

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

LAND CASE NO. 20 OF 2019

SOUH MOHAMED BARAKAT (Suing as legal representative
of the late Mohamed Islam Barakat) **PLAINTIFF**

VERSUS

SAID BARAGASH **1ST DEFENDANT**

LULUA INVESTMENT LTD **2ND DEFENDANT**

JUDGMENT

10 & 13/02/2023

NKWABI, J.:

The historical background of this suit in this Court is that the 2nd defendant through the Chief Executive Officer (1st Defendant) executed a construction agreement on 16th July 2007. The plaintiff (the owner of the plot by virtue of being one of the administrators of the estate of the late Mohamed Islam Barakat) would have four flats (apartments) in the building while the 2nd defendant would have the rest of the apartments. It is the complaint of the plaintiff that the defendants failed to discharge the part of their contract by failing to construct the building within 24 months after obtaining the requisite building permit. The building ought to have been completed by 26th September, 2011. The contract had set out rights and obligations to both

parties to the contract. After several follow-ups, the plaintiff issued a demand notice to the defendants on 14th September 2016 and instituted this suit on 11th April 2019.

The plaintiff prayed for the following reliefs:

- (a) Declaration that the defendants breached the contract signed on the 16th July 2007.
- (b) Declaration that the property Plot No. 997 is the sole property of the late Mohamed Islam Barakat and expunge the name of the 2nd defendant from Certificate of Title number 186177/40.
- (c) The honourable Court to order defendants for payment of the sum of Tanzania Shillings one billion (T.shs 1,000,000,000.00) to the plaintiff as compensation for demolition of one storey building located on plot No. 997 LO No. 21946 at Mfaume Road Upanga Dar-es-Salaam.
- (d) The honourable Court to order defendants for payment of Tanzania shillings ninety million (T.shs. 90,000,000/=) to the plaintiff being full, fair and adequate compensation for loss of income in respect of disputed landed property.

- (e) That the Honourable Court to order defendants to pay the plaintiff interest on the decretal amount at the commercial rate from the date of judgment till the date of payment in full.
- (f) That the honourable Court to order defendants to pay the plaintiff general damages to be assessed by the Court.
- (g) Costs be provided by the defendants.
- (h) Any other relief (s) that the honourable Court may deem fit and just to grant.

In the written statement of defence the defendants claimed that the only hindrance to a successful completion of the construction is failure on the part of the plaintiff to register the shares to respective authorities. It is also claimed that the plaintiff failure to acquire building permit on time partly contributed in delaying construction process. The defendants prayed the suit be dismissed with costs.

In evidence it was stated by PW1 Soud that the defendants approached them for the purpose of developing the plot. The defendants ought to build a building of 10 up to 11 floors as per the contract (exhibit P. 3). He said after the demolition of the old structures, to date the building is at the stage of

foundation for over eleven years. He prayed for reliefs as per the plaint. The evidence of PW1 was supported by the evidence of PW2 Amour.

The defence was featured by one witness who introduced himself as Baragash Ghalib Khalid and denied to be called Said. He agreed to have construction on a building of 10 to 11 floors. They got a new building permit in the year 2011. He said what caused the delay of the construction was their (plaintiff) claim for eight apartments and that some of the siblings were not involved in the agreement. He thus told them he would not proceed until they register shares (four apartments as their share and the rest of the apartments be his) in the Ministry of Land. Further, they did not give him the mandate of all sixteen heirs who proposed the three administrators to be appointed. He alleged to have suffered a huge loss. He prayed the court to dismiss the suit and other reliefs as he narrated in his defence.

Having seen the evidence of both parties, it is opportune to indicate the framed issues which are:

- (1) Whether there was a contract between the plaintiff and the defendants.

- (2) If the (1) above is answered in affirmative then whether the contract was breached or not.
- (3) If the (2) is answered in affirmative then which party is to blame for the breach?
- (4) What reliefs are the parties entitled to.

