

**IN THE HIGH COURT OF TANZANIA  
(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO. 24 OF 2021**

**DR JULIUS MASSAGA.....PLAINTIFF**

**VERSUS**

**VIGUTA LTD.....1<sup>st</sup> DEFENDANT**

**CHRISTIAN RWEBANGIRA.....2<sup>nd</sup> DEFENDANT**

**SALMIN IBRAHIM DAUDA.....3<sup>rd</sup> DEFENDANT**

**JUDGMENT**

*13/09/21 & 13/12/2021*

**Masoud, J.**

The plaintiff wanted to build a residential family house which he had in his mind. He engaged the first defendant who presented themselves as specializing in building low-cost houses. He knew the defendants after coming across their advertisements that they build such houses for members of parliament. A copy of brochure of the defendants advertising the said services was admitted in evidence as Exhibit P.1.

It was the plaintiff's pleading that he eventually signed a contract with the first defendant, some time in December 2017. During the ex-parte

hearing, the contract was tendered by the plaintiff who testified as PW.1, and was admitted as Exhibit P.2. It was alleged that the agreement was for construction of a one-storey building at a cost of Tshs 189,047,084/-. The plaintiff was to make a deposit of 50% of the construction sum for the said defendant to start the construction, which deposit is equivalent to Tshs 94,523,542/-. The deposit was to be followed by a total of 72 equal monthly instalments of Tshs 1,627,905.00 which were also to be deposited to the first defendant.

It was also stated that the contract required the plaintiff to handover his title deed (Title No. 79670 for Plot No. 2011, Block F, Kinyerezi, Dar es Salaam.) to the first defendant as a security. According to the averment in the plaint, the security was meant for the entire construction period upto the payment by the plaintiff of all the monthly instalments after the construction. A copy of the title deed was tendered by PW.1 in evidence and was accordingly admitted as Exhibit P.3.

It was further pleaded that in compliance with the contract, the plaintiff deposited a total of Tshs 99,330,000/- to the first defendant. It was stated by the plaintiff in the plaint that such deposit was far beyond the agreed initial deposit of 50% of the contract sum. During his testimony,

the plaintiff tendered a bundle of documents evidencing payment of the deposits to the tune of a total sum of Tshs 99,330,000/-, which was admitted as Exhibit P.4 collectively. And he stated that he also handed over the title deed to the first defendant as per the terms of the contract.

Despite the commencement of the construction on 23/12/2017, the first defendant failed to honour the terms of the contract requiring her to adhere to the plaintiff's requirements and aspirations reflected in the Bill of Quantities agreed upon which was also tendered by PW.1 during the hearing and admitted as Exhibit P.5. It was in particular complained that the first defendant used substandard and/or cheap materials which did not conform to the agreement.

Moreover, the plaintiff engaged an architect who raised concerns to be addressed by the defendant. The architect report was tendered by PW.1 and admitted in evidence as Exhibit P.6. In his evidence, the plaintiff had it that he thereafter wrote a letter accompanied with Exhibit P.6 to the defendants and further elaborated on the faults.

To the plaintiff dismay, the first defendant stopped the construction of the building sometime in August 2018. Despite follow ups, the first defendant did not resume the construction. PW.1 testified in relation to the follow ups and copies of correspondences were collectively admitted in evidence as Exhibit P.7. Subsequently, the plaintiff engaged an expert surveyor to evaluate the construction made as against the money paid thus far. A report in that respect was tendered and admitted in evidence as Exhibit P.8.

The plaintiff also averred as to how he met the second defendant who told him that the first defendant had since changed and is working as Vyaviguta and promised in vain to finish up the construction.

In view of the above allegation and the evidence adduced, the plaintiff claimed for a declaration that the first defendant breached the contract; an order for official handover of the site; handover of the title deed to the plaintiff by the first defendant; payment of Tshs 119,051,357/- to the plaintiff as per the valuation report; payment to the plaintiff of Tshs 3,000,000/- which the plaintiff has been paying his landlord from December 2018 to date due to breach of the contractual terms by the

defendants; general damages Tshs Tshs 50,000,000/-; costs and any other reliefs as is deemed fit.

As earlier shown, this suit proceeded ex-parte against the defendants who could not be served personally. They were thus summoned by substituted service through publication in Mwananchi Newspaper of 25/06/2021. They nonetheless failed to appear and the matter was ordered to proceed for ex-parte hearing.

