

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO. 95 OF 2016**

**TANZANIA PORTLAND CEMENT COMPANY LIMITED... PLAINTIFF**

**VERSUS**

**THE TREASURY REGISTRAR ..... 1<sup>ST</sup> DEFENDANT**

**THE MINISTER FOR WORKS, TRANSPORT  
AND COMMUNICATION ..... 2<sup>ND</sup> DEFENDANT**

**TANZANIA BUILDING AGENCY ..... 3<sup>RD</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

*Date of last Order: 25.11.2021*

*Date of the Judgement: 29.11.2021*

**A.Z.MGEYEKWA,J**

The Plaintiff, TANZANIA PORTLAND CEMENT COMPANY LIMITED (TPCC), lodged a suit against the four Defendants herein jointly and severally seeking the declaration from this court that the Plaintiff is the

lawful owner of the suit land in respect to Plot No.1, 4, and 7 with Title No. 42336 (Exh. P1) located at Wazo Hill area at Dar es Salaam Region. The Plaintiff claims that the instrument of transfer issued by the Defendants through Government Notice No. 63 of 2008, transferring houses situated on the suit piece of land is illegal, null, and void. The Plaintiff claims further that the 3<sup>rd</sup> Defendant's act of leasing out part of the suit land and collecting rent out of it is unlawful and amounts to unlawful interference with the Plaintiff's right over the suit land. The Plaintiff urged this court to order for vacant possession from suit land and or eviction of the Defendants and their agents or assignees from the suit land.

The facts giving rise to this suit are not difficult to comprehend. The facts, as can be deciphered from the pleadings and evidence on record go thus: the suit piece of land Plot No. 1, 4, and 7 with Title Deed No. 42336 registered in the Name of Tanzania Portland Cement Company Limited. It is located at Wazo Hill area, Dar es Salaam. Ordinarily, the suit piece of land and all the properties were owned by the Plaintiff from 1959. Tanzania Portland cement Company Limited is a cement factory and its production for 100%. In the year 1970's Tanzania Government nationalized all factories owned by foreigners including the suit land which

became 100% under the ownership of the Government of the United Republic of Tanzania. In 1995, the Tanzanian Government privatized the factory by selling its shares to the public in which the Plaintiff claims in 1998 and 2006 to have purchased all the shares (Exh. P2) & (Exh. P3), the end of Tanzania Government involving itself in the company's shares and assets after having sold all of its shares.

According to the Plaintiff, on 23<sup>rd</sup> May 2008, the Tanzanian Government-issued GN.No.63 (Exh. D1) transferred some of the houses on the suit plots to the 3<sup>rd</sup> Defendant. Following such transfer, the 3<sup>rd</sup> Defendant promptly collected rents from the same tenants while other tenants agreed to pay rent to the Government and others refused and sustained paying the rent to the Plaintiff. The 3<sup>rd</sup> Defendant's action to collect rent was the genesis of this suit as the Plaintiff was not happy about it.

In his amended Plaintiff dated 05<sup>th</sup> August, 2019, the Plaintiff prays for Judgment and Decree against the Defendant as follows:-

- a) Declaration that the Plaintiff is the lawful owner of all that piece of land described as Plot Numbers 1, 4 and 7 Wazo Hill Area, Dar es Salaam held under the Certificate of Title No. 42336 (the suit land).*

- b) *Declaration that the Instrument of Transfer issued by Defendants through Government Notice No. 63 of 2008, transferring houses situated on the suit land is illegal and null and void.*
- c) *Declaration that the 3<sup>rd</sup> Defendant's act of leasing out part of the suit land and collecting rent out of it is unlawful and amounts to unlawful interference with the Plaintiff's right over the suit land.*
- d) *An order for vacant possession from the suit land and or eviction of the Defendants and their agents or assignees from the suit land.*
- e) *An order requiring the 3<sup>rd</sup> Defendants immediately and within the time to be specified by the Court, write to all persons to whom it has leased out any part of the suit land and copy to and serve the same on the Plaintiff and the Court, openly informing the purported tenants that it is not the owner of the suit land and that the owner thereof is the Plaintiff and directing them to pay to vacate immediately.*
- f) *An order requiring the 3<sup>rd</sup> Defendant to prepare a written statement of the whole sum of money received as consideration for leasing out any part of the suit land and remit to the Plaintiff that sum with interest at 25% per annum from the date each of that sum was received to the date that sum is remitted to the Plaintiff.*

