IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 247 OF 2021

(Appeal arising from the Judgment and Decree of the District Land and Housing Tribunal for Ilala at Mwalimu House, in Application No. 398 of 2018, Hon. A.R. Kirumbi- Chairperson dated 27th September, 2021.)

RAYMOND TENGA @ RAYMOND LUDOVICK TENGA ..... APPELLANT

VERSUS

1.ISSA HEMED NGOMANO @ ISSA NGOMANO
2. ROSE YUDA MENEY
3. LAWI ODELO OSWAGO
4. FATUMA R. MASENEKA
5. ALLY SOMEA
6. ATHUMANI MOHAMED
7. AZIZA NASORO
8. PANDAEL PETER MSAFIRI — **RESPONDENTS**
9. JOHN STEVEN TUPA
10. ZABIBU HASSAN
11. FARID HUSSEIN SALUM
12. HAMIS ALLY MKANA
13. HASSANI SHAMTE ISSAMAIRI@HASSANI SHAMTE ISMAIL

JUDGMENT

05/09/2022 & 21/09/2022

A. MSAFIRI, J.

The appellants being aggrieved by the decision of the District Land and Housing Tribunal of Ilala (herein trial Tribunal), in Application No. 398 of 2018 has lodged this appeal on ten grounds of appeal which I need not reproduce them herein.

During the appeal proceedings, it was only the 1st respondent who appeared in Court out of 13 respondents in the appeal. The summons to serve the 2nd – 13th respondents were issued by the Order of the Court, however the summons were returned, stamped with official stamp of the Street Local Government Office of Kidugala Street, Chanika Ward, Ilala District stating that the said respondents' where about is unknown.

Basing on that, the Court issued an order for substituted service in a local newspaper, which also proved futile as the 2nd – 13th respondents failed to appear in Court. In the circumstances, the Court ordered an ex-parte hearing against the 2nd – 13th respondents.

On the 1st respondent, he attended the Court in person and on 01/8/2022, he prayed to proceed with the hearing by written submission. The Court granted the prayer and set a schedule thereof whereby the

appellant's submission in chief was drawn and filed by Mr. Hardson Mchau, advocate for the appellant.

The 1st respondent was supposed to file his reply to the submission in chief by 19/8/2022. The matter was set for mention on 05/9/2022. However, by that date i.e. 05/9/2022, the 1st respondent had not filed his written submission nor did he enter appearance in Court.

In the circumstances, the Court was of the view that the 1st respondent, for the reasons known to himself, has failed to comply with the court's order and hence failed to defend his case. The Court proceeded to determine the appeal basing on the available submission presented to Court.

In his submission in chief to support the appeal, the advocate for the appellant abandoned the nine (9) grounds of appeal and chose to argue the appeal basing on one ground of appeal only which was the 8th ground which read as this;

8. The Honourable Chairperson erred in law and facts for failure to evaluate appellant's testimony and exhibits hence reach to unjust decision.

Mr. Mchau, submitted that, the trial Chairperson failed to evaluate any of the evidences and exhibits from the appellant and this is clearly seen at

page 10 of the impugned, typed judgment. He said that, during the trial, the appellant presented oral evidence and tendered exhibits P1, P3 and P4 in support of his claims against the 1st respondent, and in support of his prayers for regaining possession of the disputed land under sections 73 and 74 of the Land Act, Cap 113 R.E 2019.

Mr. Mchau submitted further that, it is trite law that, failure to evaluate/consider the evidence of both parties in writing the judgment is fatal, but the first appellate Court, has the jurisdiction to re-evaluate the entire evidence of the trial Court/Tribunal and arrive to its own decision.

To cement his point, he cited the case of **Anord Adam vs. the Republic,** Criminal Appeal No. 171 of 2019, HC at Mbeya (unreported), and the Court of Appeal case of **Fred John vs. the Republic**, Criminal Appeal No. 17 of 2018, CAT at DSM.

