

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE NO.82 OF 2019

DIANA MASHIKA..... PLAINTIFF

VERSUS

FELICIA N. MASHIKA.....1ST DEFENDANT

WILSON C. MASHIKA.....2ND DEFENDANT

ANDREW N. MASHIKA.....3RD DEFENDANT

JUDGMENT

Date of Last Order: 06.12.2021

Date of Ruling: 15.12.2021

OPIYO, J.

Before me is a case involving blood relatives and their mother (1st defendant) at the center of her three children. It is about the plaintiff and her two brothers as 2nd and 3rd defendants here in above. Their story runs from 1991. According to the plaintiff she entered into a business agreement with the 1st defendant that, she will repay a construction loan which the 1st defendant had difficulties in paying the same. Further it was agreed among other terms that, the plaintiff should develop the landed property which was and still under the ownership of the 1st defendant. In return and as consideration thereof, the 1st defendant will transfer the said property in the name of the plaintiff. To date, the said agreement was not honored by the 1st defendant. The reasons as stated by the plaintiff, the first defendant is under pressure

from the 2nd and 3rd defendants not to transfer the said house into the plaintiffs' name as agreed back then. Aggrieved by her mothers' actions, the plaintiff lodged the present case seeking a refund of USD 150,000, from the 1st, 2nd and 3rd defendants jointly. The money which the plaintiff invested into the disputed property.

All three defendants in their joint Written Statement of Defense denied all the allegations against them from the plaintiff. The 1st defendant on the other hand had admitted that the plaintiff is her first-born daughter who from time to time willfully supported her and the family financially at large. She insisted that she had no business whatsoever with the plaintiff regarding the disputed property. That she never entered in any agreement with the plaintiff of any nature intending to dispose the suit property to her. She maintained that she has a sole ownership of the suit house and under no terms she is obliged or willing to make a transfer of the same to the plaintiff.

When the case was called for hearing, Mr. Steven Mwakibolwa, learned counsel appeared for the plaintiff while the three defendants were represented by Advocate Mafuru Muyenjwa and Advocate Buta Kama

The agreed issues for determination in this case were;-

1. Whether the plaintiff and 1st defendant had an agreement over development of the disputed property?
2. Whether the plaintiff invested on disputed property based on agreement under (1) above.
3. Whether the 2nd and 3rd defendant have interest in the property.
4. Whether there is a breach of the said agreement.

5. To what reliefs are the parties entitled to.

To open the case for the plaintiff was PW1, Diana Naetwa Mashika who stated that, currently, she is living in Switzerland. That she knows the disputed property, it is at Botswana Street Kijitonyama, a 2-storey building with six rooms, registered in the name of Felicia Nanzia Mashika. She insisted that the investment on the said property was made by her. That, she had to put down the structure that was there and construct a new modern structure. She constructed the strong foundation and ground floor reinforcement to be able to carry the two other floors above it. She financed the 1st ground completely including finishing. That, the owner of the structure that was destroyed or removed was Felicia Mashika. That, as per the engineers' instructions, there was a requirement for reinforcement of foundation of the property given the swampy nature of the area. That, before it was modernized, it was just a three bedroomed house at a rudimentary stage, not self-contained, with mere grilled windows with no glasses and it had asbestos roof. It had no proper finishing, and the windows were covered with iron sheets.

That, when she came back from studies, she found the family was in efforts of improving the house as she was to bring her fiancé home. Therefore, she had to offer remittances to facilitate the finishing including fencing, improvement of windows and general improvements to make it presentable. Then she brought her fiancé in 1992.

She went on to say that the aim was to improve the house, but they had a discussion with her mother, and she advised PW1 to make some investment

in the area. By that time plaintiff had another plot at Bahari Beach on which she could invested on, but the title was to take time to be procured. She was then advised by her mother together with her brothers that, that area was potential for investment as they could make it as a hotel or hostel and that formed the basis of sending a lot money back home. It was a large investment as it involved putting down the former property. In return her mother agreed to transfer the title to her based on the investment. Based on her mother's promise she started investing so much in the area as she promised to transfer her right of occupancy to PW1 and then inform PW1's siblings.

That, her mother took her to advocate Mbuya and gave her a copy of transfer form with promise to save originals at Kijitonyama. Before she started expanding the house, she was in difficult of paying the house loan she took from THB. That, she had to give her money to clear the loan first. Her mother handed the receipt to PW1 to signify payment of the loan. Later her mother secured a license to use the suit property as hostel for tourists. PW1 advertised the business at Hostel worldwide website. The business started under her supervision. PW1 also tendered documents to prove that the property was intended to be transferred into her name and were admitted as exhibit P1. She then proceeded with developing the property by making the ground floor complete for rental purposes.

