IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TABORA DISTRICT REGISTRY)

AT TABORA

LAND CASE NO. 02 OF 2023

1. **BUSIBA ABUBAKARY KOME**
2. **JUMA CHACHA WAMBURA** ..... **PLAINTIFFS**
3. **LAURENCE DOMINIC MADICHA**

VERSUS

1. **IGUNGA DISTRICT COUNCIL**
2. **THE ATTORNEY GENERAL** ..... **DEFENDANTS**

Date of Last Order: 13.10.2023
Date of Judgment: 30.11.2023

JUDGMENT

KADILU, J.

The plaintiffs obtained leave of this court and filed a representative suit on behalf of themselves and sixty-nine (69) others. Their claim against the 1st defendant is for the payment of TZS. 316,100,000/= being the outstanding costs they had spent for the construction of 109 business stalls in Igunga Central Market. They are also claiming for payment of TZS. 300,000,000/= as general damages for breach of contract, costs of the suit, interest at the rate of 12% from the date of judgment to the date of final payment, and any other reliefs the court may deem fit to grant.

The plaintiffs allege that in 2012, they entered into a contact with the 1st defendant permitting them and 69 others to construct 109 business stalls in Igunga Central Market at their own costs for consideration that in return,

the plaintiffs would pay to the 1st defendant TZS. 10,000/= per each shop as monthly rent for 10 years from 1st June, 2012 to 30th June, 2022 to cover the costs of construction. It was alleged further that after building the business huts, each builder had incurred TZS. 12,000,000/= as costs for the construction of each shop. It happened that after the construction, the plaintiffs started to occupy the business huts until 7th February, 2020 when the 1st defendant terminated the agreement by entering into fresh contracts with other persons at TZS. 100,000/= monthly rent per business hut.

The plaintiffs claim that the 1st defendant breached a contract and occasioned a loss of income to them, causing damages and disturbances. Upon being served with a copy of the plaint, the 1st defendant filed a joint written statement of defence (WSD) asserting that the plaintiffs were the ones who breached tenancy agreements by sub-leasing the shops contrary to what was agreed between them. It was stated in the WSD that one of the principal terms of the tenancy agreements was the restriction against sub-lease, which the plaintiffs breached. The defendants aver that there is no proof that the plaintiffs had spent TZS. 12,000,000/= for the construction of each business stall as they allege.

In further defence, the defendants elaborated that the 1st defendant did not breach the agreement with the plaintiffs as after realizing that the latter had sub-leased the business stalls, it issued a notice of termination of contracts with the plaintiffs before entering into contracts with new tenants. The defendants argued that failure by the plaintiffs to abide by the terms of

the agreement justified the termination of contracts by the first defendant because the plaintiffs could not be let benefit from their wrongs. The 1st defendant prayed for the suit to be dismissed with costs.

The trial of the case proceeded by way of witness statements. The parties were ordered to file their witness statements and serve each other as provided by the law. The case was fixed for hearing from 03/10/2023 to 13/10/2023 whereby witnesses for both sides appeared for tendering exhibits and underwent cross-examination. In the end, Counsel for both parties filed final submissions. The plaintiffs were represented by Mr. Kelvin Kayaga, learned Advocate, and the defendants were represented by Mr. Samwel Mahuma, assisted by Ms. Grace Mwema and Mr. Guren Mapande, all learned State Attorneys. In consensus with the parties' Advocates, the court framed the following issues:

1. *Were there tenancy agreements between the parties?*
2. *If there were tenancy agreements, what were the terms?*
3. *Was there a breach of the terms?*
4. *What are the reliefs to which the parties are entitled?*

To resolve the framed issues, the plaintiffs called five (5) witnesses whereas the defendants had four (4) witnesses. When the case was called on, the plaintiffs' first witness was one **Busiba Abubakari Kome,** who testified as PW1. Concerning the first issue, PW1 stated that the plaintiffs and the 1st defendant entered into contracts for the construction of business huts in Igunga Central Market. He tendered seven (7) contracts as samples

adding that all the plaintiffs had similar contracts with a variation on their names only. The said contracts were admitted and marked collectively as exhibit **P1**.

