IN THE HIGH COURT OF TANZANIA

[COMMERCIAL DIVISION]

AT DAR ES SALAAM

COMMERCIAL CASE NO. 85 OF 2009

NSAGALI COMPANY LTD.....PLAINTIFF

VERSUS

BARCLAYS BANK TANZANIA LTD.....DEFENDANT

JUDGMENT

MRUMA, J.

The plaintiff and the defendant are limited liability companies incorporated under the laws of Tanzania. The background leading to this suit can be recapitulated briefly as follows:

Under a Memorandum of understanding (hereinafter **MOU**) signed on the **12th May, 2008** between the parties it was agreed that the plaintiff would construct a brick and mortar building on her plot No. 52-54 in Block Q at Nyasubi in Kahama District. Thereafter parties could enter into a lease agreement for ten consecutive years with the defendant as the tenant and the plaintiff a land lord. The rent rates was to be fixed at **USD 14.00** per square meter per month for the first four years and then at **USD 17.00** per square meter per month for the last 6 years. It was further in their

understanding that the defendant would provide detailed specification of the suit structure and thereafter the plaintiff would complete construction and hand over the building within a period of four months subsequent to signing of the **MOU**.

The defendant did not supply the detailed specifications as agreed for about 42 days and in the same time unfortunately one of the co-directors of the plaintiff was shot dead by bandits. These, according to the pleadings were some of the frustrating events that led to failure by the plaintiff to deliver the intended building to the defendant on time.

Apparently thereafter the plaintiff proceeded out of the **MOU** specified time and with the defendant's knowledge but when the building was ready for about 95% and at the supervision of the defendant, the defendant issued a termination notice of the **MOU** on the **3rd November, 2008** on ground that its period had elapsed.

The defendant then purported to recast the **MOU** by giving the plaintiff a counter offer and suggested a new rent of **USD 7.00** per month per square meter instead of the former agreed **USD 14.00** per square meter and that she could commence occupation as a tenant in **July, 2009**. The plaintiff refused the new offer the act which as per the plaint steered up the rescission of the **MOU** by the defendant.

It is for these reasons the plaintiff alleges that the defendant had breached the clear terms of the **MOU** which has led them suffering damages as follows:-

a) That the plaintiff had already used T.shs. 673,938,614.76 to construct the building in question

b) That the plaintiff had been forced to reschedule her financial affairs therefore the breach disturbed and thwarted her financial plans.

c) That the plaintiff had lost the expected income for a period of 10 years of the agreement and had been forced to embark on marketing strategies to market the building

d) That the suit building was constructed purposely for the defendant's needs therefore it will need major alterations and heavy cost to fit other purposes.

It is on these grounds that the plaintiff prays for the judgment and decree against the defendant for the following:-

a) A declaration that the defendant breached the **MOU**.

b) An order for specific performance and payment of **USD** 252.000.00 being rent for 4 years and payment of interests at 2% per month of the same from the date of the breach to the date of judgment.

c) In the alternative to relief in paragraph (b) above payment of punitive general damages the tune of USD 966,000.00 being the amount of the plaintiff would have earned as rent for 10 years.

d) Interest on the decretal amount at 7% per annum from the date of judgment to the date of full satisfaction

e) Costs of the suit be provided for.

The defendant in her defence has denied the claims laid down against them contending that the said **MOU** was never intended to be a binding contract but rather a mere understanding. The defendant's also contended that the plaintiff had breached the covenants by delays. For these reasons the defendant hoisted a counter claim saying that the **MOU** was rescinded by her because of the delay committed by the plaintiff and therefore they are praying for judgment and decree as follows:

a) A declaration that the defendant is well within their right for opting to rescind the MOU.

b) Safe return of the defendants Automated Teller Machine(ATM), Safe and Server Rack, Generator and UPS which are in the possession of the Plaintiff.

c) Costs of the counter claim; and

d) Any other reliefs as this honourable court may deem fit and appropriate to grant.

Before the commencement of the trial the court framed four issues for determination. These are:-

1. Whether the MOU between the parties signed on the **7th** and **12th May, 2008** constitutes a binding and enforceable contract

2. If the answer to issue no. 1 above is in the affirmative, whether there was a breach of that contract.

3. If the issue no.2 above is answered in the affirmative, whether neither party suffered any damages

4. To what reliefs are the parties entitled to

The plaintiff called two witnesses and the defendant called one witness. Parties were represented by Mr. Outa learned counsel and Mr. Bahebe learned counsel respectively. I will navigate briefly through their testimonies.

The first witness is Mr. **Emmanuel Gungu Silanga** (**PW.1**), a businessman and a director of the plaintiff's company. He started with the historical background of the suit. He stated that the plaintiff and the defendant did on the **12th May, 2008** enter into an agreement for the plaintiff to construct a building for the defendant's bank branch.

On how he came to know the defendant, he said that the defendant's officers who were searching for a premise for purposes of opening a branch in Kahama called him after seeing and interested in his site on plots **No. 52 -54 at block Q Nyasubi area within Kahama township** where he was constructing a building for Azania Bank. The Bank officers proposed to him to construct another building for their bank and he accepted it.