That, in 2004 they went commercial online, they got the license and managed to procure their first agreement with Hostel world. Then PW1 proceeded with extension of the structure upwards by constructing the first floor with the same square meters. She continued to submit that, she was

bringing a lot of money to her mother, sometimes through Doreen Mashika, her young sister and sometimes through her sister's husband and later when banks opened up PW1 opened an account at Barclays Bank. Then she started using Bank transfers directly to her mother. PW1 also deposited money several times through her brother Andrew's Account. That, she sent the funds for construction for the past 10 years. That is according to what the bank was able to avail to her. PW1 tendered the copies of her Bank statement from 2007 – 2017 and were admitted as exhibit P2 collectively.

She went on to say that the dispute arose when she requested her mother to make the transfer as she promised. Her testimony continued that at some point, she started having problems in her marriage, and the issue of division of matrimonial property came in. For that reason, they agreed to postpone transfer issue as her husband could have claimed interest therein. That was in 2013/2014 and in 2015 her mother wanted to hand the house to PW1 as she claimed to be tired and wanted to go live in the village as she was having serious diabetics. She asked her to refine the house at the village. PW1 gave her mother about 8,000 USD for the renovation. She even shifted there and told her to find someone to look for the property. But around 2018 the 1st defendant started getting sick and PW1 had to take her for treatment to Zurich. She stabilized a bit. She had to go to Zanzibar to live with Doreen in recovery process from acute episode of critical diabetics. She stayed in Zanzibar for 2 years while recovering. By that time PW's brother Wilson introduced a friend to PW1 to guard the house. At around 2017 PW1 was able to re- operate the house online without her mother's presence.

Later, when her mother got better, she requested to come back to Dar Es Salaam where she is used to. The problem was who was to take her care. All of the sudden PW1's brother Andrew went there took her to Dar es Salaam and together they started residing in the property again.

PW1 went on to state that, her investment is still in the hands of her mother. She has not done the transfer and she started saying that she will give the house to whoever she wants and probably to Wilson. That is when PW1 decided to come to court. She therefore prays for the court to give her compensation of investment she made into the suit property to the tune of 150,000 USD. She also claimed that the said compensation also covers the amount she used in taking care of her mother in the past. That, since her mother has changed her mind and does not want to give PW1 the suit house, she has no other option other than claiming for the said compensation. She promised that if property is given to her she will still allow their mother to stay there.

When cross-examined by Advocate Mafuru, PW1 insisted that, that she had to substantially improve the former house, plastering, putting tiles and window repairs. That, the investment started a year before transfer of occupancy was signed. That was in the year 1991. That, she completed university in 1991 and started working, since then she started remittances and the renovation. That, the genesis of this matter is the investment she did in her mother's property. That, in 1991 there was no consideration. That, when PW1 started renovations there was no agreement for investment. That, investment became formal when her mother took her and signed transfer deed which she considered as a deed of gift.

PW1 also admitted that as per exhibit P1 there are no terms and condition of her investment agreement with her mother as the same were not documented, rather they were made verbally around 1992. There were witnesses when her mother made the said promise which are PW1's siblings, including Ruth, Doreen, Andrew and Wilson. They were all informed of her mother's decision. PW1 insisted that, she was there when her mother informed her siblings of the decision to transfer the suit property into the name of PW1. That, her brothers supervised the renovations and investments, but she was the one paying for it.

She went on to testify that she did what she did for potentiality of investment in the area. It is her mother who gave her exhibit P1 after they came from Mbuya, advocate. PW1 stated however that, the exhibit is not transfer itself, but intention to transfer. On the basis of what she invested; she is interested in refund of her investment not anything else, not even property.

PW1 insisted further that, although the refund is claimed from the person she agreed with, that is the 1st defendant, her claim against the other defendants is because they caused damage to the house for using the place without paying rent. That, their actions caused loss to her as she had to block online business. Her testimony was well corroborated with that of PW2, Doreen Neemael Mashika and Magreth Lwoga (PW3) who was the original owner of the suit property before transferring the same to her sister (1st defendant) in 1979 and PW4, Ombeni Mhina. That was all from the plaintiff's case.

