

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

COMMERCIAL CASE NO 21 OF 2016

BETWEEN

LINDI TOWERS LIMITED -----PLAINTIFF

VERSUS

NATIONAL HOUSING CORPORATION -----DEFENDANT

JUDGMENT

SONGORO, J

Lindi Towers Limited, the plaintiff filed a suit claiming that, on or about 27th day of June, 2007 it entered into Joint Venture Agreement with the National Housing Corporation (NHC), the defendant for construction of ten storey building on a plot No 1/52 Lindi Street, Dar es Salaam, held under Certificate of Title No CT 129467.

Further, the plaintiff claimed that, under the Joint Venture Agreement it was agreed that, at initial period of 12 years after completion of construction of the building is completed, the plaintiff would own 75 % shares in the property. But after completion of construction of the building, the defendant neglected and refused to surrender and transfer the title to the plaintiff which reflects the agreed new shareholders structure stipulated in the agreed Joint Venture Agreement. The plaintiff is therefore prayed for the following orders and reliefs;

- a) A declaratory order that, the defendant has breached the terms and condition of the Joint Venture Agreement.
- b) An order directing the defendant to submit the title deed CT No 129467, of Plot No 1/52 to the Registrar of Titles to enable the plaintiff to process sub-titles.
- c) In the alternative an order directing the defendant to release the original title deed to the plaintiff to facilitate the sub division of sub-titles
- d) General damages as may be assessed by the Court.

- e) Costs of the suit
- f) Any other reliefs the court deems fit.

In response to plaintiff suit, the defendant filed a Written Statement of Defence and admitted that, the two entered into a Joint Venture Agreement. Defendant opposed other plaintiff claims including a claim that, he refused or neglected to surrender the title deed to the Registrar of Title for registration of new shareholders structure. Next the plaintiff was put to strict proof.

In the light of the plaintiff claims, and defendant's defence the court in consultation of with parties counsels drew the following as issues for determinations;-

- 1. Whether the defendant has breached the terms of joint venture agreement*
- 2. If the issue is in affirmative whether the plaintiff suffered any damages.*
- 3. To what reliefs are parties entitled too.*

So, the plaintiff suit was heard and concluded on the basis of the above mentioned agreed issues.

During the hearing of the suit the plaintiff was being represented by Deogratias Lyimo Kiriita Learned Advocate; while Defendant was being represented by Mr. John Lasway, Learned Advocate.

In pursuing his claim the plaintiff called two witnesses and tendered several exhibits. To start with the plaintiff called Abdullahi Nur Guled who testified as PW1. In his witness statement, PW1 informed the court is the Managing Director and shareholder of the plaintiff's company.

Further, PW1 stated that, on the 27th June 2007 the plaintiff's company entered into a Joint Venture Agreement with the National Housing Corporation, the defendant for construction of ten storey building at landed property located at Plot 1/52, Lind Street, Ilala Municipality, and Dar es Salaam, held under the certificate of title No 129467.

PW1 then, explained that, the plaintiff contractual obligations under the Joint Venture Agreement was to fund the construction of the building. So, in his first step, the plaintiff claimed that, he

obtained a building permit No 0641 dated 15/2/2010. Then secured funds and constructed a ten storey building on the agreed defendant premises.

The witness then told the court after the plaintiff company completed construction work on the 13/2/2012 requested the defendant to process a title deed, so that, it may reflect the new shareholder and ownership agreed and in the Joint Venture Agreement which would reflect that, the plaintiff own 75% shares. But contrary to what was agreed upon in March 2014, the defendant process the title deed which shows the plaintiff is owning 50% shares, and defendant is also owning 50 % shares. The witness claim the issued shares to the plaintiff is contrary to what was agreed upon in clause 9.3 (a) of the Joint Venture Agreement which it was contractual agreed plaintiff will own 75% shares.

PW1 also stated that, the plaintiff requested the defendant to sub-divide the property to reflect shareholder agreement, and further requested the defendant to process, and issue sub-titles, as per clause 9.3 of the Joint Venture Agreement but defendant refused to comply with the said term of the Joint Venture Agreement.