In the pleadings, witness statements, and oral evidence, neither the plaintiffs nor the 1st defendant refutes to have entered into a contract with the other party. Both sides were firm in their pleadings, testimonies, and submissions that the 1st defendant contracted with the plaintiffs and 69 others for the construction of business stalls at the Central Market of Igunga. Section 10 of the Law of Contract Act, [Cap. 345] provides that:

> *"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void."*

The facts of this case do not reveal anywhere that any of the parties were forced to enter into the said contract. Further, the capacity of the parties to contract was not challenged. The lawfulness of the object and consideration was also unquestionable and, no illegality was raised concerning the parties' agreement. Thus, there was a valid contract between the parties herein, and since the subject matter of the contract was the construction of business huts by the plaintiffs on the land owned by the 1st defendant, the first issue is answered in the affirmative.

As to the second issue concerning the agreed terms, exhibit **P1** is clear that the 1st defendant permitted the plaintiffs to construct business stalls in Igunga Central Market at their expense. Thereafter, the 1st defendant had to rent the huts to the plaintiffs for ten (10) years starting from 1/7/2012 to 30/6/2022. The agreements show that plaintiffs were to pay TZS. 10,000/= to the 1st defendant as monthly rent for the entire contract period. It was agreed in addition that after the expiry of the contract period, the 1st defendant was free to rent the huts to other persons, but the plaintiffs would be given the priority as new tenants if they so wished.

One of the terms of the contract was that the plaintiffs were not permitted to transfer the huts to other persons without the consent of the 1st defendant. It was undisputed that plaintiffs were not allowed to effect any major renovations to the huts without authorization by the 1st defendant. In addition, the parties agreed that if the plaintiffs desired to continue to occupy the business stalls after the expiry of the contract period, they were supposed to make fresh applications to the 1st defendant. Nevertheless, the plaintiffs were free to return the huts to the defendant even before the expiry of the contract period.

The parties agreed more that the 1st defendant was free to terminate the contracts with the plaintiffs at any time by giving 14 days' notice to the plaintiffs if **first**, the plaintiffs breach any term(s) of the contract, and **second**, if the plaintiffs fail to pay the agreed monthly rent. The contract obliged the plaintiffs to give 14 days' notice in writing to the 1st defendant if

they became unable to discharge the contractual obligations. These were the relevant terms of the contract between the plaintiffs and the 1st defendant.

During the hearing of this case, the plaintiffs argued vehemently that there were neither express nor implied terms of a contract that compelled them to conduct business in the huts they had constructed. In consideration of this point, I have carefully examined the terms of the contract and established that clause 2.1 restricted the transfer of business stalls to other persons in various ways including sale and donation. Apart from the above-quoted clause, Section 89 (1) (i) of the Land Act, [Cap. 113 R.E. 2019] provides that:

> *"There shall be implied in every lease, other than a short-term lease, covenants by the lessee with the lessor binding the lessee not to transfer, mortgage, charge, sublease or otherwise part with the possession of the leased land or buildings or any part of it without the previous written consent of the lessor, that consent not to be unreasonably withheld."*

Therefore, there was an express and implied term of contract between the parties restricting the transfer of business huts without permission from the 1st defendant. On the 5th paragraph of the plaintiffs' final submission on page 2, Mr. Kelvin Kayaga acknowledges the existence of a term of the contract prohibiting the transfer of business stalls by submitting that:

> *"Plaintiffs according to the agreement were prohibited from leasing the said shops to other persons."*

The learned Advocate continued to elaborate on page 3 of the submission that it was not disputed that some of the plaintiffs never conducted business in the said shops on their own as in fact, the shops were leased from the beginning. This fact was supported by evidence of **PW5,** one **Oscar Mweno Mweno** who indicated in his witness statement that he constructed five (5) shops, but he occupied one (1) shop only. Likewise, DW2 and DW3 told the court the same story during the trial.

Based on the foregoing, it is apparent that the plaintiffs were required to occupy the business huts to do business in Igunga Central Market and not otherwise. They were not permitted to transfer the huts by sale, donation, or any other way. Guided by the parol evidence rule, plaintiffs cannot be allowed to bring oral evidence to vary the terms of a written contract which also contains a restrictive covenant implied by the law. *See* Section 24 of the Law of Evidence Act [Cap. 6 R.E. 2022] and the case of ***Ashraf Akber Khan v Ravji Govind Varsan***, Civil Appeal No. 5 of 2017, Court of Appeal of Tanzania at Arusha, at p. 25 on which parol evidence rule was discussed. The court is not supposed to accept any prayer from the party which amounts to interpolation of new terms and conditions as doing so will amount to tempering with the agreement the parties had entered into. The court's role is to give effect to what the parties have agreed upon.

