

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 71 OF 2002

TANZANIA BENA CO. LTDPLAINTIFF
VERSUS
BENTASH HOLDINGS LTDDEFENDANT

J U G M E N T

KIMARO, J.

The controversy between the parties stems from a sale of landed property and two crushing plants. The landed property is Farm No.2598 Tegeta, Dar-Es-Salaam and is comprised of Certificate of Title No.44542. In terms of the testimony of the plaintiff's witness; one Mr. Bruno Gatta (PW1) the properties belonged to BENNACO Company and were assigned to the plaintiff after BENACCO closed business in Tanzania.

The defendant agreed to purchase the landed property for T.shs 25,000,000/=. For this item, there is no dispute. A written sale agreement and a transfer for the landed property were prepared and signed by the parties. However, their signatures were not attested to by a Commissioner for Oaths because of problems which arose giving rise to the filing of this suit.

As regards the crushing plants, pleadings by the plaintiff and testimony of one of the plaintiff's witness – Alessandra Gatta (PW3) is that the deal for the purchase of the landed property was inclusive of the two crushing plants. Only that the

agreement for the crushing machines was oral and the purchase price was USD 160000.

It is also asserted by the plaintiff that the Defendant took possession of the landed property and the two crushing plants after effecting part payment for other properties purchased by him from Alistride Company which were kept on the farm. The purchase of properties belonging to Alistride was covered by another deal made between PW3 and DW1 – Mr. Geoffrey Johnson, the Managing Director of the Defendant. The testimony of PW3 is that she sold the properties of Alistride by virtue of her directorship in Alistride.

Whereas the Defendant admitted, execution of the sale agreement and transfer of the landed property, the oral agreement for the crushing plants was denied. The defendant also denied taking possession of the landed property and the crushing machines.

The plaintiff is claiming for payment of USD 195,000 being the purchase price for the landed property and the crushing plants. An alternative prayer is for return of the crushing plants and repossession of the landed property as well as mesne profits and loss of use or damages. The plaintiff also prays for daily compound interest at 30% from October 2000 till judgment and interest at court's rate till full payment plus costs.

The issues framed for the determination of the court are –

“ i) Whether the agreement between the parties was inclusive of landed property under Title No.44542 and the crushing plant.

- ii) *Whether the defendant took possession of the landed property.*
- iii) *Whether the defendant took delivery of the crushing machines.*
- iv) *To what relief(s) are the parties entitled to.”*

Both parties are represented by Learned Advocates, the plaintiff by Dr. Fauz Twaib of Ismail & Co Advocates and the defendant by Mr. Buberwa of B & B Law Partners.

The testimony adduced during the trial shows that the plaintiff is a limited liability company with two shareholders, each with 50% shares. The shareholders are also the Directors. They are Bruno Gatta (PW1) and France Bonnametti (PW2). Both are no longer in Tanzania. PW1 is currently living in Nairobi and PW2 is living in Italy. Another person of significance in the picture is Alessandra Gatta (PW3). She is a daughter of PW1 as well as a focal point for communication between PW1 and Geoffrey Johnson (DW1). She is also a key player in the transaction which gave rise to this suit. Geoffrey Johnson is a Director of the Defendant. All these witnesses are persons who are well acquainted to each other and they have a personal relationship. In particular PW1, PW2 and DW1 worked together in Bennacco sometimes in 1990s before each one moved to other activities but they have known each other for years.

The testimony on activities which culminated into this suit is as follows. The defendant deals with the business of hire of heavy equipments e.g. bulldozers and others for building roads. That is earth moving equipments. He visited PW1 at his

house in Nairobi and indicated an interest in hiring a store and crushing plant as well as renting a workshop. All these properties are on the landed property. Because PW1 needed time to make quotations, no decision was made there and then. DW1 had to leave without an immediate answer from PW1. PW1 prepared the quotations for the hire of the crushing plants, store as well as the quotations for renting the workshop. The quotation was tendered and admitted in court as exhibit P1.

After the preparation of the quotations, PW1 tried to get in touch with DW1 through the phone but he could not go through. He then faxed the quotations to his daughter (PW3) for transmission to DW1.

Before a decision was made by DW1, he got involved in negotiating a deal with PW3 in relation to the purchase of properties belonging to Alistride Ltd. PW3 was a Director of the company. The company was a construction company which dealt with the business of construction of roads, bridges and other civil work. DW1 wanted to purchase machinery belonging to Alistride for his company. During the negotiations for the deal, Alistride was a tenant in the landed property and all the machinery were on the land. The parties managed to come to an agreement for the purchase of the properties.