He then maintained in his witness statement that, the defendant acts of refusing to change and process the title to reflect new ownership as per a Joint Agreement, and refusal to sub-divide the property and issue sub-titles amounted to breach of the terms of Joint Venture Agreement.

The witness also claimed in his witness statement that, failure on the part of the defendant to comply with the terms of the Joint Venture Agreement of subdividing the title, to reflect the agreed shareholding structure, between the plaintiff and defendant, and refusal to process and issuance of sub-titles, caused the plaintiff failure to meet his business contractual obligations including that, of re-paying financial loans which were secured for construction of the building.

Also PW1 claimed that, the defendant failure to process and issue sub titles negatively affected the plaintiff's business due to the fact that, he failed to meet his business commitments of selling and assigning his shares on apartments and shops to Zein Mohamed Abdallah, Abdallah Hassan Kaswiza, Edward Vedasto Byoma and Ally Mohammed Riyami who were his potential customers immediately after completion of the building.

The witness then brief the court failure on the part of the defendant to process the title to reflect new ownership as per a Joint Agreement, amounted to breach of terms of Joint Venture Agreement and caused the plaintiff to suffer losses, and ultimately failed to pay his financiers of the project.

To substantiate the plaintiff claims that, he constructed and completed the building , was also not granted shares as per the Joint Venture Agreement and that, caused him to suffer losses , PW1 tendered a Joint Venture Agreement which was admitted as Exhibit P1, Building Permit which was admitted as Exhibit P2, A letter of Lindi Towers dated 28/1/2011 which was admitted as Exhibit P3, A Letter from Lindi Towers Ltd dated 26/8/2011 to NHC Exhibit P4, Two letters dated 2/11/2011 and 13/2/2017 to NHC which were admitted as Exhibits P5 and P6 , A copy of certificate of occupancy No 129467 of Plot No 1, Block 52, Kariakoo Dar es Salaam which was admitted as Exhibit P7, A letter from Marando Advocate to NHC dated 18th January 2015, a letter from H.M Advocates to DG NHC dated 10/3/2015 which was admitted as Exhibit P9. Other exhibits which were admitted were Exhibits P8, P9, P10, P11, and P12

After PW1, tendered exhibits he was cross examined by Mr. Laswai Learned Advocate of the defendant, and he explained that, the construction was completed in 2011 and “occupancy of the building” so far is 50% to 50 %. He then elaborated that, in “occupancy rate” no one is occupying the remaining 25% because the plaintiff was not availed or assign with any legal documents to support his contractual right of possession or ownership of the units.

PW1 also elaborated that, the plaintiff's company even produced to the defendant “a unit plan” for process unit occupancy of each shareholder, but it was not honoured as per the Joint Venture Agreement.

The witness further explained that, in constructing of ten storey building, he took a loan from banks, companies and other institutions which has to be re-paid. He then finally prayed to the court that, since the defendant has refused to surrender agreed title to the Registrar of Titles for subdivision of titles as per a Joint Venture Agreement he prayed to the court to enter judgment in favour of the plaintiff as prayed in the plaint.

After PW1 testified, the plaintiff called Said Issale Mmanywa who testified as PW2. Relying on his witness statement PW2 stated that, he is the legal officer of the plaintiff's company.

The witness then briefed the court that, on the 12th June, 2014 he submitted to the defendant twelve sets of applications for issuance of sub-titles for shops No 1, 2, 3 and 8 and sub-titles of apartment No 2A, 2B, 3A, 3B, 4A, 4B, 6A, P25, P26, P27, P28, P29, P30, P31, P32, P33, P34 and P35 to reflect at least 50% shares owned by the plaintiff, and he was willing to pay for registration fees and stamp duty fees in support of applications of sub titles to the Registrar of Titles, but defendant refused to release original certificate of title to the Registrar for registration of sub titles.

To substantiate his point that, he presented applications for sub titles to the defendant and there was refusal to honour applications for sub titles, PW2 tendered ten applications of potential customers who applied for sub-titles which were also submitted to the defendant and were admitted as exhibits P25,P26, P27 P28 P29,P30,P31,P32 P33,P34 P35, and P36 .