The third issue is whether there was a breach of the outlined terms of the contract and if so, by whom. In resolving this issue, I will let the exhibits and witness testimonies speak for themselves. PW1 testified that the 1st

defendant breached the agreement by agreeing with other people concerning the business stalls without payment of compensation to the plaintiffs while the duration of the agreement was not yet lapsed. He explained that the breach occurred on 7/2/2020 while the agreement was expected to lapse on 30/6/2022.

This piece of evidence was in line with the testimony of **DW1, Anthony Marko**, a Trade Officer of the 1st defendant. He informed the court that in 2020, the 1st defendant terminated the contract between her and the plaintiffs after the plaintiffs breached a contract by sub-leasing the huts to other persons without authorization. DW1 said this was a violation of Clause 2:1 of the agreement in which the plaintiffs were prohibited to sub-lease the business huts. He explained that after the termination of contracts with the plaintiffs, the 1st defendant rented the business stalls to other tenants for TZS. 100,000/= per month per each business hut. He produced notice of termination of contracts with the plaintiffs and tenancy agreements with the current tenants which were admitted as exhibits **D1**.

DW2 and DW3 stated that after the completion of construction of the business huts, the plaintiffs subleased to other persons. Sub-lease agreements were admitted and marked collectively as exhibit **D3**. From exhibit **D3,** it is evident that between the years 2013 and 2020, **Monday Daboya** was receiving TZS. 1,600,000/= as annual rent for business hut No. 034, which is approximately TZS. 130,000/= per each month. On his part, **Tungu Malale** was getting TZS. 1,800,000/= annual rent on business hut

No. 026 which is approximately TZS. 150,000/= monthly rent as evidenced by exhibit **D2**. Nonetheless, all plaintiffs who testified told the court that they sub-leased the business huts at TZS. 100,000/= each being a monthly rent. Out of each monthly rent, they paid TZS. 10,000/= to the 1st defendant.

In his testimony, PW3 elaborated as hereunder:

"We stayed with the 1st defendant peacefully for seven years and two months. Twenty-nine (29) months were remaining for contracts to reach an end. We were getting TZS. 100,000/= per month per each business hut. The TZS. 2,900,000/= we are claiming is not concerned with the TZS. 10,000/= which we were remitting to the 1st defendant as part of monthly rent that we were receiving out of sub-leases."

It was shown earlier that Clause 2.1 of the agreement between the plaintiffs and the 1st defendant prohibits the plaintiffs from transferring business huts to other persons without the consent of the District Executive Director. It stipulates as follows:

"Mjenzi haruhusiwi kuhamisha umiliki wa ujenzi, kuuza, au kumpatia mtu mwingine bila ridhaa ya Mkurugenzi Mtendaji wa Halmashauri."

While acknowledging that the plaintiffs might have breached the agreement, Mr. Kelvin faulted the procedure employed by the 1st defendant in issuing the notice of termination of the contract. He argued that the notice violated the requirement of the law under Sections 105 and 106 of the Land Act for not stating the extent of the breach and granting the plaintiffs time to remedy the breach. With due respect, the learned Advocate seems to

have forgotten one of the cherished cardinal principles of the law of contract known as the sanctity of contract.

Once parties competent to contract have agreed freely for a lawful consideration and lawful object, the contract entered becomes sacrosanct. That is, the parties become bound by the terms and conditions stipulated and each has to fulfil his/her part of the bargain. Neither a third party nor courts should interpolate or tamper with the terms and conditions therein. In the instant case, the parties agreed that if the plaintiffs breach any term of the contract, the 1st defendant would be justified to terminate the agreement after giving 14 days' notice to the plaintiffs.

The plaintiffs alleged that there was no clause of the agreement that restricted them from subleasing the business huts. Again, this is misleading. All the plaintiffs' witnesses told the court that they subleased the business stalls immediately after the construction because their financial conditions were not okay, making them unable to carry on business in the huts. However, the contract requires any plaintiff who was unable to perform any of the contractual obligations, to notify the 1st defendant by notice in writing within 14 days.