Thereafter he had a meeting with two officers of the defendant namely Elizabeth and Charles. According to him, after the meeting it was agreed that the defendant will prepare a **MOU**. He went on to tell the court that the said MOU was prepared and signed by the defendant on the **7th May, 2008** and the plaintiff signed it on the **12th May, 2008** after he (**PW1**) received it from the defendant *through* EMS.

Regarding the terms of the MOU, it is PW1's testimony that he was supposed to construct and hand over the building by **30th September,**

2008 and further that the plaintiff's main duty was to construct the building while the defendant's obligations were among others to supply some of the equipments and fixtures.

The terms of their agreement were that; the plaintiff will construct the building basing on the specific designs and drawings which were to be provided by the defendant herself. According to him, these drawings and designs were to be supplied subsequent to the signing of the **MOU** so as to be on time for the construction. Other equipments were fixtures such as doors, safe, generators, ATM machine and other bank utilities.

The witness said that the sketch plan (**exhibit P2**) was provided to him 42 days after the signing of the **MOU**. Having received it **PW1**, took it to his engineer one **Charles Wagunda** who advised him that the said sketch plan was incomplete and it could not be used to construct a house.

On the defendant's officer's instructions (one **Thomas Mhando**), the plaintiff got another architect consultant he mentioned as **Omelo** who drew another working drawings (**Exhibit P3**) in two weeks. Thereafter they embarked on the process of securing building permits and the construction works commenced on the **24th July, 2008.**

It was his further testimony that the building was supposed to be completed on the **30th September, 2008.**

According to him the problem ensued when the defendant refused to enter into a tenancy agreement in respect of the said building. As to the construction costs, he said that up the end of construction the plaintiff had used **T.shs. 673,000,000/=** and he expected to realize about **USD**

252,000.00 from the project in ten years that he had expected to lease it to the defendant being a monthly rent of **USD 14.00** for the first 4 years and **USD 17.00** for the rest 6 years starting from **December, 2008**.

He averred also that upon receipt of the termination notice of the **MOU** on the **13th ,November, 2008** he replied inquiring on the reasons behind termination. The defendant replied and in their reply the defendant made a new proposal for reduction of the rental fee to **USD 7.00** per month from the said **USD 14.00 17** further they were asking to commence their tenancy in **July, 2009**. According to PW1, he refused the new proposal and subsequently he received a letter from Law associate indicating that the defendant had refrained from entering in the said building.

Regarding the loss, he said that the money he used for construction was business money and he prayed for it to be refunded. He said that the defendant could take first the ground floor which was 375 square.

He said that he tried to mitigate the loss by looking for another tenant (NBC) which was successful after 20 months of his building being vacant. He stated further that NBC brought her own design on their costs including constructing stairs inside the building instead of the previous plan in which stairs were outside. This exercise, he said, prompted NBC to demand reduction in the rental charges.

As regards the defendant's equipments he confiscated, it was his testimony that he did so that the same could save as evidence because after the construction he could not give them back without the defendant

satisfying his part of the agreement. He tendered the visitors' book (**Exhibit P5**) in his bid to prove that he received the equipment at the site on the **13th October, 2008** from one **Denis** an official of Barclays. He said that, that date was out of the completion time as stated in the **MOU**.

He prayed the counterclaim to be dismissed for the reason that it was the defendant who had breached their agreement and not the plaintiff.

On cross examination he said that it was the defendant who approached him and convinced him to construct the building. He said that his plot was almost a bush and he had no intention to construct a building there

It was his contention that he was convinced to construct that building on the understanding that thereafter the defendant will lease it for 10 years.

He contended further that the delays in starting construction work were caused by the 42 days delay in receiving the drawings from the defendant.

On the costs of constructing the building he reiterated that he had spent **T.shs.673, 000,000/=** according to the ***BOQ***, adding that the area upon which the building was constructed is **520** square meters.

It was his testimony that after the misunderstandings ensued he decided to institute a suit and mediation having failed, he decided to look for other tenants so as to mitigate the loss which was escalating. As to why he could not let it before coming to court, it was his evidence that he was

still under the **MOU** which restricted him from letting it to any other person. He said that he did not think that they would fail to solve their misunderstandings the fact which caused him not to accept offers from other prospective tenants who he mentioned to include NSSF, NBC, and VODACOM.

Upon being examined on the essence of the time frame within the **MOU**, he said that his duty was to construct the building and therefore he based on that **MOU** as a guiding contract. Regarding the equipments he had confiscated, it was his firm reply that he had held them as exhibits for his claims against the defendant , adding that he could not let her part with the equipments after the defendant had failed to satisfy her contractual part.

He said that up to **November** they had completed about 95% of the works and not 100% because they had been waiting for some of the fixtures such as doors and other utilities which were to come from the defendant as per the **MOU.**

The second witness is **Charles Phillip Wagunda** (**PW2**). He introduced himself as a contractor and an Architect technician working with a company known as SAUCON Company Limited.

