

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 79 OF 2014

ABDALLAH ALLY SELEMAN

t/a OTTAWA ENTERPRISES (1987).....PLAINTIFF

VERSUS

GAPCO TANZANIA LIMITED.....DEFENDANT

JUDGMENT

Mansoor, J:

Date of Judgment- 3rd July 2015

Abdallah Ally Seleman, herein referred to as “Abdallah” is the owner of the premises known as plot No. 12, Industrial Area, Msalama, Songea, comprised in a Certificate of Title No. 8091-MBYLR, herein shall be referred to “the Property”.



On 1st day of March 2002, Abdallah Ally Seleman entered into a long term lease agreement with Gapco Tanzania Limited, formerly known as GAPOIL TANZANIA LIMITED, herein referred to as "GAPCO". The Term of the Lease was 20 years from the date of the Agreement. The use of the premises or land leased was for business of selling fuel and petroleum products. It was agreed that Abdallah would operate the business and GAPCO would supply Abdallah with its own fuel and petroleum products. Abdallah was required to deposit with GAPCO the Certificate of Title for this Property.

It is claimed by Abdallah that contrary to the terms and conditions of the Lease Agreement, GAPCO used the Certificate of Title to the Property to obtain financial and economic benefit. That GAPCO had mortgaged the Certificate of Title as security for the loan it obtained from Barclays Bank PLC, to the tune of US\$ 75,000,000. That GAPCO mortgaged Abdallah's Certificate of Title to the Bank without the consent or even the knowledge of Abdallah. Abdallah found out about the mortgage when the Certificate of Title was returned to him by GAPCO following the Compromise Agreement entered between them in settling a case at Songea. Abdallah saw a stamp at the back of the Certificate by the Registrar of Titles showing that the mortgage was registered with the Registrar of Titles on 5th February 2007 and it was discharged after 12 months i.e. on 17th January 2008. That the Certificate of Title



was used by GAPCO as security for a loan of US\$ 75,000,000 from Barclays Bank Plc, “the Bank”.

The plaintiff claims that GAPCO have breached the terms of the lease agreement and have unjustly enriched themselves using his property, and he lodged this suit claiming for general damages, and a declaration that GAPCO are liable for breach of agreement, trust and undue enrichment.

The defendant denied to have used the Certificate of Title to obtain any financial benefits, and averred that it had 20 years lease agreement and could acquire or obtain any financial and economic benefits, advantages or interest accorded to it by virtue of its registrable interest under the long term lease. The defendant denies to have ever mortgaged the plaintiff's title and states that the mortgage endorsement on the plaintiff's title was an error, and that upon discovering the error, the defendant immediately rectified the error by having the title endorsed as “discharged” on 17th January 2008. The defendant avers further that it was legally impossible to mortgage the plaintiff's title without involving the plaintiff, and that the value of the plaintiff's land did not and does not presently suffice to secure a mortgage of US\$ 75,000,000. The defendant states that since the endorsement on the plaintiff's title was an error, the defendant could not have notified the plaintiff of the mortgage, as there was no any mortgage that



existed, it was simply an error, which was rectified accordingly. Generally, the defendant denies to have breached the lease agreement, and thus prayed for the dismissal of the suit.

The following issues were recorded:

- i. Whether the Defendant was capable of mortgaging the Plaintiff's property;
- ii. Whether the Plaintiff's property was erroneously mortgaged;
- iii. Whether the title on Plot No. 12 Industrial Area, Msamala Songea, was kept by the Defendant in trust;
- iv. Whether the plaintiff suffered any damages as a result of the erroneously mortgage of the Property;
- v. To what reliefs are the parties entitled.

1. Whether the Defendant was capable of mortgaging the Plaintiff's Property:

Clause 2.8 of the Lease Agreement is a covenant not to assign or sub-let or part with the possession of the said demised



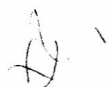
premises without the consent in writing of the lessors first had and obtained, but such consent shall not be unreasonably withheld.

A lease was for 20 years but a lease consisted in a right to the possession and use of the property owned by the Lessor, i.e Abdallah. Apart from that right of the Lessee to only possession and use of the property, clause 2.8 of the Lease, the Lessee was restricted not to sublease, assign or part with the possession of the said premises without the consent in writing of the lessor.

A Lease as defined in the Land Act, Cap 113 R: E 2002 is "lease" means *a lease or sublease, whether registered or unregistered, of a right of occupancy and includes a short-term lease and agreement to lease;*" A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a rent payable periodically.

From this definition of word "lease". It is clear that lease creates an interest in the property and the lessee gets the right to remain in occupation of the premises on payment of rent.

Section 113 of the Land Act provides that the interest of the Lessee may be mortgaged to secure the payment of an existing or future or a contingent debt or other money or money's worth or the fulfilment of a condition, it reads:



113 (1) *an occupier of land under a right of occupancy and a lessee may, by an instrument in the prescribed form, with such variations and additions, if any, as the circumstances may require, mortgage his interest in the land or a part thereof to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfilment of a condition."*

Thus the Land Act provides that an interest of a Lessee in the property under the lease may be transferred, subject to Lessor's consent as provided in Section 84 of the Land Act, which provides as follows:

84: A Lessor's consent to dealing with lease

(1) Where a lease contains a condition, express or implied, by the lessee that he will not transfer, sublet or mortgage or part with the possession of the land leased or any part of it without the written consent of the lessor, no dealing with the lease shall be registered until the consent of the lessor has been produced to, and authenticated to the satisfaction of, the Registrar."