Then upon being cross examined PW2 explained that, according to the Joint Venture Agreement the property belonged to NHC and Lindi Towers Limited. He further maintained that, was instructed by plaintiff who is his employee to go and apply for sub titles to NHC in connection with "Unit Plan" but was unsuccessful. Finally, PW2 closed his testimony and plaintiff case was closed, and defence case was opened.

On its part, the National Housing Corporation, (NHC) the defendant called Andrew Rugarabamu who testified as DW1. In his testimony DW1 explained that, is a senior legal officer with the defendant's company.

Further, he stated in his witness statement that, he has been handling matters relating to a Joint Venture Agreement between the plaintiff's and defendant's company. He then explained that, according to the agreement, it was stated that, upon completion of construction of work of the building the plaintiff company was to acquire 50% shares, and equally the Defendant was to acquire 50 % shares. The witness then clarified that, it in the venture interest that, where the plaintiff earn 75% shares of the total earning arising from a Joint Venture Agreement.

DW1 then stated that, in the entire Joint Venture Agreement there is no clause or term which requires the defendant's company to handover the original certificate of title to the plaintiff's company to enable the plaintiff to submit the Title to the Ministry of Land for sub division of titles.

The witness then argued that, all what he knows is that, the Title Deed is supposed to be handed over to the Commissioner for Lands, and later to the Registrar of Title for a change which shows new shareholder structure between the plaintiff and defendant.

On surrendering of the title, the witness explained that, the defendant did not refuse to surrender the title deed, but that, was supposed to be handed over to the Commissioner of Land together with "Unit Plan" for sub titles as agreed and not otherwise.

He then insisted that, the surrender of title for subdivision of sub-titles was supposed to be done as agreed in the Joint Venture Agreement which has to be accompanied with Unit Plan. DW1 then explained that, a new title of right of occupancy was issued by the Commissioner of Land on the 6th March 2014 which shows a joint ownership of shares of 50% each. DW1 briefed the court that, the plaintiff wishes to have his own title which bears his own name but the Commissioner of Land advised the defendant that, is not the procedure.

DW1 then briefed the court that, a certificate of title showing the plaintiff has 50% shares was handed over to one Mohammed a legal officer of the plaintiff's company.

The defence counsel then argued that, , the plaintiff as developer of the building is the one who was responsible to prepare the drawing of the whole building showing the unit plan of units which belong to the plaintiff and ones belonged to the defendants.

The witness then explained that, since plaintiff and defendant are tenants in common were required to prepare necessary documents jointly and filed them to the Commissioner of Lands for issuance of sub-titles. He then explained that, no application for issuance of sub titles was filed to the Commissioner of Land, for reason that, the plaintiff who constructed the building did not discharge part of his obligation of submitting to the defendant a unit plan for sub titles. Finally, DW1 his

testimony by praying to the court to dismiss plaintiff claims and suit for lack of merit. Then the defendant's defence was closed

Following the closure of the plaintiff's and defendant's case counsels from both sides with the leave of the court filed their closing submissions.

Submitting on the 1st agreed issue of whether or not there was a breach of the terms of the Joint Venture Agreement Mr, Deogratias Lyimo submitted the plaintiff completed construction of ten storey building in 2011 defendant was duly notified by that, time.

The counsel then faulted the defendant's company by stating that, instead of processing new title which reflect a joint ownership after completion of the building under the Joint Venture Agreement, the defendant unilaterally applied to the Commissioner for Land a new title which totally disregarded the plaintiff's request for sub-titles made in exhibits P8,10, P11, P12 and P13. He also faulted the defendant company for issuance of joint title and sub titles as envisaged in the Joint Venture Agreement where it was agreed that, the transfer of title will done after completion of construction of the building.

So the plaintiff's counsel indicated that, the plaintiff's acts of issuing new title which shows the plaintiff has 50 % shares in the property contravened Articles 9.1, 9.3(a) (b) and (C) 9.6 and 10.2 of the Joint Venture Agreement Exhibits P1/D1 in the sense that, to-date the plaintiff has no title which shows has 75% shares in the property for 12 years.

Also, he submitted that, there was a long delay in submission of certificate of Title for registration of new title which reflect joint ownership between the plaintiff and defendant. So inordinate delay in processing the title to new ownership was contrary to Article 10.2 of Joint Venture Agreement Exhibit P1/D1 which required a title to processed after completion of construction of the building.