Before hearing, three issues were formulated for determination. Firstly, whether there was a contract between the plaintiff and the defendants for the construction of the house for the plaintiff. Secondly, if the first issue is answered in the affirmative, whether the parties adhered to the terms of the contract. Thirdly, whether the plaintiff suffered loss as a result of breach of the said contract. And fourthly, to what reliefs are the parties entitled.

I am at the outset minded that the plaintiff gave evidence ex parte because the defendants, though duly served by substituted service, did not appear in court to defend the action by filing a written statement of defence, and also attending hearing to defend the suit. Thus, all the

averments put forth by the plaintiff in this court as a matter of general rule remained uncontroverted. I was in this respect, guided by the approach taken by the Court of Appeal in the case of **Mathias Erasto Manga v M/S Simon Group (T) Limited**, Civil Appeal No. 43 of 2013 (Arusha) (unreported). It does not however mean that the plaintiff is exonerated from the obligation of proving her case on the balance of probability, a standard required in civil litigations.

I am of the opinion that an answer to the first issue on the existence of the contract of construction of the one-storey residential building between the plaintiff and the defendants is the key to the case. The plaintiff pleaded about the existence of the contract in paragraph 6, 8 and 9 of his plaint.

He pleaded in the said paragraphs that the contract for construction of one-storey building at the cost of Tshs 189,047,047,084/- was entered between the parties herein sometime in December 2017 and the construction was to last for 12 months as from the day of signing the contract. He also pleaded about the terms of the contract with particular reference to the contractual sum involved, the 50% of the contract sum which is Tshs 94,523,542/- and which was payable as a deposit, and the

72 equal monthly instalments of Tshs 1,627.905 payable to the first defendant. The other term pleaded was on the handing over of the plaintiff's title deed to the first defendant as a security.

As the plaintiff was testifying as PW.1 about how the contract was concluded by the parties and its terms, he tendered in evidence the contract which was admitted as Exhibit P.2. The exhibit reflected the pleaded terms and the copy of the contract which was annexed in the plaint between the plaintiff and the first defendant. All I am required to do is to find, on a balance of probabilities, and on the basis of the evidence before me, whether or not there was a contract for the construction of the house or not. In other words, whether the evidence available on the record tilts the balance one way or the other.

I am of the opinion that, since the pleading and evidence of the plaintiff about the existence of the contract were both uncontroverted, demanding further proof other than the contract admitted in evidence as Exhibit P.2 would amount to going beyond the balance of probabilities yardstick. I am satisfied that, based on the evidence before the court, I should find for the plaintiff in respect of the first issue. I thus hold that

there was a contract between the plaintiff and the defendants for the construction of the plaintiff's house.

The second issue is about compliance with the contract for construction of one-storey building for the plaintiff. In his pleading, the plaintiff shown how the defendants breached the contract. He stated that the construction was undertaken using substandard materials contrary to the requirements. The progress of construction was not as per the contract whilst the plaintiff paid a total deposit of Tshs 99,330,000/- over and above the 50% of the contract sum agreed upon.

With respect to the foregoing, there was testimony of the plaintiff which saw several exhibits admitted in support of the above pleadings. There was Exhibit P.4 evidencing the total deposit made thus far, Exhibit P.5 evidencing the bill of quantity agreed and which according to the plaintiff was not complied with, Exhibit P.6 evidencing the poor quality of work and the progress made thus far, Exhibit P.7 evidencing correspondences made reflecting the follow ups made, and complaints raised, and Exhibit P.8 evidencing value of the construction so far made as it related to the payments made by the plaintiff.



On my part, I made sense of the pleadings and the evidence whilst closely scrutinizing the total deposit amount paid to the first defendant, and the payment schedules stipulated in the agreement (Exhibit P.2). While the plaintiff stated that he paid a total of Tshs 99,330,000/- over and above the 50% of the contract sum agreed upon, it is to be noted that the deposit which was to be paid as the 50% of the contract sum was as per the contract Tshs 94,523,542/-. Hence, a balance of Tshs 4,806,458/-.

My understanding of the contract is that the 50% deposit was to be paid upfront before the signing of contract for the construction. The deposit was to be followed by 72 equal monthly installments of Tshs 1,627,905/. The contract also had terms and conditions as to payment of interests in the event of delay in paying the instalments, as well as payments of VAT. I am in this respect mindful of clause 4(iv)&(v) of the contract.