I start my determination of this case by considering the listed issues starting with the 1st one which is whether there was a contract between the plaintiff and the defendants. The 1st defendant Said Baragash who signed the written statement of defence as such but came to claim in evidence to be called Baragash Ghalib Khalid admitted in Court the contract Exhibit P3. The contract on the part of the plaintiff was executed by Amour the then administrator of the estate, but one of the current administrators Soud took up the matter. The defence witness acknowledged the contract exhibit P3 in Court. In the circumstances, I answer the 1st issue in the affirmative.

The next issue for my consideration and determination is if the (1) above is answered in affirmative then whether the contract was breached or not. Truly, one of the terms of the contract was that after obtaining the building permit, the construction ought to be completed within two years period. The 2nd building permit as stated by both parties was obtained in the year 2011.

Construction started and the time started to run. The construction of the building ought to have been completed by 2013. To date there is no any floor of the building that it complete. That is clear breach of the contract. The defendants cannot be heard to claim that they would not proceed with until the plaintiff registers shares (four apartments as their share and the rest of the apartments be her "2nd defendant's" property) in the Ministry of Land because there is no any such term in the contract. Further, he cannot be heard to claim that they did not give him the mandate of all sixteen heirs who proposed the three administrators to be appointed, because the appointment of administrator is done by the Court, in any way, there is no such a term in the contract. Thus, the 2nd issue too is answered in the affirmative in that by failure to complete building the structure by 2013, the defendants were in breach of the contract. That answers too the 3rd issue to the effect that it is the defendants who are to blame for the breach of the contract.

Lastly, I turn next to consider the 4th issue which is to what reliefs are the parties entitled to. The plaintiff is praying for the following reliefs, (a) declaration that the defendants breached the contract signed on the 16th July 2007. Based on the above discussion, I declare that the defendants are

in breach of the contract (exhibit P3). Pursuant to the declaration that the defendants are in breach of the contract, I declare that the property thus Plot No. 997 is the sole property of the late Mohamed Islam Barakat and proceed to expunge the name of the 2nd defendant from Certificate of Title number 186177/40. Currently, the property be in the names of the current administrators of the estate of the deceased.

As to the claim in paragraph (c) that the honourable Court to order defendants for payment of the sum of Tanzania Shillings one billion (T.shs 1,000,000,000.00) to the plaintiff as compensation for demolition of one storey building located on plot No. 997 LO No. 21946 at Mfaume Road Upanga Dar-es-Salaam. This relief is rejected for the plaintiff did not prove with specific evidence that the demolished buildings had the value of one billion Tanzania Shillings. The requirement of strict proof can be seen in **Director Moshi Municipal Council v Stanlenard Mnesi & Roisiepiece Sospeter**, Civil Appeal No. 246 of 2017 (CAT) at Arusha, (unreported)

"Special damages, should be pleaded and strictly proved."

In respect of the relief sought in paragraph (d) that the honourable Court to order defendants for payment of Tanzania shillings ninety million (T.shs.

90,000,000/=) to the plaintiff being full, fair and adequate compensation for loss of income in respect of disputed landed property. This relief is also rejected because the plaintiff did not prove with specific evidence for it is special damages. The plaintiff ought to prove the income. He failed to do so.

Further the defendants are ordered by this Court to pay the plaintiff general damages which are assessed by this Court at T.shs 90,000,000/= (ninety million Tanzania shillings only) for breach of contract. The assessment of the general damages, I hope, is in accordance with **Storms v. Hotchison** (1905) A. C. 515:

"General damages are such as the law will presume to be the direct natural or probable consequence of the act complained of."

I order defendants to pay the plaintiff interest on the decretal amount at the commercial rate from the date of judgment till the date of payment in full.

I order that the defendants to bear the costs of the plaintiff.

It is so ordered.

DATED at **DAR-ES-SALAAM** this 13th day of February 2023.



A handwritten signature in blue ink, appearing to read "Nkwabi".

J. F. NKWABI

JUDGE