It was after the completion of the negotiations for the purchase of the Alistride property, that DW1 informed PW3 that he was no longer interested to hire the machines and rent the workshop. Instead, he wanted to purchase the land and the crushing plants. PW3 said an agreement for sale of the landed property was agreed upon, the purchase price for the farm being T.shs 25,000,000/=.

As for the crushing machines, PW3 said they made an oral agreement with DW1 and DW1 agreed to purchase the same for USD 166,000. PW3 communicated with her father (PW1) and informed him about the results of the deal and asked whether it was acceptable. PW1 said the deal was acceptable and he too consulted PW2 on the matter. PW2 responded positively.

DW1 on the other hand admitted the agreement on the purchase of the farm at T.shs 25,000,000/= but denied that there was an oral agreement for sale of the crushing machines. DW1 also admitted that he made an agreement with PW1 to purchase Alistride property.

Both PW1 and DW1 testified that the purchase price for the farm has not been paid and they conceded that a caveat had been entered in respect of the farm. While PW3 insisted on the oral agreement for sale of the crushing plants DW1 denied it totally. DW1 said the price of the farm was USD 160,000 and the directors wanted the amount to be paid to the two Directors of the plaintiff on equal basis outside the country but he refused. He said the Directors would have given him a receipt for T.shs 25,000,000/=. He denied that the amount of USD 160,000 was for the crushers.

In her testimony, PW3 told the court that DW1 and herself exchanged a lot of e-mails on the purchase of the farm and the crushers. The e-mails were tendered in court and admitted as exhibit P2. According to PW3, DW1 went into possession of the farm after part payment of the properties purchased from Alistride. He also took delivery of the crushers. PW3 said that was done on the basis of trust and because the Alistride property was paid for and it was at the farm. However, DW1 denied taking possession of the farm and the crushers.

In a nutshell, that was the evidence which was tendered during the trial.

In his final submissions Mr. Buberwa for the defendant submitted that the plaintiff's suit must fail because the whole transaction was geared towards evasion of payment of taxes. As such it was void ab initio. He said this reason explains why only one written agreement was made by the parties while the evidence tendered show that the plaintiff is referring to two items; the landed property and the crushers. Mr. Buberwa said that even the written agreement reflects a small value while the plaintiff is claiming for a lot of money. He made reference to section 23(1) of the Law of Contract Act 1961 and the cases of **Zakaria Barie Bura Vs Theresia Maria John Mubiru** 1995 TLR 211, **Hamed Baali Vs Hamed Batwahsaff** 17 KLR 30, **Issa V Michael & Co** 23 (1) KLR 12 and **Suryakant D. Ramji V Savings & Finance Ltd & 3 others** Commercial Case No.30 of 2000 (unreported) arguing that in all the cases, the court held that contracts which are tainted with illegality are void ab initio. The last cases cited put emphasis on strong obligation for all citizens to ensure that they make true and faithful returns for tax purposes.

Mr. Buberwa made reference to the Law of Evidence Act 1967 and argued that once a contract is written it cannot be varied by either addition or contradiction by oral evidence. (Section 101 of the Act).

In reply Dr. Twaib submitted that Mr. Buberwa's submission on the illegality of the contract because of tax evasion is unfounded because no evidence was led to support his submission. I quite agree with Dr. Twaib that no evidence at all has been led to support what Mr. Buberwa submitted in his winding up submissions. It has been repeatedly held in various cases that submissions must be confined to what is

on record. I refer to the case of **Vidyrthi V Ram Rahka**.(1957) EA 527 which conforms this position.

Dr. Twaib submitted further that the evidence on record shows that two items were involved in the sale transaction; the farm and crushers. In terms of Section 41(1) of the Land Registration Ordinance (now Land Registration Act) Cap.334 it was mandatory for the sale transaction involving the farm to be in writing. Therefore, it was done for purposes of compliance with the law.

Commenting on the case of **Zakaria Bura V Theresia Mubiru** (supra) Dr. Twaib said even if the court will find that the agreement is illegal and thus unenforceable, it will be just and proper to have the parties be restored to their position quo ante with the defendant returning the landed property and the crushing machines and paying compensation for mesne profits. The court will determine on this point on the prayers.

As regards the submission on written and oral contract, Dr. Twaib submitted that what the evidence on record shows is that the agreement for both items was made on the condition that the land and the two crushing plants were considered as one transaction and so there is no question of the oral contract adding or varying or contradicting the written agreement although he agreed with the principal of the law in Mr. Buberwa's submission.

On the first issue Mr. Buberwa submitted that the plaintiff has not proved ownership of the crushing plants and all e-mails tendered in court are concerned with sale of plant and equipment belonging to Alistride Limited. According to Mr.

Buberwa, this offers an explanation why the crushing plant was not included in the sale agreement of the farm.