The defense case was opened with the testimony of DW1, Felica Mashika who stated shortly that, the case is about a house which she constructed for her own use with her own money. She has title documents in her name which she tendered and was admitted as exhibit D1, Certificate of occupancy No. 186248/48. She went to say that she did not invest jointly with anyone. That, the disputed property is hers and it does not concern anybody else. DW1 went on to say that what the plaintiff stated in her testimony is not true. She never gave her the property and she never intended giving anybody her property as she is not ready to transfer the said property to anybody. It is not and it had never been in her mind to give anybody this property it will remain hers forever.

When cross-examined by Advocate Mwakibolwa, DW1 insisted that she had never promised to transfer her property to her daughter. She never promised her anything. That, in the said property there is a house she constructed with the help of her male children. They constructed with understanding that they were making a house they would live in with her. She said that she was a nurse therefore she was being paid salary that made her live and obtain the property in question.

That marked the end of the defense case and the time for closing submissions arrived. But it is only the plaintiff who managed to file her final submissions through her learned Advocate, Stephen Ally Mwakibolwa.

In his brief submissions, Mr. Mwakibolwa maintained that it has been proved in this case that there was an agreement between the plaintiff and the 1st defendant as stated in the plaint that plaintiff would invest in the suit

property and in turn, she would be the owner of the said property. This fact was not disputed by the 1st defendant, meaning that the same was true. He argued that it has further been shown by the testimonies of PW3 and PW4 that, the agreement between the two parties mention above was well known to other persons who were close to them following the actions of the plaintiff over the suit property. Therefore, the said agreement qualifies to be within the rules of the oral contracts. He referred to the case of **Peter Temu versus John Lyali, High Court of Tanzania at Musoma, (unreported)**, by Kahyoza, J. where it was held that:-

"According to the testimony of PW1, PW2, DW1 and DW2 which produced before this court, this court found that there is no evidence which prove that the plaintiff and the defendant entered into a contract. But there is evidence which shows that, the plaintiff's son known as Matheo Temu entered into contract with the defendant John Lyari to buy timber. As they met and went to the scene, measured timber and took it all to the workshop of the defendant, payment was done between them. All business was done in absence of the plaintiff. In absence of a written contract this kind of participation proves that there was contract between the plaintiff and the defendant."

As for the failure of the 2nd and 3rd defendants to give their defense, it was submitted that, their actions amount to admission of the claims against them by the plaintiff hence the judgment should be entered against them.

Having gone through the evidence of parties as presented in their testimonies and their accompanied exhibits, lets now see if such evidence

has succeeded in answering the issues for determination affirmatively or otherwise.

The first and second will be disposed together. The first issue is whether the plaintiff and 1st defendant had an agreement over development of the disputed property. The second issue is whether the plaintiff invested on disputed property based on agreement under (1) above. It has not been disputed that the plaintiff made improvements or developed the suit property. Since the same was not hers, one can say, without the consent of her mother, the owner of the said property, such developments could have not been effected to the extent it was done. I agree that the plaintiff and the 1st defendant had an understanding or otherwise an agreement over development of the suit property, but did such understanding intended to create legal relations in future in relation to the suit property?

In its simplest form, intention to create legal relations in the law of contracts means that the parties must intend to enter into a legally binding arrangement in which the rights and obligations in the agreement are enforceable. It is well known in law that not all agreements are enforceable contracts, save for only those which pass the test of a binding contract as per section 10 of the Law of Contracts Act, Cap 345 R.E 2019 which provides 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."

It is well settled that, in discovering as to whether the parties intended to create legal relations in their agreement the court is advised not to ask them, as this would give the rascal an easy escape from liability. Rather the court will look on the objective of their agreement. The best way to discover if in their agreement the parties have intended to create legal relations, is to see whether a reasonable onlooker, after taking into account all the circumstances of the case, thinks that the parties intended to be bound, (see **Carlill versus Carbolic Smoke Ball Company, 1892 EWCA, Civ 1**, and also the case of **Blue v Ashley [2017] EWHC 1928**).