- g) A mandatory Injunctive Order permanently restraining the Defendants jointly and severally and or anybody/person working on their behalf or on behalf from dealing with any part of the suit land.*
- h) General damages to assessed by the Court.*
- i) Interest at court rate from the date of judgment to the date of full settlement.*
- j) Cost of this suit; and*
- k) Any other fit and just relief.*

On the other hand, the Defendants, in response to the Plaintiff' claims, filed a joined amended Written Statement of Defence and denied the Plaintiffs claims and urged for this court to declare the 3<sup>rd</sup> Defendant a lawful owner of the disputed premises.

It is imperative at the outset to point out that, this matter has also gone through the hands of my brothers; Hon. Mzuna, J who conducted 1<sup>st</sup> Pre -Trial Conference. Hon. Mgetta, J who tried to mediate the parties while my learned Hon. Maghimbi, J conducted 2<sup>nd</sup> Pre -Trial Conference and heard the Plaintiff's case. My brother Hon. Tiganga, J during special session heard the Plaintiff's case and part of the Defendants' case and I

closed the Defendants' case. I thank my predecessors for keeping the records well and on track. I thus gathered and recorded what transpired at the disputed land and now have to evaluate the evidence adduced by the witnesses.

During the hearing of this suit, the Plaintiff was represented by Mr. Mbwambo, learned Advocate assisted by Mr. Tumaini, learned Advocate, whereas the Defendants were represented by Mr. Daniel Nyakiha, learned and Mr. Farajani Mwasanyamba, learned State Attorneys.

Upon completion of all preliminaries, the Final – Pre Trial Conference was conducted on 09<sup>th</sup> July, 2020 where the following issues were framed by this Court:-

- 1) *Whether they share sale and shareholders in the Plaintiff's Company dated 02<sup>nd</sup> September, 1998 included the sale of the suit land.*
- 2) *Whether the instrument of transfer issued by the Government vide GN. No. 63 of 2008 is legal and valid?*
- 3) *Who is the lawful owner of the suit property*
- 4) *To what reliefs are the parties entitled thereto.*

To prove the above issues, the Plaintiffs had four witnesses; Mr. Harmas Lait Kiwia, who testified as **PW1**, Ms. Justine Christopher Mkude, who testifies as **PW2**, and Mr. Brian Okelo Kangeta, who testified as **PW3**. Mr. Lore Maca was the fourth witness (**PW4**). The Defendants' called two witnesses namely; Mr. Hassan Mvano Mahamoud who testified as **DW1** and Ribson Kidede who testified as **DW2**.

Harmas Lait Kiwia (PW1) introduced himself as the Plaintiff's employee who served as a General Manager of the Company. PW1 informed this court that the assets of the Tanzania Portland Cement Company Limited included land, buildings, factory, and employees' quarters. He testified that the suit land and all properties fixed attached to it belong to the Plaintiff because the same was surveyed and located to the Plaintiff in the year 1993. He substantiated by tendering the Original Title No.42336 with land Office No.21159 for Plots No.1, 4, and 7 Wazo Hill, Dar es Salaam City, which was admitted as Exhibit P1. He also told the Court that in the suit piece of land there were several houses and employees' quarters. PW1 signed the Title Deed on behalf of the company.

During cross examination, PW1 testified that when he was signing the deed the factory was already a Government parastatal and the

Government was controlling all the houses, the quarry, and administration buildings. PW1 testified to the effect that after the nationalization of the factory the shares were sold to the public in which PW1 purchased 4000 shares after having seen the prospectus (Exh.P2).

Ms. Justine Christopher Mkude (PW2), testified that he was employed by the Plaintiff in 1984 and from 1985 was living in the factory houses belonging to the Plaintiff and the rent were deducted from the salary. He further testified that he has never paid rent to the 3<sup>rd</sup> Defendant but the Plaintiff. And that before the factory was privatized it belonged to the Government. But the Government has now sold all of its shares to the Plaintiff and therefore that the Company and its assets are owned by the Plaintiff for 100%.