He said that he came to know the plaintiff company since 2007 when its director-**PW1** was introduced to him by one **Robert Maziba**. Thereafter, he was contracted by the plaintiff's company through **PW1** to construct a bank building at **Kahama**.

He remembers that on **25th, June 2008** he was summoned by **PW1** in Mwanza to collect drawings for bank building at Kahama. In Mwanza he found that the drawings were rather sketches and not working drawings. He said that only working drawings could be used for registration and obtaining the building permit from relevant authorities. PWI connected him with one **Mhando** an official of Barclays bank. Mhando advised him to wait new sketches up to **12th** or **14th June**. Later on **Mhando** advised him to find any other architecture who could draw the said working drawings as he was the one at the site and knew what is required.

When he was referred to **Exhibits P2 and P3** PW2 indentified Exhibit P2 as the one that he received from **PW1** on the **25th June, 2008** and Exhibit P3 as the one drawn by a consultant one Melo consultants whom he contracted after the instructions from the said **Muhando**.

Starting with **exhibit P3**, he said that it had all specifications (*vipimo*) and further that according to **CRB** regulations every such document must bear the name of the architect together with his professional company and the Board's stamp. Contrasting it with **exhibit P2**, it was his evidence that as a professional architect he could not rely on or use exhibit P2 to construct a building because it had neither specifications nor board's stamp.

He stated that he commenced construction works on the **24th July**.

Explaining the delay to start works, PW2 said that having being issued with the sketches, he had to look for working drawings and thereafter he went ahead and commenced the processes of securing

building permits. It was his testimony that normally the procedure of obtaining permits takes long time because it involves the local government's approval which for minor works may take shorter time.

According to him the works were completed on **30th October, 2008**. He said that there was still some equipments such as doors, Safe for strong room, and ATM machine which were to be fixed before he could hand over the building.

Regarding supervision of the works he said that for Barclays he was being supervised by Engineer **Mhando** who visited the site several times including the **29th February, and 5th September, 2008.(see Exhibit P5).**

He said that one Denise a Barclay official took some equipment for fixation on **13th, October, 2008** and on **12th November, 2008** he came and took them away. He said that by that time the equipments were already fixed in the building.

On his bid to prove the costs of the construction works, PW2 tendered a BOQ(**Exhibit P6**) and said that they spent about **Tshs.703,000,000**/= Up to the time the building was ready for the hand over.

As regards to the working drawings and building permits, he said that he received them on the **18th July2008** and the construction works started on the **24th July, 2008.**

Regarding the supervision he said that he was being supervised by Melo Architect and that Engineer **Thomas Muhando** was the structural engineer who visited the site about two times to check the progress and after his last visit, the equipments were delivered to the site by one Denis on the **13th October,2008.**

That marked the end of the plaintiff's case.

For the defendant, the sole witness who testified is Ms **Elizabeth Wililo** (**DW**) a head of legal operations and corporate secretary in the defendant's bank whose duties are, among others to oversee legal functions. Her roles include advisory role on legal rights, litigations for against the bank, drafting of contracts, lease agreements, loan agreements, and supply and employment agreement. She said that she was also a company secretary up to **4th October, 2011** before restructuring which occurred in the Bank.

She said that in the year **2007** the bank had a strategy to expand national wide and Kahama was one of the area earmarked for opening their branch. They visited **kahama** they met the plaintiff and discussed and signed an understanding for him to construct a building for the bank. Subsequently they could not proceed with the plan due to the delay in completion of the building that was expected to be completed within 4 months from the date the plaintiff promised to complete but was not able to.

She stated that prior to constructing of the plaintiff's building there was no binding agreement to lease it but rather the bank was merely

looking for premises to rent. Referring to **exhibit P1** she said that it was the plaintiff who as per roman 1 of the said exhibit, proposed to the bank to build a house which the bank could rent.

She said that the MOU was executed on the **12th May, 2008** and that the completion was supposed to be within four months which was on the **12th September, 2008**. She continued to say that after that date the building was not handed over to the bank as agreed and it was neither ready for use after **11th, October, 2008**. Subsequently on the **3rd November, 2008,** according to her, the bank issued a notice to terminate the agreement.

Explaining the reason for termination, it was DW1's testimony that the delay was holding back the project and therefore the bank had to look for other premises. She said that the bank had powers to issue a one month termination notice according to the **MOU**. She added that upon receipt of the notice the plaintiff responded by explaining the reason of delay and pleaded with the bank to reconsider her decision and further that the plaintiff came to meet with the defendant's officials (note less than three times).

She continued to state that the bank expressed to the plaintiff that they could not take the premises and the plaintiff told them that there were other tenants namely PPF and Vodacom (T) Ltd but he was reluctant to take them. According to DW1, she personally advised the plaintiff should proceed and lease the premises to other prospective tenants because the defendant's notice to terminate was there to stay.

The witness further stated that there was a notice of breach before the notice of termination was issued. The notice of breach was issued in August 2008 subsequent to bank officials' visit who discovered the delay. Regarding the communication of the 42 days delay to bring specification and drawings, DW1 said that there was no such communication to them but rather after the issuance of termination notice, the daeth of the plaintiff's co-director was brought to the attention of the defendant in their meeting.

