

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO.162 OF 2018**

**MUSSA SHAIBU MSANGI.....PLAINTIFF**

**VERSUS**

**REGISTERED TRUSTEES OF CHAMA CHA MAPINDUZI.....1<sup>ST</sup> DEFENDANT**

**KINONDONI CCM DISTRICT SECRETARY.....2<sup>ND</sup> DEFENDANT**

**MWESIGWA MUTABUZI.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

Date of last order 08<sup>th</sup> February 2022

Date of judgement 04<sup>th</sup> March 2022.

**Z.A MARUMA, J.**

This is a dispute that arose from the contract between the plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The contract in controversy is alleged to result from the agreement to finance construction of the new CCM Commercial building and rehabilitation of the old CCM building at Plot No. KMK/MZN/448 situated at Minazini - Makumbusho CCM branch at Kinondoni district in Dar es Salaam region.

The plaintiff herein is a business person and an active member of Chama cha Mapinduzi (CCM) since the year 2003. The 1<sup>st</sup> defendant is the registered trustees of the ruling party (CCM) whereby the 2<sup>nd</sup> defendant is the CCM district secretary of Kinondoni district and the 3<sup>rd</sup> defendant is the lawyer of Chama cha Mapinduzi in Kinondoni district.

The brief background to the dispute, is that the plaintiff in way back in September 2003 by virtue of his membership was approached by the 1<sup>st</sup> defendant through the 2<sup>nd</sup> defendant for financial support for the construction of a commercial CCM building and rehabilitation of the old building at plot no. KMK/MZN/448 at Minanzini - Makumbusho CCM Branch in Kinondoni District. The demand arose from a plan to initiate business projects to run daily activities and to meet other financial obligations of Minanzini - Makumbusho branch. The plaintiff being a member of the CCM in Mianzini branch and convinced with the request to rescue financial crises to inject the projects, entered into an agreement with the 1<sup>st</sup> defendant to finance the two projects of construction of a new building and rehabilitation of the old building at CCM Branch Minazini - Makumbusho Branch. The parties in executing the projects reduced the agreement in writing where terms and conditions were laid down.

However, the contractual relationship started to turn to become bitter from 24<sup>th</sup> July 2009 after the change of leadership regime in Kinondoni district. That was when the 2<sup>nd</sup> defendant wrote a letter to the plaintiff and informed him that, all previous agreements signed were void as were not signed by the registered trustees of the CCM and it was on that basis an auctioneer known as MFIMA AUCTION MART was appointed to take charge and be responsible to sign all contracts and collection of rental fees in respect of the two CCM commercial buildings constructed and rehabilitated by the financial support of the plaintiff. He alleged all these were done without any negotiation or mentioning modality to refund the costs incurred by the plaintiff. Against the alleged breach of the terms of the agreement, the plaintiff is before this Court for the following prayers:

- (i) A declaration order that the two agreements entered

to by the parties for the construction of the new CCM commercial building and rehabilitation of the old CCM commercial building are valid and enforceable in law on its terms and conditions.

- (i) For permanent restrain orders against the defendants its agents, workmen, assigns or any other person acting on their behalf from interfering with the plaintiff's business in the suit premises until the plaintiff is refunded back all his costs incurred in the construction and rehabilitation of the building as agreed by the parties.
- (ii) In the alternative but without prejudice to the above prayers, the defendants to be ordered to refund the plaintiff a total sum of Tshs.86,338,299/=In the current value being costs incurred by the plaintiff in the construction of new CCM commercial building and rehabilitation of the old CCM commercial building at plot no. KMK/MZM/448.
- (iii) Costs of the suit.
- (iv) General damages as shall be assessed by this court.
- (v) Any other relief as the honorable court may deem just and fair to grant.

In this case Mr. Deogratious Ogunde, learned advocate represented the plaintiff. The case was heard exparte following an order for exparte hearing issued under Order IX Rule 6 of the CPC read together with rule 43(1) of the High Court (Commercial Division) Procedure rules, 2012 GN 250 of 2012 due to the failure of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants to attend the final pre – trial conference and compliance of previous Court order to amend written statement of defence. The prayer was granted

on 8<sup>th</sup> September 2021. However, it is on the record that the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed their joint written statement of defence on 31<sup>st</sup> December 2018.

