

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

COMMERCIAL CASE NO 96 OF 2012

BETWEEN

JOHN CHARLES KESSY -----PLAINTIFF

VERSUS

ELIZABETH NTABULI SEME-----DEFENDANT

JUDGMENT

Date of the Last Order: 19/8/2015
Date of the Judgment: 26/11/2015

SONGORO, J

John Charles Kessy, the Plaintiff instituted a suit against Elizabeth Ntabuli Seme the Defendant, claiming that, on the 16/10/2002 he entered into sale Agreement to buy Defendant's plot situated at Plot No 16 A, Kings Way Estate, Kinondoni Area.

According to the Sale Agreement, it was agreed that, the purchase price of shs 80,000,000 will be payable in three installments and upon signing the agreement. The Plaintiff paid to the Defendant the first installment of shs 20,000,000.

Plaintiff claim before paying the second installment, he visited the Plot, and found a sign post erected on the Plot, with a notice stating that, the Plot belongs to the Government of Tanzania.

In view of the sign post which was erected at the Plot, that, the Plot belong to the Government not to the Defendant, he delayed to pay the two installments, but the controversy on ownership of the Plot with the Defendant was not resolved at once. Thereafter, the Plaintiff instituted the present suit, seeking for the following court order and reliefs;

- a) A declaration that, the Plaintiff did not breach the terms of the Sales Agreement and he dutifully exercised caution by withholding paying the remaining two installments, when the Plaintiff suit premises ownership became doubtful, therefore the sale agreement subsists and binds the Plaintiff, and Defendant*
- b) a declaration that, the Defendant's refusal to accept payment from the Plaintiff was and is a direct breach of the Sales Agreement.*
- c) An order that, the Defendant should perform specific performance by accepting the remaining two installments from the Plaintiff as per Sales Agreement or reimburse the Plaintiff the first installment with commercial interest from 16/10/2002 to the payment day.*
- d) General Damages*
- e) Specific damages for loss of access to and failure to develop the suit premises on time which exposes the Plaintiff to huge developmental costs in the future.*
- f) Costs be provided;*
- g) Any other order or relief that, this court may deem just, and proper under the circumstances to make, and*
- h) In response to the Plaintiff*

In response to the Plaintiff claim the Defendant filed a Written Statement of Defence, and only admitted the fact that, , she agreed with the plaintiff on the purchase price in good faith without being aware that, the sale would be frustrated with the Tanzania Building Agency.

Further, the Defendant denied that, she did breach the contract and did not refuse to accept the remaining balance of shs 60,000,000. But the problems were caused by the Government Agency which improperly claims to be owners of the said landed property. Defendant then denied all Plaintiff claims and damages and prayed for the dismissal of the suit.

Following the Plaintiff`s claim and Defendant defence the court on the 17/7/2014 when both parties were before Nchimbi J were ordered to file proposed issues for determination before the hearing date. But none of the parties filed the proposed issues in court pursuant to the Court orders.

Next, the court finds, from its own proceedings that, the trial of the Plaintiff case commenced on the 24/9/2014 before Nchimbi J, by PW1 giving his testimony without framing up agreed issues for determination.

Since there were no proposed issues which were filed by the parties, also there no issues framed up by the court at the commencement of hearing, I perused the Plaintiff`s claim and Defendant defence framed four issues; as issues for determination in the suit. The framed up issues are;

1. *Whether or not there was sale agreement between the Plaintiff and Defendant.*

2. *Whether or not the Defendant breached the agreement.*
3. *whether or not the Plaintiff suffered any damages*
4. *What relief or reliefs are parties entitled too.*

Thus in view of the above-mentioned framed up issues, the court went on to determine the suit on the basis of the above-mentioned framed issues.

During the hearing, Dr Nshalla, Learned Advocate represented the Plaintiff; while the Defendant was represented by Mr. Benson Edward, the Learned Advocate.

In pursuing his claim in the Plaint, John Charles Kessy, the Plaintiff testified before the court as PW1.

Relying on his Witness Statement, PW1 told the court that, on 16/10/2002, he signed the Sale Agreement with Elizabeth Seme, the Defendant to buy a Plot No 16, Kings Way Adda Estate.

The witness then explained that, the agreed **purchase price** was shs 80,000,000, and, he paid shs 20,000,000 as advance payment and first installment. He then briefed the court that, they agreed the remaining balance of shs 60,000,000/= would be paid as per agreed schedule.