On being referred to **exhibit P4** she said that the bank wrote to the plaintiff to express their readiness to accommodate his request for renting his building on the conditions explained therein. She said that subsequent to exhibit P4 there was a meeting between them and the plaintiff whereby the plaintiff informed them that there were other tenants who were interested in renting the building.

On being further referred to the letter dated **1st June,2009** she recognized it as being written pursuant to the defendant's instructions after they had received a reply from the plaintiff insisting on his stand. She proceeded to contend that the **MOU** was never a binding contract per roman ***(x)*** therein. He said that the building was never completed, never handed over to the bank and no lease agreement was prepared and signed after the **MOU**.

Regarding the equipments, she conceded that some of them such as **ATM, UPS, SAFE, Saver Rack** and a **standby Generators** were sent to the site by the defendant's supplier and that up to-date(the day when she

was testifying) they were still under the plaintiff who had refused to release them.

She said that to her understanding currently the premises is leased to NBC.

Regarding the prayers, she said that the defendant did not breach the terms and conditions but it was the plaintiff who breached the MOU. She contended that there was no basis for him to claim for 4 years rent because there was no breach on their side and because there was no lease agreement and the bank never took possession of the premises.

She prayed that the plaintiff should be ordered to return the equipments that he has confiscated and refused to return in the condition they were except for the normal wear and tear.

She said that the plaintiff is not entitled to the 20 months in absence of land lord-tenant relationship between him and the defendant and much so because he had option to lease the premise to PPF and Vodacom (T) Ltd who are of similar status with the defendant.

She explained further that the spirit of the **MOU** was not to create a tenant-landlord relationship but rather it was a proposal which he gave to the bank.

On cross examination she conceded that she was the one who drafted and executed the **MOU** (as a company secretary) together with one **Barnabas Wazir** (Financial controller of the Bank) and further that she knew well its terms. She said that she did not know how the same was

transmitted to the plaintiff for signing but it must have been by post, though she was not sure.

According to her it was not the bank that approached the plaintiff because to her the term *"approach"* meant the bank was looking for premises. She said that the plaintiff never complained about the delay of specification and that the defendant complained before the termination of the MOU.

When she was referred to **exhibit P4** she said that the issue of 42 days delay was raised but it was well after the issuance of termination notice of the **MOU**. She added that there were several oral discussions with the plaintiff that started before termination of the **MOU**.

On the equipments she said that they were sent to the plaintiff's site on the **3rd November, 2008** and that there was no contract between the plaintiff and the defendant and that there was a need for the said equipments to be guarded.

She stated that the **MOU** provided that a lease could be signed one month after fixing the said equipments.

She said further that the termination was due to lack of correspondence between them and the plaintiff and that they inquired on the status of the building between the **13th October, 2008 and 3rd November, 2008**. As to supervision of the building, it was her testimony that she was not aware whether the building was being supervised or not and she had never seen any report from the defendant's architect. She also

said that she was not aware as to whether the specifications were handed to the plaintiff.

Regarding the renting restrictions, it was her testimony that the owner was prohibited from leasing out the premises by the terms of the **MOU**. She conceded that in September when one ***Mjinja*** visited the premises the plaintiff could not lease it due to presence of a clause binding him not to lease the premises.

On being asked as to the nature of the **MOU**, she said that it was binding on the parties and further that the consideration the defendant offered was the assurance that they will lease it and as such the plaintiff reasonably expected economic gains after the lease had been signed. She conceded that the anticipated rent was **USD 14.00** per square meter for two years.

She recognized **Exhibits P2** and **P3** that they were drawings from Flimsy and Print, and said that she did not know whether it was the bank which instructed MELO Architects.

She added that the bank did not construct buildings but lease them although it is very much concerned of the structure and the design of the building.

The first issue is **whether the MOU between the parties signed on the 7th and 12th May, 2008 constitutes a binding and enforceable contract**

By the term ***"binding and enforceable contract"*** the parties seek to know whether their MOU was legally enforceable or whether it carried any legal force. That can be answered by the law of **Contract Act, cap.345 R.E 2002** and particularly section 2(1) (e) read together with section 10. For easy of reference, the provisions are reproduced hereunder:-

> ***2 (1) In this Act, unless the context otherwise requires–***
>
> *(a-d).....N/A*
>
> *(e) every promise and every set of promises, forming the consideration for each other, is an agreement;*

And what agreements are contract? Section 10 expressly 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**:(Underling is mine for emphasis)"*

In view of ***section 2(1) (e)*** above quoted, it is undisputedly clear that there were promises exchanged between the parties under the **MOU**. Thus, whereas the plaintiff promised to construct the building, the defendant promised to take occupation thereof as a tenant for a period of ten years. It is further undisputed in this matter that their **MOU** was an agreement for all intent and purpose. Now, was it a contract which is enforceable in law?