PW3, Brian Okelo Kangeta, testified that he is a Tax consultant and secretary of the Company since 2015. According to PW3, the Government had sold its shares as per Exhibit P3 whereby 611,736 shares equally to 34% percent out of its 74% at the tune of USD 8,450,000/- and that purchaser paid in full, and the shares were transferred to the purchasers. PW3 further testified that Clause 2 (iv) of the sale of shares and Shareholder's agreement, the assets were excluded and that the list of



excluded assets is in appendix 2. However, the Government disposed of all of its shares at the point in time when the shares that it was holding were listed in DSE. He further testified that Exhibit P2 covers two things the first one is long-term financial liabilities of the company, as well as Immovable properties of the company, in which that the immovable properties of the companies include CT. No.42336, CT.No.17251, and CT.No.48373 as indicated on Companies assets on page 81 of Exhibit P2.

The fourth witness was Lore Maca, who testified through video conference, adopted his affidavit to form part of his testimony. He testified that he is a Legal Advisor and compliance officer of the Plaintiff since 2015. He testified that the court that there was a mistake of law in the "MOU" towards the Clause that "the use of these assets will be subject to an agreement between the company and the Government (Exh.P3). In Clause 2 (iv) of Share Sale Agreement and Shareholder Agreement (SSSA), it is provided that:-

*"The entering into an agreement on the terms and conditions for the use by the company of the assets excluded from this transaction and the arrangements deemed satisfactory by the parties. The list of excluded assets is produced in an appendix (2)."*

The affidavit of PW4 stated their different types of rights such as a right of occupation, right of use, a pledge, and all lease rights, therefore that TPCC giving rights to the third parties does not mean that they are no longer owners of those assets. He went on to testify that the transfer of ownership of the assets of the company whose shares are sold is illegal through a contract for the sale of shares between sellers and buyers of shares and which, in addition, does not involve the company itself. Therefore, the excluded assets listed in appendix 2 cannot be interpreted in any other way than as rights of use granted to SARUJI on assets belonging to TPCC whose shares are sold. PW4 further testified that the content of Clause 2 (iv) of the SSSA has incumbrance for failure to meet for a further arrangement for use before the closing of the deal. More so that the lease does not allow to create a title of ownership on land by calling one of the parties "land Lord" that a lease may be a sublease.

During cross examination, PW4 informed this court that Exhibit P3 did not exclude the houses, but that the right of use was what was in question.

He further testified that PW4 in paragraph 7 of his affidavit had said that the houses in the "MOU" were excluded, but that it was a mistake of

law. He further testified that shares include assets of the Company. But that the houses were excluded because the transfer of shares means the transfer of shares without transferring the ownership of the properties of the company. Therefore, that the suit land belongs to the Plaintiff.

On the defence side, Hassan Mvano Mahamoud (DW1), Estate Officer is the overseer of all Government houses or buildings. He testified to the effect that the houses were transferred to TBA by the chief secretary in 2008 through G.N.No.63 of 2008 dated 23.05.2008, therefore that the transfer was legally made as per Exhibit D1. He further testified that the Exhibit D1 transferred all the houses on Plot No. 1, 4, and 7 on CT No. 42336 except plant were not transferred to TBA.

On cross examination, DW1 testified that the CT No. 42336 belong to the Plaintiff for industrial use and that TBA do not deal with industrial businesses. But that Exhibit D1 is just about instrument of transfer. More so, when was asked what is superior between the transfer and the grant of right of occupancy, DW1 responded that the transfer is superior than the right of occupancy as it was effected in 2008.

Robison Kidede, a Principal Finance Officer working at the Office of Treasury Registrar. He testified as DW2. Robinson testified to the effect

that before the privatization of the Company the Government owned the company 100% and it later sold all of its shares to the public as per Exhibit P3. And that before Government selling its shares had entered a lease agreement with the Plaintiff on 05.03.1998 as per Exhibit D2 and the agreement for the sale of shares dated 02<sup>nd</sup> September, 1998. And that Exhibit D2 involves houses inside CT No. 42336.