The plaintiff counsel therefore submitted that, failure on the part of defendant to issue initial 75 % shares on the Venture interest as agreement amounted to breach of terms of Joint Venture Contract. So he applied the 1st agreed issue be answered in affirmative.

Submitting on the 2nd agreed issue of whether the defendant suffered any damages, the plaintiff counsel indicated that, the plaintiff's purpose of entering into joint venture agreement was to construct and sale or assign part of his acquired premises for the purposes of recovering his investment sum and realised profits .

The counsel then submitted that, failure on the part of the defendant to comply with terms of joint venture agreement of timely processing of new title and refusal to process sub titles denied the plaintiff's business opportunity of selling and assigning his shares in the premises to his potential customers. The plaintiff counsel then relying on Section 73(1) of the Law of Contract, Cap 345 argued that, plaintiff is entitled to compensation for loss or damages which he suffered arising loss opportunity on his business and failure to repay the loans.

On what reliefs the parties are entitled too, the plaintiff counsel submitted that, the plaintiff is entitled to reliefs prayed in the plaint.

On his part, Mr. Laswai, the learned defence counsel, submitted that, in in the Joint Venture Agreement it was not intention of parties to change a certificate of right of occupancy to reflect 25% and 75% shares after completion of construction of the building. He then emphasized that, under clause 2.2 (c) of the Joint Venture Agreement it was stated that, the certificate of title would reflect 50-50 % shareholding for each partner and that, was done.

The counsel then relying on the testimony of DW1, he insisted that, it was the duty of both the plaintiff and defendants to undertake the transfer of the certificate of title to the Land Office so even there is a delay that, would not be a blame of the defendant.

On transfer of a certificate of title, the defence counsel submitted that, the process of transfer commenced late in 2013 when the building was completed. So the defendant performed his

contractual obligations as stated in clauses 2. (2) And 4.1 of the Joint Venture Agreement and new certificate of title evidencing joint ownership was admitted in court as Exhibit P7.

The defendant's counsel then faulted the plaintiff, that, did not prepare and furnished to the defendant "a Unit Plan" of the building which would enables parties to apply for their respective units. He then emphasized that, duty of preparing "Unit Plan" was on the plaintiff and may not be shifted to the defendant because he did not take part re-development of the project The counsel indicated that, "Unit Titles" are provided and governed by Section 14(1) of the Units Titles Act No 6 of 2008, and Unit Titles Regulations GN 357 of 2009.

The defence counsel then elaborated that, since defendant was not furnished with drawings of the buildings in order to facilitate preparation of "units plan" and titles, he may not be contractual liable for any delay which took place.

Finally the defence counsel submitted that, the defendant performed his contractual obligation of under the Joint Venture Agreement and the plaintiff statement that, is occupying less than 75% of venture interest is not true.

On reliefs prayed, the defence counsel prayed for dismissal of the plaintiff suit for lack of merit and he has not suffered any financial losses.

The court careful considered plaintiff's claims on the defendant denials and easily find the testimonies of PW1 and DW1 that, the issue whether the two parties entered into a Joint Venture Agreement construction for construction of ten storey building on a plot No 1/52 Lindi Street, Dar es Salaam, held under Certificate of Title No CT 129467 and construction took place is not disputed .

Secondly the court also found from testimonies of PW1, PW2 and DW1 that, a Joint Venture Agreement which was freely entered both the plaintiff and defendant has contractual obligations to be perform by each party. Thus the key issue for determination in the plaintiff suit is whether or not the defendant breach terms of the Joint Venture Agreement as claimed by the plaintiff.

Thus before assessing and evaluating the plaintiff's claim of breach of terms of joint venture agreement, I noted that, it is ideal explain what is the meaning of breach of term of joint Venture Agreement.

Without citing any authority it is my view that, a breach of terms of Joint Venture Agreement occurs where a party to the agreement refuses, or neglect to perform agreed term of the contract or performed it differently from what is stipulated in its text.