In light of the provision of section 10 of the law of contract quoted above, I say certainly it was a contract. I say so because consent of each party to the agreement has not been disputed nor their competence. Furthermore, consideration on each part has been shown to exist and none was disputed by either party as being unlawful. For instance, when asked as to what was the consideration for plaintiff's constructing the building **DW1** answered that it was their (the defendant's) assurance that they will take tenancy of the said building upon its completion as per their **MOU**. On the other hand, the plaintiff's consideration was to give up his plot and constructing thereon a building which could accommodate the defendant's bank branch.

The set of circumstances and facts as disclosed to this purely expresses the consideration as between the parties.

Apart from that, the object thereof, that of renting is lawful. In the event therefore I find it was a contract which had full legal force

The defendant has for several times indicated that the **MOU** did not and was never intended to be binding upon the parties. For instance in her defence, particularly paragraphs 2(i) which is couched in the following language;

> *The memorandum of understanding (hereinafter referred to as **"MOU"** provides for a mere understanding between the parties for any future contractual relationship if ALL conditions between the parties are adhered to by both parties. The MOU has never been a contract between parties but mere understanding.*

The defendant is negating the binding nature of the **MOU.**

DW1 who is professionally a lawyer and an in-house counsel of the defendant in her testimony stated that the **MOU** is not a binding contract, but in cross examination he stated that it was binding on the parties.

The net result of the evidence and the law above quoted points to a conclusion that the said MOU was an enforceable contract as

Treitel G.H., in his book titled: ***An Outline of the Law of Contract, 5th Ed. Butterworth's P.75***), cautions that "*A distinction should be drawn between, on the one hand, documents which are only informal memoranda, and, on the other those which are intended as complete contract document, i.e. exhaustive records of the terms finally agreed"* to which parties consider themselves bound.

It is on such basis that courts have always applied subjective test to implore the intention of the parties when determining the status of a memorandum of understanding.

The objective test requires that the Court should examine what was said and done, and accordingly, such agreements are categorized into two. The first is business/commercial agreements and the second is the domestic/social agreements. Certainly the circumstances herein relates to the former.

In the former, the presumption always has been that the parties intended to create legal relationship. It can only be rebutted by inclusion of

a clause in that agreement to the effect that the agreement is not binding. (***See for instance Rose and Frank Co. versus Crompton Bros Ltd [1925] A.C 425***, where it was held that ***"contractual intention may be negated by proving that the agreement was a goodwill agreement"*** made without any intention of creating legal relation [see also the case of ***Orion Insurance versus Drake Insurance[1990] 1 Lloyd's Rep. at 465.***

As intimated earlier the best evidence to this may be an express clause within the document itself to the effect that no legal effect flows there from or the overall tone of the document may tend to show that the parties had no intention to enter into legal relation and therefore such document is not binding.

Apart from an express clause that no legal consequences flow from the document, the overall tenor of the particular document may indicate that the parties had no intention to enter into legal relations. Short of that, the party alleging that such agreement relating to their business relationship is of no legal effect has the heavy onus of establishing that to be the case.

I have carefully examined the **exhibit P1** which forms the gist of this case and I am satisfied that it was intended to create a legal relationship between the parties. My view is fortified by the following reasons.

Firstly, throughout the entire document, there is no single clause to the effect that it is not intended to be binding. Instead, it stipulates that

"***the memorandum shall be binding amongst the parties....*" *(See clause XV).*** Apart from this, **DW1** conceded that it was supposed to be binding at all time during the subsistence of the works. The defendant now cannot be heard justifiably claiming that it was a mere understanding which had no legal force. In fact, this is a contradictory statement which cannot have strong footing in evidence.

Also the document is drafted in such a way that it stipulates clearly all issues pertaining to their main transaction of constructing the house. It contains duties and obligations of each party with net consequences in case of breach by either party and more so, it contains all essentials of a binding contract namely consideration, lawful object, mutual consent and capability.

It is from a combination of these facts, that I find that the **MOU** signed on the **7th** and **12th May, 2008** constitutes a binding and enforceable contract, a contract to build a house and tenancy. Therefore, the first issue is answered in the affirmative.

The second issue is; "***if the answer to issue no. 1 above is in the affirmative, whether there was a breach of that contract***".
Each party alleged breach on the other party. Whereas the plaintiff claims that the defendant committed material breach by refusing to take occupation of the house, the defendant claims that the plaintiff was in breach by failing to hand over the building in time as per the **MOU**. This

will be purely evidentially resolved question, having found that their **MOU** constituted a binding contract as between them.

The plaintiff has presented his claims that the defendant by refusing to enter into the building after she had convinced her to construct it was a breach of their understanding. On the other hand, the defendant alleges that they refrained from entering the building due to the delay to completion of the said building. Before plunging into this hide and seek game, I have indentified the points of convergence which are not in direct contrast as between the parties. These are that

1. The building was constructed.
2. The defendant never entered into tenancy agreement with the plaintiff.

Henceforth, the premises to assemble on are that;

1. There is pure breach of the contract and
2. The guilty party is yet to be established to bear the consequences thereof.

