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

**DODOMA DISTRICT REGISTRY**

**AT DODOMA**

**LAND CASE NO. 17 OF 2021**

**JULIUS EMMANUEL KINONGU .....PLAINTIFF**

**VERSUS**

**1. THE CITY COUNCIL OF DODOMA .....**
**2. ATTORNEY GENERAL..... DEFENDANTS**

**JUDGMENT**

Last Order: 1/11/2023
Date of judgment: 24/11/2023

**MASABO, J:-**

Julius Emmanuel Kinongu, the plaintiff herein, is a businessman and resident of Dodoma City. He is suing the defendants for breach of a land lease agreement. His prayers before this court are for judgment and decree as follows: (i) an order for specific performance compelling the defendants to allocate him a parcel of land described as Plot number 265 Block 27 Hazina area within Dodoma City or in the alternative, payment of damages for breach of contract; (ii) Payment of a sum of Tshs 251,564,500/= in respect of the loss incurred following the destruction of his business goods during the forceful eviction and demolition of his business premise by the 1st defendant; (iii) payment of Tsh shillings 144,000,000/= being loss of business computed at a daily rate of Tshs 500,000/= from the date of demolition and forceful eviction to the date of filing of the suit (iv) payment daily loss of income of Tshs 500,000/= from 1/12/2021 to the date of

judgment (v) general damages, (vi) interest on the decretal sum at the rate of 12% per annum from the date of judgment to payment in full and (vii) cost for the suit.

The brief facts of the case as deciphered from the plaint are that, the plaintiff and the first defendant, then operating as Capital Development Authority (CDA), had a lease agreement by which the plaintiff was leased an open space where he was conducting his timber business. The agreement which was renewable annually was concluded for the first time in 2012 and its last renewal was in 2017. As part of the agreement, the plaintiff was allowed to run his business at a parcel of land designated as an open space which is located at roundabout of Majengo (keep left) near Dodoma-Iringa Road (commonly known as By road) and was promised that should the land use be changed and the place be surveyed and partitioned into plots, he will have a first priority in the allocation of the plots. As anticipated, the land use was revisited and what used to be an open space was surveyed and designated as Plot No. 265 Block 27 Hazina, Dodoma City. However, contrary to the agreement, the plaintiff was not allocated the same and much as the agreement was still subsisting on 15/11/2017 he was served with a 30 days' notice requiring him to demolish his business premises and remove all his goods. Further, on 16/2/2018 the first defendant's employees evicted him from the suit land after they forcefully demolished his premises and destructed his goods hence occasioning him the loss claimed above.

On their part, the defendants did not dispute the existence of the agreement in their joint written statement of defence filed in court on 11/7/2022 but

disputed the claim that they had promised to allocate the plaintiff the plot should there be change of land use. As regards the allegations for demolition and forceful eviction of the plaintiff, while not specifically refuted, the defendants claimed that, the notice served upon the plaintiff requiring him to vacate the suit premise was legal as it was issued at the end of the lease agreement. They also vehemently disputed the loss allegedly occasioned by the forceful eviction and put the plaintiff to strict proof.

At the final pretrial conference, four issues were framed as issues for determination by this court, namely (i) whether there was an agreement (s) between the parties; (ii) whether the first defendant acted in breach of agreement(s); (iii), whether the plaintiff suffered damages as a result of the breach of contract and to what extent and (iv) what reliefs are the parties entitled to.

It is a trite law that a person who alleges existence of certain facts bears the burden to prove its existence. The principle is articulated under section 110 (1) and (2) and 112 of the Evidence Act, Cap 6, RE 2019 and has been tested in a number of authorities among them, the case of **Paulina Samson Ndawavya vs. Theresia Thomasi Madaha,** Civil Appeal No. 45 of 2017 [2019] TZCA 453 TanzLII.

Guided by this principle the plaintiff paraded a total of 5 witnesses, himself inclusive, to prove his case. The witnesses were Yona Jacob Mpilimbi (PW1), Paul Samwel (PW2) and Mbaraka Juma Madinda (PW3). His wife, Gerdina

Alfonce Ibrahim testified as PW5 while he testified as PW4 all making a total of 5 witnesses. In addition, 12 documents were tendered and admitted as exhibits. They include, a lease agreement concluded in 2012 (Exhibit P1), extension permit to renew lease agreement dated 2013 and 2014 which were admitted as Exhibit P2 and P3, respectively; a lease agreement dated 2017 (Exhibit P4), receipts for payment of rent (Exhibit P5), a demolition notice (Exhibit P6), a letter of reply to the demolition notice (Exhibit P7), certificate of registration and an exchequer receipt, 2014 (Exhibit P8), certificate of registration and exchequer receipt, 2015 (Exhibit P9), TIN certificate (Exhibit P10), Business License (Exhibit P11) and a copy of a survey plan (Exhibit P12). The defence paraded a total of three witnesses who are Michael Vicent Muhagama (DW1), Stella Musa Komba (DW2) and John Steven Lugendo (DW3).