To support his assertion that, they had an agreement with PW1 tendered a Sale Agreement which was admitted as Exhibit P1 and it shows he paid the first installment of shs 20,000,000 to the Defendant through the NBC Bank.

To prove that, the 1st Installment of shs 20,000,000/= was paid, PW1 tendered a document with title Payment Acknowledgement dated 16/10/2002, signed by the Plaintiff and Defendant together with Bank Voucher of National Bureau De Change Limited and Cash Deposit which were collectively admitted as Exhibit P2.

After making the 1st payment, PW1 said was planning to pay the remaining two installments , but when he visited the Plot and he found officials of Tanzania Building Agency (TBA) erecting a sign posts which stated that, "the Plot belonged to the Government".

To prove that, there was a sign post which said the Plot belonged to the Government , PW1 tendered two photographs which has a black sign post which reads; NOTISI, HAIRUHUSIWI KUJENGA KATIKA ENEO HILI LA SERIKALI KWA AMRI YA MTENDAJI MKUU WAKALA WA MAJENGO TANZANIA (TBA). The photographs were collectively admitted as Exhibit P 3.

PW1 said after realizing that, there was a claim of Building Agency on the Plot, he consulted the Defendant but she did not take any actions, and was not even responding to their letters.

After realizing that, there is a dispute on ownership on the Plot in question; PW1 said he stopped payments of the two remaining installments.

In view of that, dilemma on ownership of the Plot, PW1 said they opted to institute a Land Case No 156 of 2004 at the High Court Land Division, and a decision on the said case was delivered in favour of the Defendant.

To support his claim that, the dispute of ownership of the plot was resolved by the Court in favour of the Defendant PW1 tendered a copy of Judgment which was admitted as Exhibit P4.

Next, to prove that, he issued a written notice to the Defendant, requesting her to resolve the dispute of the plot with the Government or refund the first installment, the PW1 tendered a letter from Mawenzi Advocate Chamber dated 16/1/2003 which was admitted as Exhibit P5.

Then in view of his testimony, and exhibits which were admitted in court, PW1 closed his testimony while praying for Judgment in his favour as prayed in the Complaint

Thus after PW 1 has testified, Plaintiff closed his case, and Elizabeth Seme, the Defendant testified as DW1. In her testimony DW1 told the court that, she filed a witness statement in court, and will rely on it.

Next, DW1 told the court that, on the 16/10/2002, PW1 brought to her a sale agreement which she signed and was paid a sum of shs 20,000,000 as part payment of purchase price.

The witness said the sale agreement was in relation to her plot. But after she concluded the sale agreement with the Plaintiff, was involved in a dispute with the Tanzania Building Agency who erected a sign post stating that, the plot belonged to them. DW1 stated that, after entering into a dispute with the Building Agency they consulted Land Office, and the dispute was resolved.

The witness then informed the court that, since she is not the one who wanted to defraud the Plaintiff, or to frustrate the sale agreement, is praying to refund the Plaintiff all his monies which was paid as part payment of purchase price

To substantiate her point that, she was involved in a dispute with Tanzania Building Agency on the disputed plot, DW1 tendered two letters which were admitted as Exhibits D1 and 2.

In Exhibit D1, letter Ref No. DA/22/275/01/44 dated 10/12/2002, Tanzania Building Agency was doubting the Defendant's Ownership on the disputed plot, and requested her to furnish them with supporting documents which establishes his claim of ownership on disputed the Plot.

Also Exhibit D2, dated 28/2/2003 the Defendant wrote to the Tanzania Building Agency, protesting Government claim on the disputed plot. The letter was admitted as Exhibit D2.

Then DW1 maintained in her testimony that, in reality the implementation of sale agreement was frustrated, by a Government Agency who wrongly claim ownership on the disputed plot. Defendant then insisted that, she is will to reimburse the Plaintiff the money which was paid to her as purchase price. She then added that, so far has changed the land use of the Plot in question.

In view of her defence, the Defendant prayed for dismissal of the Plaintiff suit with costs in her favour.

The court has carefully considered the Plaintiff claim, the Defendant Defence, evidence and submissions from both sides, and finds key issues for determinations are the ones which I have frame up above, and if the court may issue orders prayed in the Plaint.

Turning to the first issue whether or not there was a Sale Agreement between the Plaintiff and Defendant, the court find that, may be easily ascertained from Exhibit P1, a "Sale Agreement between John Charles Kessy and Elizabeth Ntabuli Seme .

