

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO. 96 OF 2019**

STANLEY KUSENHA.....PLAINTIFF

VERSUS

ICON PHARMACEUTICALS LTD.....DEFENDANT

Date of Last Order: 20/9/2021

Date of Judgment: 30/9/2021

EX-PARTE JUDGMENT

MKAPA, J

On 25th May 2009 the plaintiff and the defendant entered into an investment agreement in which parties had agreed to invest in modern abattoir (slaughterhouse) situated at plot Nos.1404 1445, 1441 &1446 Block A, Ukonga area Ilala District, Dar-Es-Salaam Region. (the suit property). Under the terms of the agreement parties had agreed the plaintiff to acquire 70% of the shares in the said investment while the defendant acquired the remaining 30%. Later a certificate of title No. 96922 was issued to that effect. The plaintiff claimed that at the beginning the business took off well as agreed but later the defendant failed to honour his obligations under the agreement. That, repeated efforts by the plaintiff to trace the defendant proved futile. As a result of which the business became ineffectual. The plaintiff preferred this suit claiming for the following reliefs;



- i. An order to declare the defendant as trespasser in the suit property.
- ii. An order to compel the defendant to hand over ownership documents in respect of the suit premises to the plaintiff.
- iii. An order to restrain permanently the defendant from interfering the plaintiff's lawful possession of the suit property.
- iv. An order for payment of damages for injury and inconvenience caused to the plaintiff assessed by the Court.
- v. An order for defendant to pay costs of this suit.
- vi. Any other relief(s) that this Honourable Court may deem fit and just to grant.

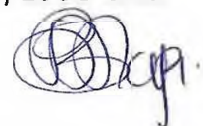
The defendant was served, but failed to file a written statement of defence. This was followed by an order for ex parte hearing. At the hearing Mr. Bitaho Marco, learned counsel, appeared for and represented the plaintiff. The issues were framed that; whether there was contractual agreement between the plaintiff and the defendant; whether the defendant did not honour his obligations under the agreement; who is the lawful owner of the suit property; whether the plaintiff suffered damages thus entitled to payment; and what are the relief(s) entitled to parties.

The plaintiff (plaintiff's daughter through Special Power of Attorney) appeared as PW1 and testify the fact that the plaintiff's claim against the defendant is over a parcel of land situated at Ukonga Mazizini Gongo La Mboto Area, Ilala Municipality, Dar es Salaam area valued at Tshs. 454,000,000/= (Say Four Hundred Fifty Four Million). To support her claim she tendered the valuation report in respect of a suit property No.



Plot 2092 Block E, and the same was admitted as Exhibit P1. It was her further testimony that on 25th May, 2009, the defendant and the plaintiff entered into an investment agreement in which they jointly agreed to invest in livestock modern Abattoir (slaughterhouse). That, as per the terms of the said agreement the plaintiff acquire 70% of the investment shares while the Defendant acquired the remaining 30%. She stated that the said portfolio investment included among others land ownership of the suit property and construction costs. However, todate the defendant is yet to fulfil his obligations under the agreement and has since been on the run with various original documents relating to the suit property including the investment agreement and certificate of occupancy. The agreement titled "*Mkataba wa Uwekezaji wa Machinjio ya Ukonga Kati ya Icon Pharmaceuticals Ltd na Bwana Stanley Kusenha*", was admitted as Exhibit P2.

It was PW1's further testimony that, the suit property had a Certificate of Title No. 96922 situated at Gongo La Mboto Area Block E, Plot No. 2092, Exhibited and numbered P3. She stated further that, after the signing of the agreement, the plaintiff fulfilled his obligations while the defendant is on the run with the original documents of the suit property. She testified further that, in the course of fulfilling his obligations under the agreement the plaintiff incurred some expenses including costs relating to the processing of the title deed of the suit property and payment of land rent. That, although she was unable to specify the exact amount spent, she tendered exchequer receipts No. 362282 issued to the plaintiff amounting Tshs. 7,170/= dated 11/10/1993 and



exchequer receipt No. 44935 respectively, issued to the plaintiff amounting Tshs. 54,570/= dated 11/10/1993 (Exhibit P4.)

PW1 prayed for this Court to declare the defendant a trespasser to the suit property; order the defendant to surrender all ownership documents in his possession in respect of the suit property; and an order for the defendant to pay damages for injuries and inconvenience suffered by the plaintiff. At the closure of evidence the plaintiff opted not to make any closing remarks.

Having analysed the evidence obtained from the witness and exhibits tendered, in resolving the first issue as to the existence of an investment agreement, it is undisputed the fact that an agreement was entered between the plaintiff and the defendant on 25th May 2009 as there was no evidence to the contrary as the same was made ex-parte.