At the closure of the hearing the parties prayed and were granted leave to file their final submissions. Both parties filed their submissions which I have thoroughly read and considered along side the evidence tendered by both sides. With this prelude, I will now turn to the issues for determination starting with the first issue.

Let me state at the outset that, much as the existence of the agreement was not contested, it was thought crucial to have it among the issues for determination for purposes of ascertainment the actual terms of the agreement as the parties were at logger heads with each other concerning the claims for allocation of the plot to the plaintiff should the land use for the suit land be surveyed into plots and allocated to persons who are eligible.

Whereas the plaintiff alleged that it was agreed that he will have first priority in the allocation of the plot the defendants stated that there was no such term. The controversy has however been easily resolved as PW4 and DW2 were all in agreement that the disputed term was part of the lease agreement. In fact, DW2 told the court that, such term was imbedded in the 2012 and 2014 agreements. This corroborated the content of the 2014 agreement which was admitted as Exhibit P3.

In my further scrutiny of the agreements which were tendered and admitted as exhibits, I have observed that the 2014 agreement has two remarkable features which distinguish it from the two predecessor agreements (Exhibit P1 and P2). The first of such two features is that, whereas the first two agreements were totally silent on the contested issue, the 2014 agreement (Exhibit P3) explicitly stated that should the land use plan for the suit land be changed and it be partitioned into plots, the plaintiff shall have the first priority in the allocation. It states:

> "Eneo hili ni sehemu ya eneo la wazi hata hivyo iwapo eneo hilo litabadilishwa matumizi na kupimwa viwanja kutokana na hitaji la wakati huo utafikiriwa kwanza wakati wa umilikishwaji."

Second, unlike the first two agreements which explicitly stipulated their expiry term, the 2014 agreement is silent on this issue. As this court was not presented with any agreement or a termination thereof it is assumed that the 2014 lease agreement remained operation until 1st July 2017 when the new lease agreement (Exhibit P4) came into being. Even if there was a termination which was for any reason not brought to the attention of the

court, the fact that the plaintiff remained in the premise until he obtained a new lease agreement infers that, he acquired the status of a statutory tenant under section 82(2) of the Land Act [Cap 113 R.E. 2019] and the terms of the 2014, the contested term inclusive, remained valid and operational until 1st July 2017 when the new agreement (Exhibit P4) came into being.

As for the period between this date and the date of the alleged demolition and forceful eviction on 16/2/2018 the contested term was not an integral part of the agreement as exhibits P4 which was then operational is totally silent on this issue. Paragraph 9 which appears relevant, just addresses the possibility for change of land use plan with no any indication that the plaintiff will anyhow benefit from such change. In the foregoing, it is crystal clear that not only were there contracts between the parties but the contested term was an integral part of the contract for the period above stipulated.

Moving to the second issue as to whether the 1st defendant acted in breach of agreement. Two fundamental breaches have been pleaded by the plaintiff the first being the first defendant's refusal to allocate the plaintiff the suit plot and the second is the demolition of the business premises and the forceful eviction of the plaintiff prior to the expiry of the contractual term. In the foregoing of the above finding, determination of this question entails an engagement with the last two agreements, that is the 2014 and 2017 agreements, respectively. Starting with the 2014 agreement, as there is no dispute that such term was an integral part of the agreement, the failure by the first defendant to allocate the plaintiff the plot, infers a breach of contract if established.

Two preliminary questions have sprout and both of which require the determination of this court before making a conclusion on whether the first defendant breached the agreement. The two preliminary questions are: whether there was a change of land use and if yes, whether the first defendant lived up to its contractual obligations. From the evidence of both parties there is no dispute that there was a change of land use plan for the open space area at which the suit land is located and as per exhibit P12, the same occurred between 2014 and 2016 when, the terms of the 2014 lease agreement were still subsisting. PW4 stated that, the suit premise and its surrounding area were surveyed and partitioned into five plots identified as Plot number 261, 262, 263, 264 and 265 Block 27 Hazina, the disputed one being Plot 265 Block 27 Hazina. DW2 on the other hand, stated that indeed there was a survey and partition of plots but the same did not involve the suit land as it has so far remained an open space. She deponed further that, after the area being surveyed and partitioned, it produced only four plots identified as Plot 261, 262, 263 and 264. The parcel of land at which the plaintiff's business was premised produced no plot as it has remained as an open space. Hence, the claimed Plot No. 265 is nonexistent. She deponed further that, much as the suit land did not produce a plot, the plaintiff was allocated Plot No. 262 and advised to move his business to the said plot so that the open space can remain vacant and that, although the procedures for vesting into the appellant the right of occupancy in respect of this plot are still underway, the plaintiff has moved his business to the said plot where he now operates from. DW1 also corroborated this story when he told the court that the plaintiff was allocated Plot 262 and that he currently operates

there. As none of these two witnesses were controverted in their disposition that, the plaintiff currently runs a business in Plot 262, it implies that their testimony on this fact is true.