The preamble of Sale Agreement Exhibit P1 signed on the 16/10/2002, it fully established that, **Elizabeth Seme the** Defendant was ***"the Vendor"*** while **John Charles Kessy** the Plaintiff was ***the Purchaser"***.

Also, in Exhibit P1, it stated clearly that, the Plaintiff was the "Purchaser" and Defendant was **"Vendor"** of title holder of the Plot No 16A Kingsway Estate, Kinondoni, registered under the Certificate of Title No 186039/96.

Next, Paragraph 2 of Exhibit P1, there is purchase price payable in three installment, terms of payments, and dates and months which each of the three installments would be paid.

So going by the wording of Exhibit P1, the court is satisfied that, there is evidence which proved that, there was a sale agreement between the Plaintiff and Defendant involving the selling of Plot No 16A Kingsway Estate Kinondoni registered under the Certificate of Title No 186039/96, and purchase price was payable in three installments. Therefore I answer the 1st issue in the affirmative that, both the Plaintiff, and Defendant executed the Sale Agreement.

Moving to the second issue whether, the Defendant breached the contract; I noted that, the Plaintiff in his testimony, has firmly claimed that, the Defendant breached the contract for not selling the plot in question as per their agreement. But the Defendant is claiming that, the contract was frustrated due to improper interference by the Tanzania Building Agency who claims that, the Plot belonged to the Government. In addition, the Defendant further contested that, even after the controversy with TBA was being resolved, the Plaintiff did not bother to pay the remaining two installments as per their agreement. In view of the above, Defendant maintained that, there was none compliance on the part of the Plaintiff which lead to none performance of the Contract.

The court has carefully considered the arguments from both sides in line with defendant defence and easily find that, the notice of the Tanzania Building Agency on a sign post which read NOTISI, HAIRUHUSIWI KUJENGA KATIKA ENEO HILI LA SERIKALI KWA AMRI

YA MTENDAJI MKUU WAKALA WA MAJENGO TANZANIA - Exhibit P3 is the one which frustrated the sale agreement, and sale transaction, as I am about to explain.

In the first place, the court finds, Plaintiff did not pay his second remaining installment of Shs 30,000,000/=, which was due for payment on the 15/11/2002. Also he did not pay the 3rd and last installment of shs 30,000,000 which was due for payment on the 15/1/2003.

The Plaintiff reasons for non payment of the two remaining installments were due to the Notice which was issued by Tanzania Building Agency. PW1 said in his testimony that, "after reading the notice, he doubted the Defendant's claim of ownership on the disputed plot. Even, he said hesitated to pay the remaining balances". In his own words PW1 expressed his doubt on the disputed plot by stating at page 20 of his testimony of 24/9/2014 before Hon Nchimbi J that;

Wakati nafungua kesi Mheshimiwa Jaji Nilikuwa bado nina wasiwasi kwamba kiwanja either ni cha Serikali au ni cha mama Seme . Kwa hiyo kutokana na hiyo hofu na baada ya kuandika zile barua ambazo hazikujibiwa na muuzaji ndio tukapeleka ile kesi Mahakamani na tuliwashikilia pia watu wa Tanzania Building Agency,

On his hesitation to make payments on the 2nd and 3rd Installments PW1 at page 21 of the Proceedings, Plaintiff said he firmly stated that, stopped to make the 2nd and 3rd installments due to the

dispute of ownership on the plot which arose. In his own words PW1 stated that,

.....tangazo lao kwamba eneo lile ni la serikali na mtu yeyote asifanye shughuli pale ya kuendeleza , kama mnunuzi makini mheshimwa na Tanzania Building agency kama Serikali nisingeweza kuendelea kulipa mpaka mgogogoro ule ungelimalizwa kati ya muuzaji na hao building Agency ambao walidai ni eneo lao.

So going by the testimony of PW1 referred above, it is clear that, the Plaintiff did not pay remaining two installments, and the sale contract was not concluded on the 15/1/2003 as per the Agreement. It seems to me from the testimonies of PW1 and even DW1 that, what actually prevented the two parties from concluding the sale agreement was the notice from TBA.

On his part, PW1 hesitated to complete his obligation of paying two installments, after realizing that, there is a dispute of ownership on the disputed plot between Defendant who was the vendor, and TBA , and he doubted ownership of the Defendant's title on the Plot, and he finally stopped to make the two payments.

It seems to me only the emerged dispute of Tanzania Building Agency with the Defendant is the one which halted the sale transaction, and the disputed lasted for quite some time, and obstructed the Plaintiff from making further payment.

