notice. Pw3 tried to contact Defendant son Mussa Edga also failed, as Mussa replied to him that, he PW3 is unwanted person in Tanzania by the then president. It was then followed with Defendant grabbing the land to date. From the evidence PW2 and PW3, it is clear that, Defendant breached he sale agreement. Second issue has been answer in the affirmative.

Last issue to what reliefs are the parties entitled.

It is clear from the 1st issue and the 2nd issue that there was a contract that was breached by the Defendant, Plaintiff need to be returned to the situation prior to the breach. Plaintiff has not used his plot effectively he bought since 2009, because in 2017 his land was grabbed by defendant. PW3 who had Power of Attorney explained how he tried to rescue the

situation. PW2, care taker explained how he was forced to leave the area leaving his properties including goats and chicken. It is the trite law that parties are bound by the terms and conditions set in their contract which has been freely entered, and since it is proved that there was a contract of sale entered between the Plaintiff and the Defendant and the said contract all attributes of a valid contract in the face of law, that the parties contracted while they were of sound mind, no any coercion, fraud, misrepresentation, undue influence to make it voidable as evidenced by exhibit P2. In the case of **SIMON KICHELE CHACHA V AVELINE M KILawe CIVIL CASE NO 160 /2018 CAT AT MWANZA.**

*“It is settled law that parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract that is there should be a sanctity of the contract as lucidly stated in **Abualy Alibhai Azizi v. Bhatia Brothes Ltd [2000] T.L.R 288** at page No 289 thus ‘the principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity no fraud (actual or contractive) or misrepresentation, and no principle of public policy prohibiting enforcement’.*

From the above holding, it is clear that, in any contractual relationship each party is expected to comply with or his contractual obligations. Put otherwise round, each party is expected to perfect performance of the term agreed contractual undertaking, failure of that, tantamount to breach of that contract. It is clear likewise that, each party to the contractual relationship expect to obtain the benefit of the agreed deal

reciprocally. Contrary to that will mean that, an innocent party who does not receive the reciprocal benefit of the contract, by reason of other party's breach, has a legal right to recover compensation for the damage suffered, same was stated in the case of **EA Trade & Marketing G solution v Sayona Drinks Ltd, Commercial case 127 of 2020, High Court of Tanzania, Commercial Division at Dar es Salaam** (unreported). In our case at hand the plaintiff bought the piece of land in 2009 and paid the entire agreed price as of June 2010. The acts of Defendant to disturb the plaintiff and claim that the said piece of land has been returned to him and that it is his property clearly amount to the breach of term and condition of the signed agreement. It should be noted that the Defendant benefit from the agreement and the Plaintiff is suffering more costs by filling the suit before this honourable court instead of proceeding with the investment as clearly demonstrated in the business plan exhibit P4.

In the case of **Mohamed Idrissa Mohamed vs Hashim Ayoub Jaku [1997] T.L.R 280 CAT** insisted on how parties are bound with what have been agreed in their contract .Which held that:-

"When the party to the contract has no good reason not to fulfil an agreement, he must be forced to perform his party , for an agreement must be adhered and fulfilled."

Since the plaintiff paid the entire considerations, the acts of the Defendant is intolerable and amounted to breach of the contract. Thus declare the plaintiff herein as the owner of the land as well as grant permanent injunction against the Defendant from trespassing and selling the piece of land belongs to the Plaintiff herein.

Thus in totality judgment entered for the plaintiff as follows:-

1. Defendant has breached contract entered between him and plaintiff on 28 June 2009 exhibit P2.
2. Plaintiff is a lawful owner of the land at plot number 5 with certificate of title CT number 30062, L.O number 8008 in Mbae area, within Mtwara region.
3. Permanent injunction is granted against the Defendant from trespassing and or selling pieces of land on plot No. 5 Certificate of title number 30062 L.O. No. 8008, Mbae, Mtwara.
4. Defendant is ordered to pay general damage to the plaintiff to the tune of Tsh. 50,000,000.
5. Defendant is ordered to pay Plaintiff cost of this case.



A handwritten signature in blue ink, appearing to read "Z.G. MURUKE".

Z.G. MURUKE

JUDGE

31/03/2023

Judgment delivered through video conference in the presence of Alex Msalenge for the plaintiff.



A handwritten signature in blue ink, appearing to read "Z.G. MURUKE".

Z.G. MURUKE

JUDGE

31/03/2023