In my further scrutiny of the copy of the survey plan tendered by the plaintiff in support of his case (Exhibit P12) I have observed that it sharply contradicts with his oral testimony. The survey map is titled "Survey of Plots No. 261-264 Block 27 Hazina, Dodoma Municipality" and its contents show that the survey produced four plots identified as 261, 262, 263 and 264. Next to Plot 264 is an area marked as 'OS' which is the borne of the contention in this suit. None of the witnesses stated what it means by "OS". In the absence of clarification and there been no assigned plot number for the alleged plot, I am made to believe that stands for open space which tallies with DW2's testimony that, Plot 265 Block 27 Hazina is nonexistent and the area is an open space. Accordingly, I have found the plaintiff to have materially failed to substantiate his claim as per the overwhelming evidence on record, Plot No. 265 Block 27 Hazina is not existent.

As for the demolition and forceful eviction, the fact that the plaintiff's business premises was demolished on 16/2/2018 is uncontested. PW1, PW2, PW3, PW4, PW5 and DW1, were present and eye witnessed the demolition done by the first defendant's employees on 16/2/2018. Similarly uncontroverted was the fact that prior to the demolition the plaintiff was issued with a notice requiring him to vacate the area. PW4 and PW5 stated that three months prior to the demolition they were served with an eviction notice. The notice dated 15/11/2017 (Exhibit P6) required the plaintiff to

demolish his premise and remove his timber from the open space within 30 days. The plaintiff was unpleased. He objected through a letter dated 28/11/2017 (Exhibit P7) in which he explained that he was legally occupying the area. In turn he received no formal response from the 1st respondent. Instead, the 1st respondent's employees went to the premise and affixed an "X" mark. When PW4 went to the Executive Director to complain about the "X", the Executive Director took him to the Land Officer and after a long discussion between PW4 and the land officer, he was told to go back to his business. The discussion made him believe that the matter was over and that he was free to proceed with business. Acting on that belief he proceeded with business until on the day of demolition. As per the testimonies of PW4 and PW5, this was about 3 months after they received the eviction notice.

PW4 told the court and it uncontradicted that at the time he was served with the eviction and even on the date of demolition the contract period of one year had not lapsed. Hence the question whether the demolition amounted to breach of contract. In answering this question, I have scrutinized the terms of the agreement. In this endevour, I have come across a termination clause vesting into the parties a total liberty to terminate the lease agreement at any time before the expiry of the term of the lease. The same is found in clause 9 and 10 of the agreement. Under clause 9, the parties agreed that the agreement will become inoperative and will naturally terminate following the change of land use plan whereas clause 10 conferred each party an unimpeded liberty to terminate the agreement at any time upon issuing a 30 days' notice to the other party. For easy of reference, the paragraphs are reproduced below. They read as follows:-

"9. Kwamba, ikihitajika, kwa sababu zozote, kubadili matumizi ya eneo husika au eneo husika kuhitajika kusitisha huduma zinazotolewa kwa muda maalumu au moja kwa moja, mkataba huu utafikia mwisho na pande zote mbili zitafungwa na majukumu yaliyowekwa na mkataba huu bila upande wowote kutakiwa kulipa fidia."

10. KWAMBA, upande wowote ambao kwa sababu yoyote ya msingi hautakuwa tayari kuendelea na mkataba huu unaweza kutoa notisi ya siku thelathini (30) kwa upande mwingine kuonesha nia yake ya kusitisha mkataba. Ikiwa sababu ya kuvunjika kwa mkataba ni mpangaji kukiuka masharti ya mkataba, mkataba utakuwa umefikia mwisho.

Going by these terms it is crystal clear that the eviction notice whose existence and contents were well acknowledged by PW4 and PW5 had the effect of terminating the lease agreement. Therefore, been served with the notice the plaintiff was duty bound to stop his business and remove his goods from the suit land. As there was no formal revocation of the eviction notice the plaintiff risked the consequences stated in notice and especially those in the last paragraph of the notice which stated that should the plaintiff fail to demolish his business premise, the first defendant shall demolish it.