Quite frankly, I find from the Plaintiff testimonies that, the payment of the remaining two installments was frustrated by notice and subsequent sale transactions like transfer of certificate of occupancies were both frustrated and were never performed by the parties.

More, from the presented evidence, I did not find any Defendant's negative actions towards the Sale Agreement or on the Plot which halted the performance of the sale Agreement or transaction of the said plot which may amount to breach of contract or termination of contract.

At most the court find that, when the Sale Agreement was entering into the 2nd and 3rd stages it was interfered with a third party, the Tanzania Building Agency who issued a Notice that, the Plot belonged to Government.

It seems to me the interference on the sale agreement which was done by TBA notice frustrated both the Plaintiff as well as the Defendant from continuing with sale agreement.

It is the claim of ownership raised by Tanzania Building Agency which frustrated the Sale Agreement.

It is important to state that, legal effect of frustration in any contract or sale agreement is to relieve both parties from the obligation of performing their contractual obligation which has become impossible.

Quite frankly, I find this is the legal positions which was even stated in the case of **Hirji Murji Versus Cheong Yui Steamship [1926] AC 497** where it was decided that, frustration of contract automatically terminates the contract.

So, guided by the principle enunciated in the case of Hirji Murji cited above, I find the contract was frustrated and parties are entitled to be relieved from the sale agreement. In view of the above I decide the second issue that, neither the Defendant nor the Plaintiff breached the sale agreement. But it is the Notice and claim of ownership from Tanzania Building Agency which frustrated the sale and sale agreement.

With that, court finding that, the sale contract was frustrated, I therefore move to the third issue of what relief's parties are entitled too. In addressing the above I first addressed the question of whether or not the court may order specific performance of the sale agreement, and compel the Defendant to take two remaining installments as per the Sale Agreement and delivered the Plot to the

Plaintiff or reimbursed the first installments with commercial interests rate.

In addressing the above, the court finds the sale transactions were frustrated by a third party the Building Agency. So it will be unfair to the parties, for the court to order specific performance of any of the terms of the sale agreement.

Next, the court find since the sale contract was frustrated in 2002, almost 12 years has elapsed, and it is most likely that, what was agreed by the parties, their value is no longer there.

In view of the facts that, the sale agreement was not concluded by that, moment, the court finds it undesirable to make a specific order to compel the Defendant to take the two outstanding installments and delivered the Plot to the Plaintiff because the objective of sale of the Plot in 2002 was frustrated.

On the reimburse of shs 20,000,000 which was paid to the Defendant as first installment of purchase price, I find there is all justifications that, the Defendant be reimbursed by the Plaintiff a sum of 20,000,000/= she received as part payment. The sum of shs 20,000,000 was costs incurred by the Plaintiff.

It is certain that, under Section 73(1) and (2) of the Contract Act, Cap 345 R.E 2002, when a contract has been broken even by frustration, a party affected with none performance of the said contract is entitled to claim of any loss or damage directly arising from none performance of the contract. Sections 73(1) states that;

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

And Section 73(2)

(2) The compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

With above-mentioned legal guideline stated in Section 73 of the Contract, Act, Cap 345, I find and decide that, Plaintiff prayers for reimbursement of the 1st installment is legally justifiable and hereby orders the amount be refunded.

Regarding the Plaintiff`s claim of interest at commercial rate, I find since I have decided that, the contract of sale was frustrated and there was no any breach on the part of the Defendant, I find the granting of interest at the commercial rate would be improper, because there was no fault on the part of the Defendant.

Having considered that, I grant the interest rate of 3% per annum from the date the amount was paid, to the date of Judgment, and interest of 7% per annum from the date of the Judgment to the date

of the final decree would be paid. On the costs of the suit, I decide that, the Defendant pays to the Plaintiff half of the costs incurred in pursuing the suit.

Consequently, the Plaintiff suit partly succeeds as explained above. The right of appeal is fully explained to the parties.

Dated at Dar es Salaam this 26th November, 2015


H.T.SONGORO
JUDGE

Delivered at Dar es Salaam this 26th November, 2015


H.T.SONGORO
JUDGE.

The Judgment was delivered in the presence Ms. Glory , Learned Advocate holding a brief for Dr. Nshalla Learned Advocate for the Plaintiff, and Ms. Florence Ernest, Learned Advocate holding a brief of Mr. Magafu Learned Advocate for the Defendant, and in the presence of the Defendant in person.