Dr. Twaib replied that there is clear evidence by the defendant acknowledging the transaction under Para 16 of the amended written statement of defence and the annexed copies of correspondences written by the Directors of the Plaintiff directing the Defendant to effect payment in accordance with the agreement. Dr. Twaib submitted further that the impression which the correspondences give is that there was consensus of mind of the parties and all ingredients of a valid contract existed. The Defendant should be estopped from denying the representation made to the plaintiff.

Making reference to the testimony of the Defendant in court on 5/07/2004 Dr. Twaib said the defendant admitted having agreed to purchase the farm for USD 160000 and he has not yet effected payment.

During the trial, evidence was led showing that the defendant wanted to pay. However, his intention was bogged down because of Civil Case No.433 of 1999 filed by one Bruno Frenzoni who entered a caveat against the land in dispute.

The analysis of the evidence which was tendered in court leaves no doubt that the agreement between the parties was inclusive of the landed property under title No.44542 and the crushing plants. As correctly submitted by Dr. Twaib the written agreement covering the farm could not have been effected in any other manner. The law requires the same to be in writing.

According to the defendant himself and the other witnesses, the parties know each other for a very long period. It is therefore not a surprise to have an oral agreement for the purchase of the crushing plants. It was not expected that the Defendant would change his position given the relationship which existed between the parties.

The exchange of the e-mails between PW3 and DW1 tells it all. That the sale transaction included two items; the farm and the crushing plants. There is no way in which the Defendant can disassociate himself with what took place. The question of ownership raised by Mr. Buberwa is of no assistance to the Defendant. The answer to the first issue is positive.

As regards the second issue Mr. Buberwa submitted that the defendant has not taken possession and the crushing plants belongs to Alistride Limited and that there are cases involving the disputed property. He submitted further that a search conducted at the Ministry of Lands show that the land is still in ownership of the Plaintiff.

Dr. Twaib submitted correctly that the e-mails exchanged between PW3 and DW1 draws a conclusion that the defendant took possession. That is precisely so. PW3 said the properties of Alistride sold to the Defendant were on the farm which forms the subject matter of the suit. It was after the Defendant had partly paid for the properties that he was allowed to take possession of properties. The crushing plants were also on the farm. There are also the e-mails exchanged between PW3 and DW1 and in particular the e-mail dated 22nd February 2001 which showed that what remained unfulfilled is payment for the farm and the crushers.

PW4's testimony also shows that it was the Defendant who took over the responsibility of payment for the security services offered in respect of the properties which were on the farm. If he was not in possession of the farm and the crushing plants why pay for security services for those properties?

I would also agree with Dr. Twaib that the fact that the land is still in the ownership of the plaintiff does not prove that the defendant did not go to possession. Mr. Buberwa must have confused between ownership and possession Dr. Twaib pointed out correctly that the transaction involving the disposition of the farm had not been completed. Transfer had not been effected. That is why the plaintiff is asking for among others specific performance. The defendant to effect payments.

As regards the caveat the evidence shows clearly that the case has been settled. It is only a matter of making a follow up to ensure that the caveat is up lifted. Under the circumstances issues number two and three are answered positively.

Lastly is the reliefs. The plaintiff having proved its case on the balance of probabilities judgment is granted for the plaintiff for payment of USD 195,000/-.

In the event of failure to honour prayer (a) the defendant should return the farm and the two crushing plants to PW1. In addition, the Defendant should also pay mesne profits on the landed property at USD 1000 p.m. till delivery of possession. The prayer for loss of use is not accepted because no evidence at all was led to support this prayer. The plaintiff is also granted interest at 20% per annum from 1st October 2000 to the date of judgment and thereafter interest at the courts rate of 7% till full satisfaction plus costs.

N.P.KIMARO,

JUDGE

9/08/2004

Date 12.8.2004

Coram: Hon. N.P.Kimaro, J.

For the Plaintiff – Dr. Twaib.

For the Defendant – Dr. Twaib/Mr. Buberwa.

CC: R.Mtey.

Court: Judgment delivered today.

Order:

1. Judgment for the plaintiff for USD 195,000.
2. Alternatively, the defendant should return the crushing plants and the plaintiff will be allowed repossession of the farm.
3. The plaintiff will also be entitled to mesne profits at USD 1000 p.m. till delivery of possession.
4. The plaintiff is also granted interest at 20% from 1st October 2000 till judgment. Thereafter interest to be at the court's rate of 7% till full satisfaction.
5. The plaintiff is also granted costs.

N.P.KIMARO,

JUDGE

12/08/2004

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I Certify that this is a true and correct
of the original order judgement Ruling
Sign [Signature]
Registrar Commercial Courts Dsm.
Date 12/8/04