Under the Land Act the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, however, that right should be exercised in accordance with the restrictions imposed under

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the lease Agreement as well as under Section 84 (1) of the Land Act.

Thus in this case, GAPCO, the Lessee, and as restricted in Clause 2.8 of the Lease Agreement, and in Section 84 of the Land Act, could not sub-let or transfer or give on license or mortgage its interest in the Lease without the written consent of Abdallah. Under the law for the time being in force, it is not lawful for any tenant to sub-let or give on license or mortgage the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein contrary to the provisions of Section 84 of the Land Act, i.e. without the written consent of the Lessor:

Section 113 of the Land Act does not absolutely prohibit or totally forbid the tenant to mortgage or assign or transfer in any other manner whole or any part of the premises let to him but he must do this with the written consent of the landlord. In other words, the landlord is always at liberty to permit the tenant to sublet or give on license or assign or transfer in any other manner whole or any part of the premises let to him. Thus, legally, even if it were true that GAPCO did mortgage its interest in the property to secure the loan, that mortgage would not have been effective in the absence of a written consent of Abdallah. Thus, GAPCO could not legally mortgage the Property of Abdallah to obtain any financial benefits without the written consent of Abdallah.



ii. Whether the Plaintiff's property was erroneously mortgaged;

There was proof adduced by the plaintiff that the Certificate of Title for the Property was endorsed by the Registrar of Titles, Mbeya Sub Registry. This endorsement showing that the Title was mortgaged as security for the loan of US\$ 75,000,000 given to GAPCO by Barclays Bank PLC. The Certificate of Title therefore remained with the Bank for eleven months holding it as security for the said loan. The defendant denies to have mortgaged this Property, but admitted however, the existence of the stamp or endorsement at the back of the Certificate of Title. They said, this was an error. That GAPCO had indeed taken the loan from Barclays, and placed before the Bank a number of its assets as security for this loan, but this property was not one of them. The witness of the defendant did not however tell the court how did the title of this property ended with the Registrar of Titles, and why was it endorsed as mortgaged for 11 months. He simply said, this was a mistake, and the mistake was rectified 11 months later.

On this I take the view of the plaintiff that, there was no error, and if there was such an error, which error was not established by the defendants to the required standard of proof, the error was not rectified, as the endorsement at the



back of the certificate shows that the mortgage was discharged, there was no any record or proof adduced to the Court by the defendant to show that indeed this was an error, and that the error was rectified or the stamp showing that the property was mortgaged was cancelled. The burden of proving that this was an error shifted, and lied on the defendant. On the face of the records, discharge means the mortgage of US\$ 75,000,000 had been fully paid, and that is why the certificate of title was endorsed as discharged. If this was an error, the Registrar would have simply cancelled the original stamp showing that the certificate of title was erroneously mortgaged, but since the stamp shows that the mortgage was discharged, this, on the face of it, clearly indicates that the certificate of title was used to secure the loan, and 11 months later, the mortgage was discharged. It is not clear however if the discharging of the mortgage was a result of paying the loan, or the Bank realised that the property did not belong to GAPCO, thus the mortgaging of this property was un-procedural and of no effect. This was not proved by the defendant.

There was no evidence produced by the defendant proving that this was an error, and since the Certificate bore a stamp or an endorsement by the Registrar of Titles showing that the Certificate of Title was used to secure a loan, and later on the mortgage was discharged, this, prima facie, is evidence that indeed GAPCO had mortgaged this Property to secure a loan of



US\$ 75,000,000 in favour of Barclays Bank PLC, in contravention of Clause 2.8 of the Lease Agreement, also in contravention of Section 84 of the Land Act. I therefore hold GAPCO in breach of the Lease Agreement.

iii. Whether the title on Plot No. 12 Industrial Area, Msamala Songea, was kept by the Defendant in trust;

This issue need not detain us. It is clear from the records and from the testimonies of PW1 that the defendant did not keep the Certificate of Title in trust for the plaintiff. This was a condition fixed in the Lease Agreement, and the Plaintiff complied with the condition of depositing the Certificate of Title to the Defendant since the Lease Term was long. This was even pleaded by the plaintiff in paragraph 5 of his plaint, he averred:

5. *“that, in February 2002, the plaintiff and GAPOIL TANZANIA LIMITED, entered into a fuel supply agreement by which GAPOIL TANZANIA LIMITED was required to supply the plaintiff with oil and petroleum products on credit and the plaintiff was required to deposit with GAPOIL TANZANIA LIMITED certificate of title No. 8091-MBYLR annexed herewith and marked AAS-2 to form part of the plaint.”*



Thus as per paragraph 5 of the plaint, the depositing of the Certificate of title with the defendant was not for the purposes of creating a trust thereof, but the title was deposited as security for the credits taken by the plaintiff for the fuel supplied.