When DW2 was cross examined, he testified to the effect that the houses were not part of the Sale Agreement, the same were excluded assets. He referred this court to Article 2 (vi) Clause 2 of the said Sale Agreement. He said that the closing of the contract was in the aspect of payment date. DW2 went on to testify that the contract did not state who will use the said houses. DW2 testified that the Tanzania Saruji Company was not owing to the suit houses and Tanzania Portland Cement was supervised by Saruji Company as an overseer. DW2 also said that the Tanzania Portland Cement Company is the owner of the suit land.

In addressing the first issue, *whether the shares sale and shareholders in the Plaintiff's Company dated 02<sup>nd</sup> September, 1998 included the sale of the suit land*, I wish to start by saying that disposition of shares of a company is governed by the Law of Contract and the Companies Act Cap.

212. Shares in the Company are the properties, which are owned by members (shareholders) of the company as movable properties, which can be transferred in a manner provided by the respective article of the company, pursuant to section 74 of the Companies Act, Cap.212.

Shares, as properties of a member to the company, they can be sold by the member owning such shares of interest to the company affairs. In principle, disposition of shares does not include assets of the company based on the principle of separability of corporate personality laid down in the famous case of **Solomon v Solomon and Company** [1897] A.C 22 where it was stated that:-

*"A company is a separate legal entity and can own property."*

Reading the evidence on record, it is indisputable fact that the sale of Government shares to the Plaintiff was effected whereby the Government of the United Republic of Tanzania entered into an agreement with the Tanzania Saruji Corporation for the sale of 100% of its shares as per Exhibit P3. In the instant case, based on the principle of separability, the sale of shares owned by the Government to the company does not include the sale of assets of the company because members do not own assets of the company. Therefore, in answering the first issue, the sale of shares owned by the Government to the Plaintiff's company did not include the

sale of the land which was among the assets that belonged to the company. It is my firm view that the exclusion of the suit houses from the IPO transaction was not intended for ownership, rather on how such houses would be used. The Exhibit P3 contains the answer to the first issue in Clause 2 the conditions precedent (iv) provides that: -

*"The **entering into an agreement** on the terms and conditions **for the use** by the company of the **assets excluded** from this transaction and the arrangements deemed satisfactory by the parties. The list of excluded assets is produced in appendix (2)."*  
*[Emphasis added].*

Appendix 2 is the list of 16 assets excluded in the above Clause, with only one condition; for a future agreement between the parties for the use of the excluded assets, before closing the deal.

Regarding the second issue *whether the instrument of the transfer issued by the Government vide GN.NO.63 of 2008 is legal and valid.* Transferring the disputed houses to the 3<sup>rd</sup> Defendant on the ground that they are assets of the Government, based on the principle of separability laid down in **Solomon's** case raises a question as to whether the transfer was valid and effectual.

From the evidence on record the Government sold all its shares in TPCC to the Plaintiff through IPO by 2006, this implies that the Government ceased to have any share in the TPCC which in principle owned the suit land and houses erected thereon. The fact that the Government owned no interest in TPCC, by having no shares and the fact that the suit land became under TPCC, the Government could not have a valid and legal ground to transfer it to the 3<sup>rd</sup> Defendant.

I have no doubt with the transfer on itself, as it is, but what was transferred. Guided by the common law principle of "*Nemo dat quod non habet*" as the Court considered in Farah Mohamed v Fatuma Abdallah (1992) TLR 208, the principle applies here, for one to transfer any property must have a good title to pass to the other, otherwise, you transfer nothing. The Defendants had to establish the good title they had, superior to the opponent, before proving the issue of transfer in Exhibit D1. However, exhibit D2 lease agreement is not proof of ownership of land registered compared to the right of occupancy.

I have reached such a decision because as it was established in the genesis of this suit herein, that all assets including the suit properties were initially owned by the Plaintiff (TPCC) in which later on the company was

nationalized and became owned by the Government for 100% and later on transferred to the Plaintiff by the sale of all shares. It is thus my firm view that the purported transfer vide GN.NO.63 of 2008 was invalid for the Government had nothing to transfer to the 3<sup>rd</sup> Defendant as the purchaser the shares owned by the Government became the owners of the Company (TPCC), the owner of the assets including the suit land.