At the hearing the plaintiff called five witnesses to support his case. The plaintiff (PW1) guided by his learned advocate alleged that he is a staunch member of Chama Cha Mapinduzi (CCM) and tendered an **exhibit "P1"**. He entered into agreement to finance of constructing New CCM Commercial building and rehabilitate the old Commercial building at Minazini – Makumbusho CCM branch. To justify this the plaintiff tendered **exhibit "P2"** a copy of the agreement between him and the defendants which was referred to as annexure B (1) in his plaint as an initial contract signed on 5<sup>th</sup> September 2003. The plaintiff also testified that after the completion of the new building he moved to the second project of rehabilitating the old building and second agreement was issued to him by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. However, the plaintiff did not produce the second agreement he referred to as annexure B2 in his plaint. The plaintiff alleged that the construction was supervised by a committee formed by the defendants which started with three members and at a later stage other three members were joined to form a committee of six members. He testified that the committee throughout the constructions from 2003 up the completion in 2006 was mandated to supervise and approve costs and expenses incurred during the construction. To prove this, the plaintiff tendered **exhibit "P3"** collectively of correspondences between him and the 1<sup>st</sup> and 2<sup>nd</sup> defendants showing letters dated 15<sup>th</sup> August 2004 marked as annexure C (2), letters dated 5<sup>th</sup> February 2005 and 10<sup>th</sup> February 2005 marked as annexure D1 and D2 of the plaint together with **exhibit P4** marked as annexure D3 of the plaint. All these confirming the terms and conditions of the contract

According to the plaintiff (PW1) among the conditions in the agreement was for the plaintiff to collect all of the costs incurred in construction which was to be deducted from the rent. The amount agreed to be paid by the plaintiff was at a tune of Tsh. 80,000/= per month in a breakdown of Tsh. 30,000/= for the old building and Tzs. 50,000/= for the new building as indicated in **exhibit "P2"** the initial contract. The plaintiff (PW1) also testified that, he was allowed by the 2<sup>nd</sup> defendant to sub – lease some of the rooms (frames). He said in 2<sup>nd</sup> February 2006 after the completion of the construction he submitted his report with a total cost of Tsh. 86,338,299/= which was approved by the leadership committee of Minazini CCM branch tendered **exhibit "P6"** collectively comprises a letter dated 18<sup>th</sup> January 2006 marked as annexure L(a) and annexure J and K, the minutes of the committee received and approved the construction costs incurred by the plaintiff. The plaintiff further testified that on 2<sup>nd</sup> March 2006 the 2<sup>nd</sup> defendant wrote a letter to him to confirm the amount of Tsh. 86,338,299/= as construction costs incurred by him and promised to include the same in the new contract. He also testified to be given a lease agreement which he signed and submitted back to the defendants but he never received his copy. However, PW1 testified to receive another lease agreement on 4<sup>th</sup> March 2006 which incorporated the construction costs and upon agreed with the terms, himself and 1<sup>st</sup> defendant signed the agreement **exhibit "P7"** collectively. The plaintiff testified that since then he was paying a monthly rent of Tsh. 80,000/= in which 50% went to the 1<sup>st</sup> defendant and another 50% retained by him refunding the construction costs incurred. He supported his evidence by a batch of payment receipts **exhibit "P8"**. Plaintiff testified that, the agreement was smoothly executed without any faults in respect of the agreed amount until July 2009 when he started to receive requests from

the 1<sup>st</sup> and 2<sup>nd</sup> defendants **exhibits "P9"** collectively to set for a new agreement and annulment of the previous agreement. However, he was not disturbed till March 2018 when the situation became bitter after the increase of rent and other directives together with the threats from the defendants as indicated in **exhibit "P10"**. He testified that all these happened with no room for negotiation on the new terms and conditions or acknowledging the refund of outstanding construction costs. He further said up to the year 2021, the plaintiff had already paid as per their agreement a total amount of Tsh.7,680,000/= to the 1<sup>st</sup> defendant and retained Tsh. 7,680,000/= as the construction costs. Therefore, his pending claim is a total amount of Tsh. 78,658,299/= as the recovery of the remaining construction costs.