Since, it is the plaintiff who alleges that, defendant has breached the terms of Joint Venture Agreement I find that, it is trite law derived from Section 110 (1) and (2) of the Evidence Act, 1967, Cap 6 R.E. 2002 that, whoever request a court to give judgment in his favour as to any legal right on the existence of any fact which he asserts, must prove that, the fact exist, and the level of proof is that, of the balance of probability.

Guided with the above mentioned legal position, I straight went to determine the first issue of whether or not the defendant breached the terms of Joint Venture Agreement. In doing so I have considered and assessed the plaintiff's and defendant's evidence and find the plaintiff presented original copy of the Joint Venture Agreement which was admitted as Exhibits Exhibit P1. Also, the defendant produced original copy of the Joint Venture Agreement which was admitted as Exhibit D1. I subjected the original copy in scrutiny and find both Exhibits P1 and D1 their texts resemble in form and contents. So it is one and the same document.

While on this point, I find in both Exhibit P1 and D1 Joint Venture Agreements, the National Housing Corporation, the defendant has his own contractual obligations stipulated in the agreement and was bound by such terms.

Next, I found from the plaint and testimony of PW1 the plaintiff main complaint centres on the question of ownership of the property, and contractual right of having sub titles under the Joint Venture Agreement.

Now coming to the plaintiff claim on ownership of 10 storey building, the court finds was dictated by the Joint Venture Agreement and particular Article II of 2.2 JVA Exhibits P1 and D1 which clearly stipulated that, a ownership of property will be in two forms. First is in Venture Interest and secondly title to the land

First was Venture interest which was to last for initial 12 years period from the completion of the building. So it was agreed during initial period the National Housing Corporation (NHC) who is defendant will own 25%, and M/S Lindi Towers Limited the plaintiff will own 75%.

“Venture Interest” was defined in Article 1.1 (d) of the Joint Venture Agreement to mean’;

Obligations, benefits, and rights of the parties expressed on the percentage basis determined in accordance with this agreement

The second shareholder structure was the envisaged after the expiry of 12 years period, that, is where NHC the defendant will acquires 25% venture interests in addition to his 25% share acquired during the initial period. So after 12 years new shareholding arrangement will be 50% to each partner. .

The Court interpretation of shareholding structures in both phases is based on Article 11 clauses 2, 0 (a) and 2.2(b) of Exhibit D1 which reads as follows

a) Initially

- National Housing Corporation (NHC) -25
- M/S Lindi Towers Co Ltd 75

Next in Article II, 2.2 (b) of Joint Venture Contract it terms reads as follows

(b) The other 25% shares shall remain under and be operated by partner for the period of twelve 12 years in order to recover his investment costs in the project. The NHC shall automatically and freely acquire the additional 25 shares held in surrogacy by the partner after expiry of the said period of twelve years from the date of the completion of the project in accordance with clauses D and E”

Therefore court upon reading Article 11, 2.0 and 2.2 (a) (b) and (C) of both Exhibits P1 and D1 it found there is no ambiguity on what was agreed by parties on ownership. It is clear that, there are two types of ownership. First is that, of initial period of 12 years, and second one

starts after expiry of 12 years period. It seems me according to Exhibit P1 and D1 the shares structure was going hand in hand with ownership of title. Further, I find it was a contractual promise from the defendant that, his 25 % shares in the initial period of 12 will only be 25% and will regain the additional 25% after the expiry of 12 years. The issue of sharing earnings was never incorporated in the agreement.

So, from presented evidence, the defendant contractual promise on shares structure on two phases was consistently and persistently repeatedly in Clause 9.1 of Article IX General Condition of Exhibits P1 and D1 where it was agrees as follows;

The parties agree that, upon completion of the construction works, the property shall be owned by the parties in proportion to the percentage of the joint venture interests as provided under clause D and Article 2(a) – (b) of the agreement.

Likewise a fact that, defendant promised to surrendered 75 % of shares at the initial period of 12 years is even reflected in defendants letter Ref No. NHC/DSM/1351/Vol.III/37/AAR Exhibit P15 to the plaintiff signed by Hamad Abdallah and Martin Mdoe for the Director General where the defendant committed himself by informing the plaintiff that;-

“We would like to draw your attention to the provisions of Article II of the said Agreement, which provides that, the ownership percentage would be such that, NHC will own 25% and the partner owns 75% during initial stages of development of the project. The other 25% shares shall remain under, and be operated by the partner for the period of twelve (12) years in order to recover his investment costs in the project”

Next the defendant in the same letter stated that;-

The NHC shall automatically and freely acquire the additional 25% shares held in surrogacy by the Partner after the expiry of the said period of twelve (12) years from the date of completion of the project.