On the third issue, *who is the lawful owner of the suit property?* During the hearing of the case, the Plaintiff tendered a Certificate of Title to prove ownership of the suit landed property in Plots No.1, 4, and 7 located at Wazo Hill area at Dar es Salaam Region holding the Title Deed No. 42336. I have noted that the suit land is registered in the name of Tanzania Portland Cement Company Limited (Exh. P1). The Defendants do not dispute the fact that the owner of the suit land is the Plaintiff as per Title Deed No. 42336 (Exhibit D1), the land known as *TPCC Plot No. 1, 4, and 7 Wazo Hill Estate Kinondoni Municipality Wazo Hill Dar Es salaam*. Section 2 of the Land Act Cap 113 defines land to:-

*"... includes the surface of the earth and the earth below the surface and all substances other than minerals and petroleum forming part of or below the surface, things naturally growing on*



*the land, buildings and other structures permanently affixed to or under land and land covered by water."*

To be precise the Plaintiff has managed to establish his case on the ownership of the suit land, the suit houses being part of it. However, as far as the Sale of Shares and Shareholder's' Agreement is concerned specifically Clause 2 (iv) where parties' were required to fulfil what was stated under Clause 2 (iv) of the Sale of Shares and Shareholder's' Agreement on the use of the 16 assets.

In principle, parties are bound by the terms and conditions of their agreement as was propounded in the case of **Astepro Investment Co. Ltd v Jawinga Company Ltd**, Civil Appeal No.08 of 2015, **Bahari Oilfield Services PPZ Ltd v Peter Wilson**, Civil Appeal No. 157 of 2020 (both unreported), and in the case of **Unilever Tanzania Ltd v Benedict Mkasa t/a Bema Enterprises**, Civil Appeal No. 41 of 2009 (unreported), in which the Court of Appeal of Tanzania relied on the persuasive decision of the Supreme Court of Nigeria, in **Osun State Government v Daiami Nigeria Limited Sc 277/2002**, which held that:-

*"Strictly speaking, under our laws, once parties have freely agreed on their contractual Clauses, it would not be open for the courts to*

*change those Clauses which parties have agreed between themselves. It was up to the parties concerned to renegotiate and to freely rectify Clauses that parties find to be erroneous. It is not the role of the courts to redraft Clauses in agreements but to enforce those Clauses where parties are in dispute."*

Applying the above authority, the parties herein had the purpose of accommodating Clause 2 (iv) of the Sale of Shares and Shareholder's Agreement regarding the use of the excluded houses that need to be ascertained as it was intended.


I fully subscribe to the learned counsel for the Plaintiff on the maxim *'quicquid plantatur solo solo cedit'* (whatever is affixed to the soil belongs to the soil) that all the houses in dispute that are built in the piece of land that belongs to the Plaintiff, they are part of it. However, since there is an agreement of excluding the said houses, I tend to hold that the Government use of the said houses in the land of the Plaintiff is of the status of the licensee and not as the owners of the same. Pursuant to the SSSA.

As to the reliefs to which parties are entitled thereto, I can summarize by stating that the Plaintiffs are found to be the owners of the suit piece of land. The 3<sup>rd</sup> Defendants remain in use of the 16 assets as the licensee

of the registered owner of the suit land, pursuant to clause 2 (vi) of the Sale of Shares and Shareholder's Agreement. Each party to bear its own costs.


Order accordingly.

Dated at Dar es Salaam this date 29<sup>th</sup> November, 2021.



A.Z.MGEYEKWA  
**JUDGE**  
29.11.2021

Judgment delivered on 29<sup>th</sup> November, 2021 in the presence of the Ms. Tumaini Michael, learned counsel for the Plaintiff and Ms. Janeth Kimamo, learned counsel for the 3<sup>rd</sup> Defendant also holding brief for Mr. Daniel, Nyakiha, learned State Attorney for the 4<sup>th</sup> Defendant.



A.Z.MGEYEKWA  
**JUDGE**  
29.11.2021