I am clear that the plaintiff was silent in his pleading and his evidence as to how he paid the monthly instalments aside from the 50% deposit. If one were to deduct the 50% deposit from the total amount the plaintiff claimed to have deposited, one will find as follows: Having paid the 50% deposit which was less than the agreed amount and which was not paid

as per the terms of the contract, the plaintiff made about two further deposits only as evidenced in the Exhibit P.4.

My further scrutiny of the Exhibit P.4 evidencing the payment left me in no doubt that the deposits made were not made pursuant to the terms of the contract. The contract was signed on 22/12/2017 and the plaintiff was to pay 50% deposit before the signing of the contract. Contrary to the terms of the contract (Exhibit P.2), the Exhibit P.4 showed that the plaintiff paid the first payment of Tshs 50,000,000/- (not Tshs 94,523,542/-) to the first defendant on 22/12/2017. The second payment was of Tshs 26,000,000/- paid on 09/02/2018 to the first defendant. The third payment of Tshs 4,330,000/- was made to the first defendant on 23/6/2018. The fourth and last payment of Tshs 19,000,000/- was made to the first defendant on 28/8/2018.

There is in Exhibit P.4 letters from the first defendant complaining about the failure of the plaintiff to effect payments as required under the contract. These are letters Referenced Ref No. VIGUTA/UJEN/2019/02 of 9/01/2019 and Referenced Ref No. VIGUTA/UJEN/2019/02 of 30/01/2019 both addressed to the plaintiff which were both acknowledged by the plaintiff.

The letters were apparent that the delay in the completion of the project due to several factors including the failure by the plaintiff to effect payments as per the contracts and hence existence of payment arrears which were still yet to be settled as of January 2019. There are also letters from the plaintiff in Exhibit P.4 which acknowledged existence of the payment arrears and in which the plaintiff undertook to pay after seeing serious commitment from the first defendant. On the part of the first defendant, she was looking forward towards having a renewed contract signed, outstanding arrears paid, and the project finalised.

Again, all I am required to do is to find, on a balance of probabilities, and on the basis of the evidence before me, whether or not the parties adhered to the terms of the contract. In other words, whether the evidence available on the record tilts the balance one way or the other.

There is no satisfactory evidential account from the plaintiff as to how he complied with the contract in terms of adhering to the payment schedules as is evidenced by Exhibit P.4. However, at stake is the complaint by the plaintiff that the first defendant breached the contract. The complaint is predicated on the allegations of using cheap and

substandard materials contrary to the agreed contract and bill of quantities.

The allegation is supported by the testimony of PW.1 which was based on the opinion of independent architect engaged by the plaintiff (Exhibit P.6). The said architect was not called to testify in respect of his opinion. The court was not shown by PW.1 a clause in Exhibit P.2 which provides materials to be used which was violated. The bill of quantities (Exhibit P.) was not shown as to how it was violated. There was as a result nothing on the record to support the allegation of using substandard/or cheap materials. In his testimony, PW.1 did not list substandard and/or cheap materials that were used against the proper and quality materials that were to be used. There was also no evidential link given by PW.1 between the payments made by the plaintiff and the materials used.

With regard to the foregoing as they relate to the second issue, I am of the opinion that the evidence available on the record tilts the balance against the plaintiff. There was further evidence that was needed which is missing to answer the issue in the affirmative and thus in the favour of the plaintiff. The pleading and evidence of the plaintiff on the record in respect of the issue is insufficient for reasons shown above. In my

judgment, this finding does not amount to going beyond the balance of probabilities yardstick.


As a result of the finding on the second issue which was on breach of the contract, there is no basis for this court to resolve the third issue as is the fourth issue in the favour of the plaintiff. Consequently, I need not labour much on the last two issues as what has already been found suffices to answer the issues in the negative as they relate to the plaintiff.

In view of the foregoing and given the manner in which the issues were herein above answered, I would find that the suit is not meritorious.

In the end, the suit is for reasons stated herein above dismissed. In the circumstances, I will not make any order with costs.

It is so ordered.

Dated and Delivered at Dar es Salaam this 13<sup>th</sup> day of December 2021.

  
**B. S. Masoud**  
**Judge**