This was also confirmed by PW1 during cross examination saying that there were never any trust deed created between them for keeping of the title by the defendant as trustee for the plaintiff.

Since there was no trust legally created, or the intention of the parties to keeping the certificate of title was not for creation of any trust or holding the title of this property in trust, and as there was no express or implied agreement, this certificate was not held by GAPCO in trust for the benefit of Abdallah, and therefore GAPCO cannot be held in breach of any trust or in excess of any authority and to the detriment of the trust or wrongful omission of any act required of GAPCO by the terms of any trust, as there was no such trust legally created and entered , whether expressly or impliedly.

iv. Whether the plaintiff suffered any damages as a result of the erroneously mortgage of the Property;



The plaintiff claimed general damages of such sum as this honourable Court would deem fit and just to grant. He did not however establish as to what damages he has suffered and to what extent. During cross examination, Abdallah, who was the PW1 admitted to have not suffered any tangible loss but he simply said he is entitled to damages because, if the mortgage was not discharged, he would have suffered a great loss. His property could have been sold by the bank, if GAPCO defaulted paying the loan. But this did not happen, the mortgage was discharged, and the property became free of encumbrances.

Damages are awarded for the actual loss suffered, and not for the loss which is contemplated. The plaintiff was duty bound to establish in evidence the loss suffered to enable this court to award him damages for breach of the contract. The plaintiff has averred that he has never really suffered any tangible damages, but he contemplated that had the loan not being discharged, he would have suffered damages. Again, since he was not in possession of the Certificate of Title he cannot say that he missed an opportunity to use the Certificate for obtaining any financial benefits from anybody or from the financial institutions. There is no such evidence given by the plaintiff to this Court to show that the plaintiff has suffered any damages. During cross examination, the plaintiff admitted that he would not have been able to take a loan from the bank



using this Property because the Certificate of title was with the defendant, he also admitted that he had never intended to take any loan using this Certificate of Title. The plaintiff also admitted to have never asked for the return of the Certificate so as to use it for obtaining any financial benefits. The Certificate of Title was returned to him, after the case in Songea was finalised by an amicable settlement.

Since there are no actual damages suffered by the plaintiff, the short question for consideration thus is to what damages is the plaintiff entitled to for the breach of the Lease Agreement by the defendant, in the circumstances:

The term 'damage' means the harm for loss suffered or presumed to be suffered by a person as a result of some wrongful act of another and in common phrasing, the sum of money awarded by the Court to compensate damage is called 'damages'. Damages are pecuniary compensation recoverable by a person who has suffered loss, detriment or injury to his person, property or rights, consequent to any wrongful act or omission or negligence of another. These may be compensatory or punitive, depending upon whether these are awarded for actual loss suffered or as punishment or contemptible conduct and to deter future transgression.



Damages fall in various categories. These may be nominal, actual or compensatory, consequential or exemplary.

- Nominal-damages are awarded merely to vindicate a right.
- Actual or compensatory damages are awarded to compensate the loss or injury actually suffered. In a way it is a re-compose to loss or injury suffered by a person at the hands of another. In extent and quantum these are calculated to equate the loss or injury actually suffered. Compensatory or actual damages consist of both general and special damages.
- General damages are the natural, necessary or the usual result of the wrongful act or occurrence in question, which the law implies in every breach of contract or violation of legal rights.
- Special damages are compensation for special damage which is presumed by law to be natural but not necessary and inevitable result of the wrongful act, to be proved strictly and are not too remote.
- Consequential damages do not flow directly or immediately from the act of the party, but only from some of the consequences or results of such acts.



- Exemplary damages are punitive in nature, increased in scale, awardable over and above what will barely compensate the injured party where the wrong done to him was aggravated by circumstance of violence, oppression, malice, fraud or wanton or wicked conduct of the wrong doer. These are intended to solace the plaintiff for mental anguish etc. If it is proved that a defendant has acted wilfully, maliciously or fraudulently, the plaintiff may be awarded such damages.

The plaintiff in this case is therefore entitled to General damages, which are the usual result of breach of contract by the defendant. The plaintiff cannot be awarded actual or compensatory damages as there is no loss which was suffered. There is nothing to compensate. There is no loss or injury actually suffered.

v. To what reliefs are the parties entitled.

The plaintiff is therefore entitled to the following:

1. A declaration that GAPCO is in breach of Clause 2.8 of the Lease Agreement dated 1st March 2002;



2. Payment of general damages to the sum of THz 10,000,000 (Tanzanian Shillings Ten Million Only) for breach of the Lease Agreement;

3. Costs of the suit.


It is so ordered.

DATED at DAR ES SALAAM this 3RD day of JULY, 2015

MANSOOR
JUDGE
3RD JULY, 2015

COURT:

Judgment delivered in the presence of Advocate Kannonyele holding brief for Advocate Mbogoro. The Defendant was absent.


MANSOOR
JUDGE
3RD JULY, 2015