Basing on that, Mr. Mchau prayed for this Court being the first appellate court, to re-evaluate the evidence and exhibits from the appellant and allow this appeal with costs.

Having been invited to re-evaluate the available evidence as the 1st appellate court, I went on to accomplish this by going through the whole records from the trial Tribunal.

According to the application filed by the appellant before the trial Tribunal, on 5th April 2018, the appellant (then applicant), entered into a sale agreement with the 1st respondent in consideration of TZS. 90,000,000/= where the appellant agreed to sell a piece of land sized three (3) acres to the 1st respondent. The piece of land (suit property), is located at Kidugalo, Chanika Ward, within Ilala District.

On the first sale agreement, the 1st respondent made an initial payment of TZS. 2,000,000/= and put as security his car Toyota Ractis with Registration No. T. 843 DLN. It was agreed that, the purchase price which is outstanding shall be paid in instalments, and that, the respondent was to pay TZS. 20,000,000/= on 7th April 2022. It is said that, later, the applicant and 1st respondent entered into addendum to the first sale agreement by which, they agreed that, the purchase price will now be TZS. 73,000,000/= only and on failure of the 1st respondent to pay the said amount, then the 1st main contract will come into effect on both terms and conditions.

Following that, the said parties agreed that, the suit property will be partitioned into 54 plots of which each plot will be sold at consideration of TZS. 1,352,000/=. It is the claim of the appellant that, the 1st respondent managed to sell 42 plots out of 54 plots to different purchasers (who are the 2nd -13th respondents), which made a total of TZS. 56,784,000/=.

That, the 1st respondent managed to pay the applicant TZS.31, 705,000/= only out of TZS. 56, 784,000 for the 42 plots which were already sold by the 1st respondent.

Testifying as PW1, the appellant stated that, the 1st respondent has breached the contract, and that on 15th October 2018, he issued the 1st respondent with a statutory notice of rescission of their contract and notice of regaining possession of the suit property.

He tendered the sale agreement which was admitted as Exhibit P1, he tendered the respondent's motor vehicle's card which was put as security. It was admitted as exhibit P2. He also tendered the 1st addendum to the contract as exhibit P3, and 2nd addendum to the contract as exhibit P4. PW1 stated that, the outstanding balance at that time was TZS. 41,000,000/= out

of which he asked the 1st respondent to pay TZS. 25,000,000/= out of that and hand back to him the remained plots which were 12 plots.

He said that, the 1st respondent returned back to him (the appellant), 12 plots but did not pay TZS.25, 000,000/=. In cross examination, PW1 admitted to receive TZS. 10,460,000/= as part of TZS. 73,000,000/=

The 1st respondent testifying as DW1, admitted that he entered a sale agreement with the applicant. He essentially agreed to the whole transactions between him and the applicant. He also admitted to have sold the pieces of land on the disputed property and collected TZS. 31,500,000/= which he gave the applicant, and that the remaining amount is TZS 8,000,000/= only.

The 1st respondent stated further that, he could not complete the sale of other pieces of land because the applicant himself started to sell the pieces of land without the knowledge of the 1st respondent. He claimed that the applicant sold one piece of land at TZS. 24,000,000/= and another at TZS. 2,000,000/=. However, he did not produce any documentary evidence or any other witness to support his claims. He argued that it was the applicant who breached the contract by selling the plots without involving him.

Having gone through the evidence adduced during the trial, I will base my determination on the two issues which were raised before the commencement of trial which are; **first**; whether the 1st respondent breached the sale agreement. **Second**; whether the applicant has a right to regain possession (of the land in dispute). And **third**; to what reliefs are parties entitled to.

Starting with the first issue, on whether the 1st respondent breached the sale agreements, there are a total of three sale agreements which were purported entered by the applicant and the 1st respondent and were all tendered in Court and admitted as Exhibits P1, P3 and P4 respectively.