So from the above cited letter from National Housing Corporation what was agreed and being discussed is that, the partner who is the plaintiff would receive 75% shares, and that, was intended to assist the plaintiff to recover his investment monies. DW1 from National Housing Corporation (NHC) while testifying attempt to tell the court that, what was agreed upon is not division of shares,

but division of venture interests in the sense the plaintiff would be entitled to 75 % of total earnings from the Joint Venture Project; while the defendant will entitled to 25 %.

I have assessed the testimony of DW1 in respect of his argument that there was no agreement on division of shares, and find his words on division of business earning are not reflected in the Joint Venture Agreement. Instead the term of division of shares has been consistently and persistently used and agreed upon in the Joint Venture Agreement and even in the defendant letter Ref No. NHC/DSM/1351/Vol.III/37/AAR Exhibit P15

The court went a step further and assume if DW1 is speaking the true that, there was an agreement of division of earnings the defendant would have with credible evidence when there was a division of earning from the joint venture agreement. But from testimonies of both sides the court did not find any evidence which shows that, the plaintiff was paid 75% of the total earning realised from the Joint Venture Project as Venture Interest as testified by DW1 .

So honestly, I find oral and written testimony of DW1 on that, there was an agreement of distribution of total earnings of the project between the plaintiff and defendant into 25 % and 75% respectively that, may not legally be accepted to contradict or vary the terms of Written Joint Venture Agreement which stipulated that, at initial period of 12 years the plaintiff will own 75% shares and defendant will own 25 %..

Taking into account that, the defendant's commitment in Joint Venture Agreement and a letter Ref No. NHC/DSM/1351/Vol.III/37/AAR Exhibit P15 shows the plaintiff will acquire 75% shares, defendant handed over to a plaintiff's company a copy of certificate of title showing new shareholder structure is of 50 % for each party, it certainly that, the share transferred and ownership between the plaintiff and defendant processed by the defendant at the initial period of 12 year was not reflecting what defendant agreed upon in Article 11 .2.2 (a) and (b) of Exhibit P1 and D1 which required the plaintiff to retain 50 % shares and retain additional 25% shares at the initial period of twelve 12 year so that, he may recover his investment costs. The additional or extra 25 % shares to the plaintiff were according to a Joint Venture Agreement for the purposes of recovering the investment costs.

So, the defendant Failure to fulfil contractual term that, the plaintiff will have 75 share at the initial 12 years amounted to none performance of Article 11, 2.0 and 2.2 (a) (b) and (C) of both Exhibits P1 and D1 and is breach of term of Joint Venture Agreement. It was the defendant contractual promise in the Joint Venture Agreement and the promised was never implemented. What was implemented on share structure is different from what was agreed upon. So in brief I find and decide that, the defendant breached the term of the agreement which required the plaintiff be granted 75% shares in the constructed building.

On second plaintiff claim that, defendant delayed to process and issue title and subtitles reflecting a new shareholding. Also I find that, defendant contractually promised in a Joint Venture Agreement that, “ after completion of the construction “ the title will be transferred to reflect new shareholder structure. The said defendant contractual promise is found in Article 11(two) 2.2 (c) of Exhibit P1 and D1. In deed the clause stated that;

After the completion of the project the title to the land shall change to reflect the new shareholding arrangement of 50% for the Partner and 50% for NHC

PW1 while testifying he stated that, construction of the building was completed in May, 2011. The plaintiff statement on completion of the building in year 2011 was not contradicted by the defendant.

Also the court find from Land Form No 19 Exhibit D4 signed by Nehemiah K. Mchechu , Director General of defendant company and Martin Mdoe Corporation Secretary of NHC that, defendant commenced process of transfer of title to the plaintiff on the 8/11/2013 when they filed application for new title in the Land Registry.