The defendant alleged that it refused to enter into tenancy agreement because the plaintiff delayed to finish up the building timely. When asked, **DW1** stated that the delay was holding back the project therefore the bank had to look for another premise. She did not say where did the defendant acquire another premise and when and at what costs.
I have scrutinized the pleadings, tendered exhibits and the witnesses' evidence and I must admit that the defendant's tenor in the whole

transaction is so obnoxious and her drive towards the transaction leaves much to be desired. I will canvass into this before I zero in the basics as to the hunting for the guilty party for the breach. It is crucial to establish the guilty party in respect of breach so as to resolve the real and material issue in controversy here, that is the costs for the said constructed house, on the one hand and the confiscation of the defendant's equipments by the plaintiff on the other.

First of all, the defendant wished this Court to believe that it was the plaintiff who proposed to construct the building which the bank could rent. But on the other hand the plaintiff alleged that it was the defendant who approached her with the proposal for her to construct the building to accommodate its branch. **PW1** said that he was called by the officials of the defendant after they were attracted by the location of the plot together with the then on-going construction of the building for Azania Bank on the same plot. He added that the call culminated into meeting with the defendant's officials in Dar es Salaam and eventually a memorandum was drawn and signed. This story tallies with **DW1's testimony** that their officials had met the plaintiff's director-**PW1** who proposed to construct a building which they could rent.

The **MOU** and particularly items 1, 2 and 3 of the recitals coagulate their stories. These are coached in the following language

1. *The owner is a registered owner of that piece and or parcel of land located at plot nos. 52-54 Block **"Q"** Nyasubi, Kahama District*

and which the Owner is intending to develop a building structure for commercial purposes.

2. *The client is intending to establish a brick and mortar branch in Kahama and has* ***approached the Owner with the view of developing the property to accommodate its banking operations in the area.***
3. *The owner has agreed in consideration to build a structure with the purpose of accommodating the establishment of a bank at the preferred location according to the design and specifications presented by the client's architect.*

Taking a deep gaze into the accompanying testimonies to these recitals, I find the plaintiff's story to be highly plausible and credible. The plaintiff could not have bothered to enter into such undertaking to construct a building within the specified time and design by the defendant, if his intention was merely to develop the area for commercial purpose. He could have done it at his own time and own design. It could not be possible even for the bank to enter into an understanding that the building should be constructed within specific time, and neither could they have made certain the rental charges in their **MOU**.

This is further fortified by the fact that for all estate developers, it is not the practice in the market that a prospective tenant should enter into an agreement to construct so that upon completion of the house by the landlord, he could rent it.

Clause 2 puts it more in clear terms that the defendant ***approached*** the plaintiff with a view of developing the property to accommodate her banking operations. The bolded term is defined in the ***Oxford Advanced Learner's 7th edition dictionary*** at page 61 as*" to speak to somebody about something, especially to ask them for something or to offer to do something".*

For this reason, I cannot buy the definition of the said term supplied by the **DW** that it meant "***we were looking for premises***" and therefore that it was the plaintiff who proposed to build so that they can rent the building. It is simply frivolous calculated to dissuade the cause of the law. The language of their document which she drew, and which is very clear to the effect that it is the defendant ("***Client***" in the MOU) who asked the plaintiff for constructing the building to accommodate her banking operation, should be left to rule in this episode.

I take it that the plaintiff had been genuinely motivated by the defendant to construct the house for accommodating the defendant's branch and had it been not for such motivation the plaintiff could have chosen to erect the building at any other time and at his own design and costs.

Indeed the defendant was aware and has not disputed this fact, that for sure there were other prospective tenants after the building was constructed. To this end, it is my considered view that the tenants were equally available even before the plaintiff had started to construct the

house but none had approached the plaintiff in the style and manner the defendant did, hence, she cannot be held at this juncture and after the building had been constructed in her own design and specification to claim that the same could be rented to other tenants.

The stance having been that indeed the defendant initiated the construction and motivated the plaintiff to enter into such project, the question that remains is whether the reason tendered by the defendant for refusal to enter tenancy and or termination of the memorandum were justifiable and genuine? This is a crucial question as its answer will lay the basis for the answer to the sub-issue in regard to who should shoulder the blame for the breach of the contract.

My exploration starts in the **MOU**, and while there my starting point is clauses **(ii), (iii)** and **(ix).** These stipulate that;

> *ii. That the owner will build and develop the banking premises and make sure that the same is available to the client for its use within* ***four months*** *from the date of execution of this memorandum.*

> *iii. That the said banking premises shall be constructed in accordance with the detailed* ***design specifications prepared by the client's architect and engineers****. The proposed drawings and scope of work are attached with this memorandum. (*Underlining is mine*).*

ix. That construction shall only begin once this memorandum has been executed by both parties and the Owner has accepted and signed off the design specification.

I am satisfied that apart from the fact that construction was supposed to be completed within four months period, there were some conditions *sine qua non* to commencement of the construction namely; execution of the **MOU**, receipt, acceptance and signing off of the design specifications by the plaintiff.