It is settled law in our jurisdiction that, a party who freely enters into a contract is bound by the terms of such contract save where the contract so entered is voidable for being contrary to the law and public policy, or where

the party's consent was obtained out of coercion, undue influence, fraud or misrepresentation (see section 19 (1) of the Law of Contract Act, Cap. 345 R.E 2002). This principle, has been tested and applied in numerous authorities. The relevant cases include, **Abualy Alibhai Azizi v. Bhatia Brothers Ltd** [2000] T.L.R 288; **Unilever Tanzania Ltd v. Benedict Mkasa trading as BEMA Enterprises,** Civil Appeal No. 41 of 2009, [2009] TZCA 24 TanzLII CAT; **Philipo Joseph Lukonde v. Faraji Ally Saidi, Civil Appeal No. 74 of 2019** [2021] TZCA 1779 TanzLII and **Simon Kichele Chacha v. Aveline M. Kilawe,** Civil Appeal No. 160 of 2018, [2021] TZCA 43 TanzLII CAT. In all these cases, the Court of Appeal underlined the need for parties to adhere to the terms of their respective agreements. It also instructively underscored that the role of the court is to interpret the terms of the agreement as opposed to rewriting of the same. Being guided by these authorities I am constrained to hold as I hereby do, that the demolition did not constitute a breach of contract.

The third issue for determination is whether the plaintiff suffered damages as a result of the breach of contract and to what extent. As stated in the introductory part of this judgment, further to the prayers that the defendants be compelled to allocate him the plot number 265 Block 27 Hazina area or a compensation in lie thereof, the plaintiff has claimed that the demolition caused him multiple losses which need be compensated. He has prayed for compensation to a tune of Tshs 251,564,500/= to attorney the loss he has suffered following the demolition of his business premises by the 1st defendant; Tshs 144,000,000/= to attorney the daily loss of business of Tshs 500,000/=computed from the date of the forceful demolition and

eviction to the date of filing of the suit and a further compensation for a daily loss of income of Tshs 500,000/= from 1/12/2021 to the date of judgment and general damages.

Substantiating these claims, PW1 stated that on the day of demolition, the plaintiff's business had goods which were collected and taken away by the the first defendant's employee. When cross examined, he stated that, on the date of the demolition on 16/2/2018 the goods were not taken away. They remained there for about a year before the first defendant's employees came back and took them away. PW2 who was the saleslady, told the court that they used to sell timber, gypsum board, ceiling boards, floor tiles, nails, cement, square pipes and flat bars and the total sales per day was Tshs 500,000/=. PW4 stated that on the date of demolition, the total stock in his shop which encompassed timber, gypsum boards, ceiling boards, angle iron, wood, gypsum tiles, nails, cement, among others, were worth Tshs 251,564,500/=. On cross examination, he told the court that these items were not taken away on the date of the demolition on 16/2/2018. Some were destroyed and some were not but they all remained there for about three years until 24/7/2011 when the first defendant workers came back and carried all the things to an unknown place. In the course of reexamination, he clarified that, he did not remove the goods from the site as there was a court injunction. PW5 who, according to PW4, had a better account of the goods and their value as she was the one placing orders and managing the shop, produced some receipts and delivery notes to show the orders she was pressing before the demolition.

Section 73(1) of the Law of Contract Act, Cap 345 provides that:

> Where a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

In view of this provision, having overruled the claim that the demolition of the business premise proceeded in breach of agreement, the plaintiff's claims above have been rendered nugatory as compensation can only be awarded if there was a breach of the contract.

Without to prejudice to the above, I would add that even if this was not the case, the plaintiff's claims would still have failed as no concrete evidence was rendered to show the items which were in the shop on the date of demolition. All what was presented were receipts and delivery notes bearing the name of Mama Nganilo which is different from the plaintiff's name. Also they were of various dates ranging from 10-01-2011, 10/9/2015; 2015-12-01; 2016-1-7; 2016-1-15; 2016-1-4; 2016-10-1; and 1/20/2017. None of the receipts and delivery notes was dated 2018. Therefore even if this court was to believe that the delivery notes and receipts had connection with the plaintiff's business, it would have been impossible to establish the type and quantity of the goods which were in the plaintiff's shop during the demolition on 16/2/2018. It would have been similarly impossible to compute the profit which the plaintiff was daily earning from his business. Being a registered tax payer, the plaintiff could have backed up his case with the tax returns he previously filed at the Tax Revenue Authority (TRA) as these could have

easily been obtained from the TRA but he did not. Hence, he miserably failed to substantiate his claims.

In the foregoing of the above, the plaintiff's claims and prayers fail save for the allocation of Plot No. 262 Block 27 Hazina for which there is an undertaking by the defendants to allocate him. Accordingly, the 1st defendant is ordered to formally allocate the plaintiff Plot No. 262 Block 27 Hazina. In the interest of justice, I have found it not prudent to award costs to the winning party. The costs shall therefore, be shared by each of the parties bearing its respective costs.

**DATED** and **DELIVERED** at Dodoma this 24th day of November 2023

**J. L. MASABO**

**JUDGE**