The plaintiff's case was also supported by the evidence of Ally Mkali (PW2) who testified on existence of contractual relationship between the plaintiff and the 1<sup>st</sup> and second defendants **Exhibits "P4"** (collectively as the annexure to the plaint B (1), B (2), B (3), C (2), D (1), D (2), D (3)) in the plaint. Mr. Mwinchumu Tunu Mwinchumu (PW3) an architect testified that he was involved in the preparation of drafting and drawing the Map of Architectural Drawings of that new CCM Commercial building at Minazini CCM branch evidenced by **exhibit "P5"** (Architectural Drawings) supported by the evidence of Mr. Ephraim Mwamakunge (PW6). Mr. Ramadhani Madhehebu Tuli (PW4) and Joseph Adam Masam (PW5) who basically testified to establish that there was a contractual relationship between the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

In determining this case, I will rely on issues which were framed by the plaintiff and filed in Court on 24<sup>th</sup> February 2021 and adopted by this Court. These include:

- (1) Whether there was the valid agreement between the plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants towards the construction of the new Commercial CCM Building and Rehabilitation of the old commercial CCM building.
- (2) Whether if the issue number one is answered in affirmative what are the legal consequence in both parties?
- (3) Whether it was lawful for the 1<sup>st</sup> and 2<sup>nd</sup> defendants to unilaterally review and increase the payable monthly rent and demand the plaintiff to pay contrary to the agreement.
- (4) Whether the 1<sup>st</sup> defendant breached the agreement.
- (5) To what reliefs are parties entitled.

The Court also taking into account that the 1<sup>st</sup> and 2<sup>nd</sup> defendants did file their joint written statement of defence on 28<sup>th</sup> December 2018 which disputed all facts established by the plaintiff save for the particulars of the plaintiff.

In fact, the five framed issues, are all of them centered on the two first issues no. 1 and 2 which this Court will focus on.

Starting with the 1<sup>st</sup> issue on whether there was a valid agreement.

Section 2 (a) of the Law of Contract Act, Cap 345 R.E of 2019 defines agreement that,

***"Every promise and every set of promises, forming the consideration for each other, is an agreement"***

Whereby section 10 amplifying the definition of an agreement 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."***

On the legal ambit an agreement is a meeting point of ideas of agreement and obligations. In view of the definition and relating it to the facts of the plaintiff evidence (**exhibit "P2"**) the agreement signed by the plaintiff (PW1) and the 1<sup>st</sup> defendant on 5<sup>th</sup> September 2003. The fact supported by the evidence of PW2 Ally Mkali who was among the members signed the said agreement. In my view am satisfied that it stipulates all basic criteria and tests provided under section 2 (e) and section 10 of the Law of Contract Act (supra) that there must be an offer, acceptance and consideration. It is from the said agreement the obligations of the parties led to the construction of the two buildings of New CCM Commercial building and rehabilitation of the old Commercial building at Minazini – Makumbusho CCM branch. Therefore, the first issue is answered in the affirmative to the extent that, based on the factual evidence by the plaintiff it established contractual relationship between the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

Coming to the issue of what are the legal consequences of both parties? To affirm this issue, I considered the circumstances of communications and correspondences which cemented the contractual obligations between the two parties. This is evidenced by the letters **exhibit "P3"** collectively on correspondences between the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants showing letters dated 15<sup>th</sup> August 2004 concerning the confirmation of the terms and conditions of the agreement signed by the secretary of Minazini CCM branch, letters dated 5<sup>th</sup> February 2005 marked as annexure D1 and D2 in the plaint confirming the terms and conditions of the contract by confirming the monthly rent at a tune of Tsh. 80,000/= with the retain of 50% to cover construction costs and another 50% paid to the branch and that of 10<sup>th</sup> February 2005 together with **exhibit "P4"** directed a point of payments of those rents. Also,



there is no dispute that the plaintiff incurred construction costs of Tsh. 86,338,299/= which was approved by the leadership committee of Minazini CCM branch **exhibit "P6"** collectively comprises a letter dated 18<sup>th</sup> January 2006 anneture L(a) and annexture J and K, the minutes of the committee received and approved the construction costs incurred by the plaintiff. All these lead to an inference of contractual obligations between the plaintiff and the defendants. This was also discussed by the Court of Appeal, in the case of **Hotel Travertine Limited & Others vs National Bank of Commerce Limited** (Civil Appeal 82 of 2002) [2006] TZCA 16 (27 October 2006), whereby the Court defines section 2 (1) of the Law of Contract Act Cap. 345 R.E. 2002 referring to the case of **Gibson v. Manchester City Council** (1979) 1 WLR 294 (HL) where Lord Diplock at page 297 made the following pertinent observations -