Further, in **Balfour versus Balfour, 1919, 2 KB, 571**, it was settled that, family agreements, like the one entered by the plaintiff and the 1st defendant here in above, are presumed not to give rise to legal relations unless there is clear evidence to the contrary. Persuaded by the principles laid in the above English cases, I am of the settled opinion that, the agreement between the plaintiff and the 1st defendant over the development of the suit property was a mere family arrangement, the same was never intended to bind any of the two in the future. Plaintiff relies on exhibit P1 allegedly signed between her and the 1st defendant (transfer of right of occupancy). This document was allegedly signed on unknown date in the year 1993. The fact that it was not dated itself lessens its seriousness, by affecting its validity. It was also not accompanied with other related documents to effect valid transfer, including land forms Nos 29, 30 and 33. It has been in shelves for almost 30 years without taking any meaningful turn of events. Such finding is also backed with the testimony that, the improvements had started even

before the said written promise to transfer the property was made. It was also not stated categorically as to what amount in exhibits P2 collectively was sent to the 1st defendant for the alleged investment and the amount for her general upkeep not related to the investment. It cannot be said with certainty that it was triggered with the promise. It is so because the plaintiff did not provide any concrete evidence to prove the existence of a binding contract between her and her mother showing that the consideration to what she was doing over the suit property is a transfer of the same from her mother into the plaintiff's name in the future. And above all, the 1st defendant as the main party to that alleged contract has completely denied its existence.

Furthermore, the alleged signing of transfer that was not completed as noted above in itself shows hesitation of the said transfer, if at all. There is no proof why the transfer could not be effected for more than thirty years, if at all the intention was there. It is provided under the Law of Evidence Act, Cap 6 R.E 2019 under section 110 (1) that whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

In her evidence, the plaintiff tendered a document on Transfer of Right of Occupancy (exhibit P1), executed before Advocate Evarist H. Mbuya, but the process of transfer was not completed. With such weak evidence, the evidence by the 1st defendant remains strong, that she never intended to transfer the said property to anyone, including the plaintiff. In the case of **Hemed Said versus Mohamed Mbilu, (1984), TLR 113**, it was held that the one with the most probable evidence is the one who wins. That being the case, what the plaintiff did on the development or improvement of the

suit property cannot be called investment solely associated with whatever agreement on transfer of the property to her she had with her mother. It is just a contribution to the wellbeing of her family as she is among the members of the said family. This is especially because the participation of the rest of plaintiff's siblings in the development of the property has not been excluded sufficient to erase their interest in the same. It is on record that all of the 1st defendant's children were involved in the improvement in one way or the other, believing it was property of their mother. This is proved by Exhibit P3 minutes of the family meeting held on 30th Day of December 2018. In that meeting the family sat to '*establish how distribution of contribution of investment on the development of Kijitonyama plot will be compensated between 5 siblings in the event of the passing of Mrs. Felicia Mashika*' as their first agenda. This means until 2018, the property was still thought and believed to be under the ownership of Mrs. Felicia Mashika, with contribution of all five siblings recognized.

Therefore, what can be concluded from above finding is that although there was some sort of understanding between the plaintiff and 1st defendant for the improvement of property, but the same was not proved to be based on the promise to transfer the same to her. That is, whatever the understanding, it did not constitute enforceable contract.

As to whether the 2nd and 3rd defendant have interest in the property. Being the biological children of the 1st defendant same as the plaintiff, the answer is obvious, they have interest in the property. They are legal heirs to the estate of their mother with equal status as the plaintiff. However, in subsistence of their mother, the owner of property, they do not have any interest to be sued for in the disputed property. And as the plaintiff did not

show, how they influenced their mother in refusing to keep the alleged promise plaintiff does not have noany valid claim against them in this case. This makes the argument by Mwakibolwa that failure of the 2nd and 3rd defendants to give their defense amounted to admission of the claims against them by the plaintiff a misconception. Instead, in my considered view, they failed to find interest worth defending, leading to choosing silence weapon.

The 4th and 5th issues will be consolidated and discussed together. That, whether there is a breach of the said agreement and to what reliefs are the parties entitled to. Based on the findings of the 1st issue above, I see nothing was breached in the agreement between the plaintiff and the 1st defendant. There was no agreement to be breached. That is to say, the first defendant did not breach any agreement to the detriment of the plaintiff.

As to the reliefs that the parties are entitled to. In her testimony, the plaintiff insisted that what she wants now is a compensation of the monies she provided to her mother when developing the suit property to its current state. As I have said earlier, this was a daughter helping her family, a big sister helping her siblings to have a dignified life, she was supposed to expect nothing in return, unless proved to the contrary. She has failed to prove the contrary. Hence failed to prove her claim.

For the reason, the suit is dismissed with no order as to costs.





M.P. OPIYO,
JUDGE

15/12/2021