Paragraph 5 of the plaint states that

> *"The defendant did not provide detailed specification of the suit structure as covenanted in the memorandum in time but she delayed to do so for 42 days, therefore, delay execution of the Memorandum of understanding for that period, though the matter was sorted amicably orally".*

PW1 testified that he did not receive such drawings until after 42 days despite the fact that the **MOU** provided that immediately after the signing the said drawings could be issued. I have scrutinized the **MOU** and the said attachments contain only the "***Scope of works for the land Lord and for Barclays***". Nothing in the nature of "***drawings and specifications***" is attached therewith. When asked about them, **DW** averred that she was not aware whether the specification was handed over to the plaintiff. Further, she testified that the issue of delay to hand over

the said drawings was raised before termination and that they (defendant) did not address the same.

Apart from that, it was the plaintiff's testimony, that the drawings which were received on the **25th June, 2008**(**Exhibit P2**) were mere sketches, which, according to **PW2**, could not be used to construct a building for want of measurement specifications and the board's stamp. This was not seriously contravened by the defendant as to correctness and or propriety of the said drawings. Further, **PW1** stated that the proper working drawings were secured after the defendant's official-one **Thomas Mhando** asked the plaintiff and **PW2** to find another architect for preparing the drawings where after, one Omelo did the job and prepared the same after two weeks.

It was due to this process together with the acquisition of the building permit as explained by **PW2** that the works commenced on the **24th July, 2008** which is a period of about 2 months since signing of the memorandum. This too was not seriously challenged evidentially by the defendant because **DW** did not know as to whether the drawings were ever handed over to the plaintiff or not.

That being the case I am entirely convinced by the plaintiff's testimony and evidence tendered in this respect and I remain certain that the defendant delayed to issue the specifications and drawings for 42 days. The defendant had invoked the death of the co-director of the plaintiff as a cause for the delays. The plaintiff on the other hand had pleaded and

through PW1 in testimony stated that the said death caused a one week stop of work for funerals. The one week delay has not been disputed by the defendant.

Indeed, this clearly indicates that the defendant was ill-advised to terminate the contract on the ground that the plaintiff sought funeral as an excuse to his delay to complete the building. I say so because a one week stop cannot reasonably be said to be intolerable a delay that had the effect of failure to finish the building in time.

Secondly, death is a supervening event that eventually and understandably could frustrate the performance for 7 days' period given the position of the deceased in the plaintiff company.

These apart, it is said that per the MOU, the deadline was supposed to be on the 12th September, 20108. The plaintiff and all her witnesses said that the building was complete by 95% by early the end of October or early November.

Given the fact that the defendant was aware that she had not issued the drawings in time, plus the death of the co-director of the plaintiff's company, it is obvious that a delay of 20 days to one month were reasonable and not so outrageous as to cause the defendant to issue a notice of breach of covenant even before the expiry of the four months without even a technical evaluation reports of the site works.

It is undisputed that the **MOU** was executed on the **12th May, 2008.** It has also been undisputed that the drawings were complete and received 42 days subsequent to the signing. That was a delay of about one and half months. Even if we assume that the sketches that were received on the **25th June, 2008** were proper, still it was a delay enough to hold back commencement of the construction works and timely completion.

Since the works commenced on the **24th July, 2008**, the fact which has not been evidentially contravened by the defendant, the four months period as per the **MOU** was supposed to demise on the **24th November, 2008**. Strangely the defendant issued a notice of breach of covenant on the **26th August, 2008**(per paragraph 3 of **exhibit P4**). To me this begs a question as to why could she have taken such a move even before the expiry of the originally agreed period of four months because, per the terms, the building was supposed to be handed over on the **12th September, 2008**. I ask so because according to **DW1** the defendant had never received Architect's report of the works who, per the preamble to the **MOU(in the scope of work attached thereto)** was supposed to inspect and approve the same.

How did they asses the non satisfaction of the building or the failure of the plaintiff to deliver on time? What was not completed by then, and within what time was it estimated to be completed as per their architect and supervisor so as to conclude that the plaintiff could not meet the deadline? All these questions could have been answered by a technical

evaluation report of the works by the defendant's appointed supervisor at the time they decided to quit the deal.

Unfortunately she had no such report, and neither was any of their engineers or supervisors called to testify on the general state of the project at the time of issuance of the notices of breach of covenant or termination of the MOU. This leaves a single conclusion that, the two notices were ***malafide***, ill motivated and intended to frustrate the contract.

And it is for that reason that second issue that if issue no.1 is answered in the negative, whether there was breach of contract is answered in the affirmative, and further in the circumstances, the defendant breached the contract.

Now, I have answered the second issue in the affirmative. The third issue as to whether either party suffered damages is certainly in the affirmative.

The plaintiff claimed that he had spent about Tshs.673 million to construct the building which, per the terms of the MOU (**particularly clause XIII**) could not be leased to another tenant and accordingly had to be vacant for about 20 months.

E**xhibit P6,** shows that the total costs for the construction project were **Tshs. 703 Million**. **PW2** stated that this was rather an estimated

cost whereby the actual costs could range between **Tshs. 690 million** and **Tshs.695 Million**. This was not seriously challenged by the defendant.