The first agreement exhibit P1 was entered on 05/4/2018. It was agreed that the 1st respondent will pay TZS. 2,000,000/= on 05/4/2018, which both parties agreed that he did. The 1st respondent was to pay TZS 20 million on 07/4/2018. The applicant stated that the 1st defendant did not pay the sum.

According to the evidence, parties agreed to enter another agreement which is Exhibit P3. The same recognize that there was a former agreement which is Exhibit P1. In Exhibit P3, it was agreed among other things that

the land in dispute is on partnership between the vendor and the purchaser, and that the land in dispute will be sold at supervision of the vendor. This agreement was not dated.

Again, the parties entered another agreement. It was termed as an amendment to the sale agreement of 05/4/2018. It was signed on 02/6/2018. It stated that the purchase price is TZS 73,000,000/= and that the buyer has already paid TZS 10,460,000/= so the remaining balance should be paid by 20/6/2018. It was agreed that on failure, the former agreement will take effect.

It is on evidence that the outstanding balance was TZS 41,000,000/= which as per Exhibit P4, was supposed to be paid by 20/6/2018. The 1st respondent failed to pay the said balance by the agreed date. However, instead of pronouncing that the 1st defendant has breached the contract and then demand for the parties to effect the terms of the 1st contract, the appellant agreed to receive TZS. 31,705,000/=.

The appellant went even further to hold a meeting with 1st respondent where he demanded the latter to pay him TZS. 25,000,000/= and hand him

back the remaining plots which were 12 plots, upon which the 1st respondent returned to the appellant 12 plots but failed to pay back TZS 25 million.

In the circumstances, it was the appellant who initiated the breach of terms of contract between the two parties because in the sale agreements exhibits P1, P3 and P4, there was no any terms that, on failure of paying the outstanding balance, the 1st respondent shall have to pay TZS 25 million and 12 plots. The terms of the sale agreements were clear. Hence, it is my finding that the appellant cannot claim breach of contract by the 1st respondent. He (the appellant) was the one who, orally, changed the terms of the contract, and this fact has been admitted by him.

Hence, to this Court's opinion, even if there could be a breach of contract as claimed by the appellant, it was initiated by his act of agreeing to receive TZS 31,705,000/= and 12 plots. The appellant being a part to the agreement and bound by the terms, he should have effected the same by demanding the 1st respondent to effect the terms of contract and upon failure, he could then sue to rescind the said contract.

However, having initiated another agreement on which he first received TZS 31,705,000= and then received 12 plots on the disputed land,

the appellant is estopped from claim of retaking possession of the disputed land which is already sold.

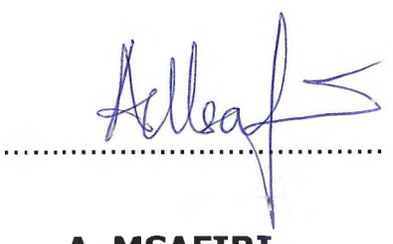
It is in the evidence that, the appellant first received TZS 2,000,000/= then received TZS 10,460,000/= as part of TZS 73,000,000/= later he received TZS 31,000,000/= and 12 plots. All these shows that the appellant was satisfied with the arrangement.

For the above reasons I find that there was no breach of contract by the 1st defendant but the parties agreed on the terms of payment. The first issue is answered in negative.

The second issue on whether the applicant has a right to regain possession (of the land in dispute), is also answered in negative. As observed earlier, the appellant's act of initiating a meeting with the 1st respondent to re-discuss the terms where he invited the 1st respondent to pay him TZS 25 Million and return back 12 plots, by which the appellant agreed to receive 12 plots, was done on his own peril. He is now estopped from claiming breach of contract and regaining the possession of land in dispute.

On the third issue on reliefs by the parties, having re visited and re-evaluated the evidence available, I see no reason to depart form the award issued by the trial Chairperson and I uphold it.

The appeal is hereby dismissed in its entirety for lack of merit, with costs. Right of further appeal explained accordingly.



.....

A. MSAFIRI
JUDGE
21/9/2022.