A thorough analysis of Exhibit P2 has brought to my attention the fact that, although the same was tendered and admitted in evidence, the agreement was not stamped with stamp duty as required by the Stamp Duty Act Cap 189 [R.E 2019]. The relevant section is reproduced hereunder;

"47 ;-(1) No instrument chargeable with stamp duty shall be admitted in evidence for the purpose by any person having by law or consent of parties' authority to receive the evidence or shall be acted upon, registered in evidence authenticated by any such person or by any public officer, unless such instrument is duly stamped."



A reading from the above section, failure to comply with the requirement of section 47, renders the agreement inadmissible.

This legal position was fortified by the decision in **Zanzibar Telecom Ltd Vs. Petrofuel Tanzania Ltd (Civil Appeal No. 69 of 2014) [2019] TZCA** in which the Court of Appeal observed;

".....that section instructs that no instrument chargeable with duty s hall be admitted in evidence unless such instrument is duly stamped, except under conditions stipulated in clauses (a) to (e) thereof....."

Subjecting the above legal authorities to the instant matter there can be no doubt that an investment agreement (Exhibit P2) is an instrument chargeable with stamp duty since the same evidences the right to shares.

Section 25 and 26 of the Stamp Duty Act respectively, provides that, all chargeable instruments executed by any person in Tanzania mainland shall be stamped within 30 days of execution. The fact that Exhibit P2 was not stamped this court ought to have rejected it before its admission. However, since the same was admitted I proceed to disregard it for lack of stamp duty.

Having disregarded Exhibit P2 this brings me to the second issue as to whether the defendant did not honour his obligations under the terms of the agreement which has now been disregarded by the court. The answer is in the negative for lack of proof by the plaintiff as the terms of the defendants' obligations were incorporated in the agreement which this court has disregarded.



As regards to the issue of ownership of the suit property the plaintiff has relied on Exhibit P3 which is a certified copy of a certificate of title No. 96922 with joint ownership of Stanley Ara Kusenha (plaintiff 70% shares) and Icon Pharmaceutical Company Limited (the defendant 30% shares). A close examination of Exhibit P3 revealed that the said copy of certificate of title was certified as true copy of original by M/S Ashery K. Stanley advocate, Notary Public and Commission for Oath on **17/06/2021**. Meanwhile under paragraph 10 of the plaint filed by the plaintiff on 18/07/2019 the plaintiff stated that*"the defendant had disappeared with the original certificate of occupancy"* . As it is trite principle that a copy of a primary document has to be certified against the original the question to be asked is how could exhibit P3 be certified as true copy of the original on 17/6/2021 while the defendant had since disappeared with the original document in 2019. Although Exhibit P3 was admitted, I now proceed to disregard the same. Additionally, since the plaintiff had pleaded in his plaint the fact that the defendant had disappeared with the original certificate of occupancy, he is bound by his own pleadings to the effect that. Thus, it can safely be assumed that the same is lost. However, the plaintiff failed to prove any efforts made in tracing a lost property such as production of a police loss report.

Hence, this court cannot act on a purported certified copy of the certificate of occupancy whose original has been lost, to declare either party a lawful owner or otherwise prior to the plaintiff exhausting the available local remedies in recovering a lost property. Therefore, the plaintiff is urged to exhaust local remedies in dealing with a loss property. As to whether the plaintiff has suffered damage, the law is well settled that in civil case the burden of proof lies on the plaintiff and



the standard of proof is on the balance of probabilities. This simply means that the one who alleges must prove. This is the position as per **Section 110 (1), (2) and section 112 of the Evidence Act, Cap. 6 R.E 2002** which reads;

"110(1) whoever desires any court to give judgment As to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. 112. The burden of proof as to any particular act lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person."

In **Anthony M. Masanga versus Penina (Mama Mgesi) & Lucia (Mama Anna), Civil Appeal No. 118 of 2014 (Unreported)** the Court observed that:-

"....let's begin by re-emphasizing the ever cherished principle of law that generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour."

In the instant matter the material evidence relied upon by the plaintiff to prove his case is the investment agreement (Exhibit P2) from which all the prayers stem, while the same has been disregarded by this court. Elaborating on the concept of compensation for damages in the case of **STANBIC BANK TANZANIA LIMITED Vs ABERCROMBIE & KENT**



(T) LIMITED CIVIL APPEAL NO. 21 OF 2001, the Court of Appeal observed;

"Damages are a 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 for which he is now getting compensation or reparation."

As I mentioned earlier, the plaintiff prayed for damages with a view to place himself in the same financial position had the investment agreement being effectual. However, it is the very agreement which this court disregarded for want of compliance with section 47 (1) of the Stamp Duty Act Cap 189 [R.E 2019], It follows therefore the plaintiff is not entitled to any relief (s) which also stems from the terms of the investment agreement which has been disregarded by this court.

For the reasons I have stated, I am satisfied that, the plaintiff has failed to prove the case to the required standard. I therefore dismiss the suit. Since the same has not been contested, I make no order as to costs.

Dated and delivered at Dar-es-Salaam this **30th** day of **September, 2021.**




S. B. MKAPA
JUDGE
30/9/2021