Since plaintiff could not have constructed the building at that time and on the said specifications, she could not have incurred such costs. She invested time and resource with expectation to realize profit out of the building. Breach of their agreement by failure to enter into tenancy agreement as found out for sure damaged her financial equilibrium of the plaintiff. Further the 20 months vacancy of the building implies loss of monthly earnings which she had projected to be at **USD 14.00** an expectation which was well known to the defendant.

I find the plaintiff's story plausible and henceforth the time spent and money spent for construction and lost during vacancy as intimated earlier on amounts to none other than financial and business damage fit for compensation under the claim of damages.

No damage has been pleaded by the defendant in her counter claim for the plaintiff's confiscation of the said equipments. Even if she could have pleaded, none could yield positively. This is because she sent the same or authorised the same to be sent by her supplier to the defendant's site knowingly that she could not use them to have them fitted in the building since she had already sent a notice of breach of covenant on the **26th August, 2008.**

This brings me to the fourth issue: the reliefs:

I will start with the plaintiff's prayer. The first one was asking this court to declare that the defendant breached the **MOU**. That is what I have found in my analysis, and accordingly I proceed to declare so.

The second prayer contains numerous prayers within, including prayers for specific performance, payment of rent and interests. I wonder whether by asking for specific performance, the plaintiff meant the conventional specific performance or not. If at all that was his intention, then it is my considered view that this prayer has been overtaken by events as it had been averred by the plaintiff that currently the building is occupied by NBC. Certainly, the client did not intend to stop such on-going tenancy of the said NBC so as to enforce specific performance, in the event that this court orders so. Even if it was vacant, at this level of their qualm, with their relationship gone sore it could not be any wiser and just to order specific performance against the defendant. So this first limb of the prayer fails. The house is already occupied. Let the status quo be maintained.

The second limb of this prayer asks for the **USD 252,000** as rent for four years. On being asked, it was PW1's statements that he had expected to realize that much in the first four years of their would be lease agreement. But later on, it was his further averments that the building stayed vacant for 20 months which is about one year and eight months (1.8 years) where after he accepted other tenants to mitigate the loss. DW testifying for the defendant said that the plaintiff is not entitled to such amount because they had advised her to take in other tenants but she was

reluctant. I have already found that such fear was genuine and since the MOU stipulated that the building could not be leased to anyone else, and further that the plaintiff had endeavoured to mitigate the loss, the defendant cannot be heard to contest this prayer.

As I intimated previously, this period of the 20 months vacancy indisputably caused disturbance in the financial equilibrium of the plaintiff and resulted into a compensable damage. I therefore order that the defendant will compensate the plaintiff for the whole period of the 20 months (1.8 years) that the said building had remained vacant at USD 14.00 monthly. Before resting on this prayer, I noted during cross examination by this court that the plaintiff had planned to lease only the ground floor which occupies a total of 375 out of 520 square meters due to what the plaintiff termed as economic situation. Therefore, the said USD 14.00 monthly awarded will be for the 375 square meters monthly for the said 20 months.

The plaintiff has prayed for interests at 2% for the said amount. I find this to be in order and I proceed to grant it. The plaintiff expected to make considerable investment out of the said rent amount, therefore an award of interest on such principal amount is just and fit for the circumstance.

Since the third prayer was put in alternative to the first and second one, it abates. The plaintiff has also prayed for the interest on the decretal amount at 7%. I find this to be on the higher side since the principal sum

awarded is on the United States Dollars' currency which is one of the internationally strongest currencies. Accordingly, the rate of 3% will grace the occasion. It shall be so chargeable from the date of this judgment till full satisfaction. The plaintiff shall have his costs for this suit.

As for the counter claim, the analysis hereinabove renders the first and the third prayers nugatory. They accordingly tails off. As regards the second, it is undisputed that the defendant confiscated the equipments of the defendant. His reasons for so doing are real untenable and unjust. He could not have failed to prove his claim as he has done at this trial. I therefore order the plaintiff to release those equipments which were mentioned to be a standby generator, server rack, ATM machine, safe and UPS in the condition they were save for normal wear and tear.

In the upshot the counter claim is partly dismissed, judgment is hereby entered for the plaintiff and the defendant as hereunder ordered;

1. The defendant shall pay the plaintiff a total of USD 14 per square meter per month for the 20 months for 375 square meters being the rental amount that the building remained vacant. That is he shall pay USD 14 x 375 x 20 = USD 105,000.00
2. An interest of 2% per month shall be chargeable on the awarded principal sum from the date of filing this suit to the date of this judgment.
3. Further interest at court rate of 3% shall be chargeable on the decretal amount from the date of this judgment to the full satisfaction.

4. The plaintiff shall have his costs of this suit.
5. The plaintiff shall return the equipments of the defendant namely saver rack, Automated Teller Machine (ATM), UPS, Safe, and Generator in the condition they were except for normal wear and tear.

It is so ordered.

A. R. Mruma

JUDGE

Date: 21/11/2011

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