There is nothing on record or evidence showing that any of the plaintiffs informed the 1st defendant about his failure to conduct business activities in the disputed huts. To the contrary, the plaintiffs complain that the 1st defendant breached a contract by renting the business huts to other

persons before the expiry of the contract period. PW3 stated as follows during the trial:

> *"I did not inform the defendant about my failure to proceed with business in the huts. My business huts are No. 160 and 161. I do not remember the costs I incurred in the construction of my business stalls. Even if the 1st defendant had not breached a contract, I would still be claiming for TZS. 100,000/= per month. The TZS. 10,000/= was a contribution to the 1st defendant as per the agreement."*

The **Black's Law Dictionary, 8th Edition** of 2004 page 200 defines the term "breach of contract" as a violation of a contractual obligation by failing to perform one's promise by repudiating it or by interfering with another party's performance. It is common knowledge that a breach of contract occurs when its terms have not been performed as agreed. In the present case, one of the terms of the agreement was a restriction on the transfer of the business stalls. I have already shown that the 1st defendant was justified to terminate the agreement because the plaintiffs breached the contract by sub-leasing the business huts and failing to give notice to the 1st defendant after they failed to perform the contract.

As a matter of procedure under clause 7 of the contract, the defendant was obliged to give 14 days' notice to the defaulter before the termination of the contract, and in that situation, the 1st defendant could not be liable to compensate the plaintiffs. The 1st defendant gave the notice to the plaintiffs

before termination of the contract and it was admitted as exhibit **D1.** The following is an excerpt from the testimony of PW1:

> *"... The agreement provided that the 1st defendant would terminate the tenancy if any of us failed to pay rent or breached a contract. If any of us failed to honour the agreement, he was supposed to give notice to the 1st defendant."*

The plaintiffs are of a firm view that since none of them failed to pay rent, the 1st defendant contravened the terms of the agreement for renting the business stalls to other persons while the contract was still subsisting. The Law of Contract Act, [Cap. 345] provides under section 37 (1) that:

> *"The parties to a contract must perform their respective promises unless such performance is dispensed with or excused under the provisions of this Act or any other law."*

It is apparent from the records and testimonies that the plaintiffs do not dispute having subleased the business huts. Neither do they object that they never informed the 1st defendant about their failure to use the huts as agreed? Based on the foregoing, I am of the considered view that the plaintiffs' conduct contravened Clause 2.1 and 9.2 of the agreement constituted a fundamental breach and the 1st defendant was justified to terminate the agreement. Ultimately, it is hereby concluded that the plaintiffs breached the agreement between them and the 1st defendant.

The last issue is about reliefs to which the parties are entitled. The plaintiffs prayed for general damages at the tune of TZS. 300,000,000/= for the defendant's breach of contract. Although the award and quantum of general damages are at the discretion of the court, it is the established principle of law that general damages are awarded where there are direct, natural, or probable consequences of the act complained of. In the case of ***Stanbic Bank Tanzania Limited v Abercrombie & Kent (T) Limited, Civil Appeal No. 21 of 2001***, Court of Appeal of Tanzania at Dar es Salaam, it was held that:

> *"Damages, generally, are that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he has not sustained the wrong for which he is now getting compensation or reparation."*

In ***Victoria Laundry v Newman*** [1949] 2 K.B. 528, it was observed that damages are intended to put the plaintiff in the same position, as far as money can do so as if his rights had been observed. In the matter at hand, I have just found that the plaintiffs breached the terms of the contract between them and the 1st defendant. Therefore, I will not labour to discuss the reliefs as prayed by the plaintiffs since they did not suffer financial losses as a result of the termination of the contract by the defendant. In the final analysis, the case is dismissed with costs for lack of merits. The right of appeal is open to any party dissatisfied by this decision.

It is so ordered.

KADILU, M.J.,

JUDGE

15/12/2023

Judgment delivered in chamber on the 15th Day of December, 2023 in the presence of Mr. Kelvin Kayaga, Advocate for the plaintiffs, and Mr. Samwel Mahuma, State Attorney for the defendants.

KADILU, M. J.

JUDGE

15/12/2023.