From the application for transfer of title filed to the Land Registry on the 8/11/2013 by the defendant that, establishes that, the process of transfer of title and the transfer itself was not done after completion of construction work as the defendant contractually promises rather it commenced after the elapse about one year plus as shown in Land Form No 19 Exhibit D4.

Admittedly, the court find in the Joint Venture Agreement there was no exact date which state when the process and transfer of title should have started and completed. But due to the contractual promise that, “ transfer of title “would be done after completion of the construction work , reasonably it was expected that, the defendant who has contractual liability of processing transfer would use a reasonable period time to ensure that, the process and transfer of certificate of title and issuance of title into plaintiff name and to ones who applied for sub-titles are done and completed without inordinate delay. .

It seem to me in the contract of commercial nature like the present one, where there is no contractual date of processing title and sub titles it obvious a reasonable period of time which the defendant would have spent is either three to four months since the completion of construction work.

But by using one year plus to process the new title or sub-titles which includes the defendant used a long period time and that, was a breached of Article 11, 2.2 (c) of Exhibit P1 and D1 So by consuming more than one year to process and transfer the title in accordance with shares structure, that, was inordinate delay and contractual term was done differently from what was agreed upon that, transfer will be done after completion of construction.

Therefore the defendant act of delay in processing of title into new shareholder structure was a breach of Article 11(two) 2.2 (c) of a Joint Venture Agreement Exhibits P1 and D1 which required the process of transfer of title to be done after completion of construction of the building. Also the plaintiff claim that, the delay in transferring a title into his name negatively affected his business on the project has a commercial basis and has been proved because no tangible business may be done without a title or sub-titles or any assigning document

Moving on third plaintiff claim that, the defendant declined to process sub-titles, and that, amounted to breach of contract the court find defendant fully agrees in his own letter reference Exhibit P15 addressed to Mr. Yassin Member Esq the plaintiff advocate where he stated that;

In order to minimise costs of transfer NHC decided to apply a new Certificate of Title with both names i.e NHC and Lindi Tower Co from the beginning with equal 50 %. During the process of creating sub-title NHC will submit all necessary documents to the Ministry of Land and Housing and Human Settlements Development and you will be required to pay all the fees"

Therefore guided by the Joint Venture Agreement which allowed assignments of premises and defendant's letter that, title and sub-titles will be created certainly the defendant was under contractual obligation to process sub-titles pursuant to Article 12.1 of the Joint Venture Agreement without unreasonable withheld his consent .

.So it is a finding and decision of the court based on Article 12 .1 of the Joint Venture Agreement Exhibit P1 and D1 the parties agreed that, there will be assignments of sub titles,

Taking into account PW1 and PW2 testimonies that, the plaintiff applied for sub-titles from the defendant without success the court find failure on the part of the defendant to process and issuance of sub-titles while he was served with application for sub-title that, amount to breach of the terms of Joint Venture Agreement envisaged by Article 12.1 of Exhibit P1 and D1.

It is trite law derived from Section 37(1) of the Law of Contract, Cap 345, the parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or of any other law.

The legal obligation to honour contractual promises was even emphasized in the decision in the case of Edwin Simon Mamuya Versus Adam Jona Mbala Edwin [1983] T.LR 410 at 414 whereas Lugakingira J quoting Lord Denning J (as he then was) in the case of Robertson & Minister of Pension (1949) 1 KB 227 Said that,

.....if a man gives a promise or assurance which he intends to be binding on him and to be acted on by the persons to who it was given then once it is acted on he is bound by it.

Also in the same case of Edwin Simon Mamuya versus Jona Mbala, Lugakingira J said.

follows

"A party shall also be a defaulting party in terms of this agreement if the said party shall default in the due observance of performance of any covenant, condition or provision contained in this agreement other than the payment of money and such default shall continue for more than 60 days after written notice from the other party specifying the default and demanding the same to be remedied"

Guided by the wording of Section 37 of the Law of Contract Act, Cap 345 cited above, and a decision in the case of Edwin Simon Mamuya versus Jona Mbala, the court defendant as a party to the JVC contract was under contractual obligation to perform his promises of timely transferring a title after completion of construction, processing a title which reflecting initial new shareholding structure of 25 % and 75 % respectively, process sub-titles, and a promise that, consent shall not be unreasonable withheld in application for assignment.