***"My Lords, there may be certain types of contracts, though I think they are exceptional, which do not fit easily into the normal analysis of a contract as being constituted by offer and acceptance; but a contract alleged to have been made by an exchange of correspondence between the parties in which the successive communications"***

Relating these observations and the correspondences in the case in hand, I find no doubt to rule that, there were legal binding terms between the plaintiff and 1<sup>st</sup> and 2<sup>nd</sup> defendants following the agreement to finance two construction projects belonging to the Minazini CCM branch.

Following the above contractual obligations from July 2009 the plaintiff started to receive requests from the 1<sup>st</sup> and 2<sup>nd</sup> defendants **exhibits "P9"** collectively to set for a new agreement and annulment of the previous agreement. However, he was

not disturbed till March 2018 when the situation became bitter after the increase of rent and other directives from the defendants as indicated in **exhibit "P10"** with no room of negotiation on the new terms and conditions or acknowledging the refund of outstanding construction costs.

Analysing what are the causes of the shaking contractual obligations. I have gone through the initial agreement signed in 2003 (exhibit P2), the second agreement signed in the year 2005 (exhibit P3) the agreement signed in year 2006 after the completion of construction (exhibit P7). All of these agreements despite the discrepancies which do go to the basic requirements of the contract, the main cause is lacking of clarity on terms and conditions of the said contracts and this is where the dispute arises. This might be caused by an oversight which is also of neither party's fault due to the nature of the agreements and the relationship of the parties thereto by the time such agreements were executed. Looking at the initial agreement (**exhibit P2**) the terms therein is for the plaintiff who is also the tenant therein to date to finance the construction of the two buildings on conditions of being refunded through the monthly rent paid under the agreed arrangement of 50% of the amount be paid to the 1<sup>st</sup> defendant and the remaining 50% retained by the plaintiff as recovery costs for the construction. However, going through the subsequent contracts such term and condition do not reflect in either of the agreement signed in the year 2005 (**exhibit P3**) or the agreement signed in year 2006 after the completion of construction (**exhibit P7**). Moreover, the contract period is also not certain however, in the initial agreement (**exhibit P2**) and correspondences confirming the construction costs incurred by the plaintiff be deducted till the amount claimed is recovered.

The common law principles is clear on when dispute like this occurred where other terms should be read into or implied into agreement. However, the Courts are reluctant to add such terms unless under special circumstances with careful consideration of the rights of the parties therein. Looking at the case in hand, it is a finding that, there is no doubt on the contractual relationship between the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants established following their ideas initiated an agreement signed 2003 (**exhibit P2**). Also, there is no dispute on the amount incurred as to the costs of construction as evidenced to be approved by the defendants. In addition to that, there is no dispute that the amount paid of Tsh. 80,000/= as monthly rent is paid for more than twelve frames (12) as evidenced in **exhibit P8**.

However, looking at the terms of payments which have no clarity concerning time for contract performance specifically on the payment of construction costs. Also, taking into consideration the amount of monthly rent paid and the current market price of one frame, I am of the view that, it is logical and prudent for the parties to reconcile and clarify the terms of payments amicably. This is saying so based on the relationship of the parties into this agreement who are all members of the Minazini CCM branch, the business relationship they have and their good intention to promote developments within their territory. Moreover, every one of them is entitled to be proud of the development made on the two construction projects in which today each party is enjoying the success and fruits of the efforts made.

In the view of the above findings, I have no reason to labour much on the remaining issues which were not sufficiently proved. Mostly, taking into consideration the interests of justice to both parties, the contractual and business relationship between them which have not been disturbed to the extent of ruining all what have

been done to amount to a breach of agreement. To maintain the existing legal, business and social relationship, the parties are advised and encouraged to define clearly all the terms which have resulted into a dispute and settle all issues in a manner which will result into the peaceful end of their contractual obligations. Each party to bear its own costs. It is so ordered.

Dated at **Dar Es Salaam** this 04<sup>th</sup> March 2022.



15/03/2022

X 

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Judge  
Signed by: Zahra A. Maruma