The court would like to stick to the words of Lord Diplock in the case of Photo Production Ltd Versus Securicor Transport Ltd [1980] 1 ALL ER 556 where he stated that, said

“Where the contracting parties, have agreed whether by express words or by implication of the law then any failure by one of the parties to perform a particular primary obligation results into breach

In view of what I have stated and decided above I find and decide that, the defendant has breached the terms of joint venture agreements.

Moving to the second limb of whether the plaintiff suffered any damages the court find from the Joint Venture Agreement in particular item D of Exhibits P1 and D1 that, the plaintiff has invested his monies in the project and was promised by the Joint Venture Agreement that, he would recover his investment and realised profit. So the plaintiff has legitimate expectation of receiving 75 % shares and will utilise 25% share to recover his costs investment.

Also the plaintiff has expectation that, will also assign sub titles of the premises he occupied within reasonable period of time, but there has been delay in utilising his business opportunity. . So reasonably the plaintiff suffered losses of earning which would have earned if the Joint Venture Agreement was fully and timely implemented by the defendant. The project being commercial venture the delay in its implementation caused loss. Thus the court find and decide on agreed issue No 2 that, the plaintiff suffered losses arising from legitimate expectation on business from the investment which he made and is entitled for damages for reasons explained above

Turning to the 3rd agreed issue of what reliefs are parties entitled too, the court find that, under Section 37 (1) of the Law of Contract Cap 345 R.E 2002 the defendant was under contractual promise to perform his promises of transferring agreed shares to the defendant at the appropriate time. And the plaintiff was entitled to his contractual right under the Joint Venture Agreement including that of initial possession of 75% shares for a period of 12 years.

Next the court find the plaintiff is entitled to general damages arising from losses which he suffered as a result of defendant none performance of the terms of the Joint Venture Agreement within reasonable period of time which ultimately denied the plaintiff right of recovery of investment sum and making profit from his investment.

The courts in several decisions including in the case of Stanbic Tanzania Limited Versus Abercrombie & Kent (T) Limited Civil Appeal No 21 of 2001 (unreported) the Court of Appeal stated that, general damages are the ones which the law will presume to be the direct, natural or probable consequence of the action complained of and are , sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he has not sustained the wrong act.

Also, in the case of Victoria Laundry v Newman [1949] 2 K.B. 528 at p. 539 Asquith, C.J said "damages" are intended to put a party in the same position, as far as money can do so, as if his rights had been observed.

Having fully considered the multi breaches committed by the defendant on none performance of the terms of the joint venture agreement, plus a fact that, the court was not furnished with the earning which the plaintiff was entitled to receive if the contract was fully performed I find since there was persistent breach for years which lead to financial losses on the part of the plaintiff I assessed a sum of shs 550, 000,000/ as general damages will be enough to address losses which plaintiff suffered. So I find that, the plaintiff has proved his claims on the balance of probability and hereby enter judgment in his favour against the defendant as follows'

- 1) The court declare that, the defendant is in breached the terms of Joint venture agreement.
- 2) That, the defendant is hereby ordered to submit the Title Deed No CT 129467 of Plot No 1/52 to the Registrar of Titles to effect the agreed initial share structure envisaged in item 2.2 (a) of the Joint Venture Agreement of 25% and 75 % with its tenure stipulated in the agreement and for processing sub-titles which were forwarded to him.
- 3) That, the plaintiff is entitled to general damages assessed by the court to the sum of shs 550,000,000 as loss of earning and business.
- 4) The defendant is ordered to pay the plaintiff an interest of 11 % per annum on decretal sum from the date of judgment to a date the decretal sum will be paid in full.
- 5) That, the defendant is ordered to pay plaintiff's costs of the suit,

Finally the plaintiff suit succeeds as explained above and right of appeal is fully explained to both parties.

Dated and Delivered at Dar es Salaam on this 9th day of May, 2018


H.T. SONGORO
(JUDGE)

The Judgment has been delivered in the presence of Mr. Deogratias Lyimo, Learned Advocate and Mr Laswai, Learned Advocate of the defendant