

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 36 OF 2021

LULUA INVESTMENTS LTD PLAINTIFF

VERSUS

HUSSEIN ALLY ZUNGIZA (The legal representative

of the late ALLY HUSSEIN ZUNGIZA) **DEFENDANT**

JUDGMENT

Date of the last Order: 25.03.2022

Date of Judgment: 12.04.2022

A.Z.MGEYEKWA, J

The Plaintiff, Lulua Investments Limited brought this action against the two Defendant. The facts giving rise to this suit are very simple and not difficult to comprehend but involve very complex issues as regards reliefs. The facts, as can be deciphered from the pleadings and evidence on record go thus: the Plaintiff alleged that he entered into the construction

agreement with Ally Hussein Zungiza sometime on 31st August, 2007 who later passed away, and Hussein Ally Zungiza whereas Ally Hussein Zungiza was appointed as his legal representative. The Plaintiff claims that in April, 2017, the Defendant illegally constructed a wall on the corridor and the main passage on the ground level at the building situated at plots No. 10 and 11 Block 12 along Msimbazi road at Kariakoo within Ilala City in Dar es Salaam Region.

According to the Plaint, on 10th July, 2017 the BPM Studios in course of investigation in the said building detected the fault and informed the Defendant to rectify it and clearing of the electricity bill in vain. The Defendant was requested to demolish the wall to allow construction to proceed. The Plaintiff is complaining that the Defendant has neither demolished the wall nor cleared the outstanding electricity bill, therefore, causing a loss of profit to the Plaintiff counting from October, 2017 to date.

In their Plaint, the Plaintiffs prays for Judgment and Decree against the Defendant as follows:-

- i. The Court's order to demolish the illegal wall on the corridor.*
- ii. An order for payment of specific damages to the tune of Tshs. 574,000,000/= as March, 2021.*

iii. An order for payment of general damages to be assessed by the court.

iv. Any other relief (s) at the court deems fit and just to grant.

It is imperative at the outset to point out that, this matter has also gone through the hands of my sister; Hon. Mango, J who conducted the 1st Pre-Trial Conference, hearing of the Plaintiffs and Hon. Hamza, Deputy Registrar conducted Mediation. I thank my predecessor 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 to determine and decide on the aforementioned issues.

At all the material time, the Plaintiff enjoyed the legal service of Mr. Ndibalema, learned Advocate and the Defendant had the legal service of Mr. Abdul Aziz, learned counsel.

The Plaintiff's case was founded on Simoni Williard Msukwa, who testified as **PW1**, and Barahashs Ghalib who testified as PW2. The Plaintiff's side tendered a total of four (4) documentary Exhibits to wit; a letter prepared by Focus Construction Co, Ltd which was admitted by this Court and marked as **Exhibit P1**. A Construction Agreement dated 31st August, 2007 which was admitted by this Court and marked as **Exhibit P2**. A letter prepared by BPM Studios concerning the construction of a

building located at Plots No. 11 and No. 12 Block 12 Msimbazi road at Msimbazi, Kariakoo within Dar es Salam which was admitted by this Court and marked as **Exhibit P3** and a letter issued by Lulu Investment Limited dated 7th September, 2017 was admitted by this Court and marked as **Exhibit P4**. On the Defendant's side DW1 tendered one document to wit; a copy of Land Case No.77 of 2016 which was admitted by this court and marked as **Exhibit D1**.

Simoni Msukwa, in his testimony, introduced himself as an Engineer working with Focus Company Ltd since 2013. PW1 testified to the effect that Focus Company Ltd is dealing with constructions such as roads and buildings and he is the supervisor of the day-to-day activities of the Company. He testified to the effect that Lulua Investment Ltd is one of their clients in construction activities. He testified that in 2017, he was hired by the Plaintiff to construct a building in Plots No. 12 located on Msimbazi Street. He testified that they were unable to accomplish the task since during the construction process the pathway was blocked, they build a wall thus, they were unable to transfer building material to the site.

PW1 testified that there was the main entrance which was not safe for them to transfer their building materials. PW1 testified that it was expensive to proceed with the construction process because of the poor

environment, therefore, they wrote a letter complaining that they were facing an electricity problem and requested the client to demolish the wall which blocked the entrance. PW1 testified that they wrote a letter to the Local Government at Mnazi Moja within Dar es Salaam. To substantiate his testimony he tendered a letter from Focus Construction Co. Ltd which was admitted and marked as exhibit P1. He said that neither the Local Government nor the client replied to their letter.

PW1 went on to testify that they have incurred a loss since they had to wait for the client to demolish the said wall. In case the Defendant will demolish the wall then they will be able to transfer their material and adhere to the agreement which they had.

During cross-examination, PW1 testified to the effect that he is the Company Engineer working with Focus Company. He testified that there were two entrance main entrance and a small entrance and the said entrance were not proper to transfer their materials. PW1 testified that the small entrance was blocked by an unknown person. PW1 testified that the Defendant has constructed a wall and he was well informed vide a letter dated 4th September, 2017 and believed that the Defendant received the said letter.

Barahashs Ghalib, testified as PW2. He testified that he is a businessman, and resides in Zanzibar. PW2 testified to the effect that they entered into a partnership with the Defendant to construct a building in Plots Nos. 10 and 11 Block 12 and they prepared a contract concerning construction. To substantiate his testimony, he tendered a Sale Agreement that was admitted and marked as exhibit P2. PW2 went on to testify that the agreement was to the effect that the Plaintiff was supposed to build a seven floor building and the Defendant to occupy four floors and four shop frames. They prepared a sketch map and obtained a building permit. PW2 went on to testify that the Defendant was required to vacate from the site to allow the Plaintiff to demolish the building but the Defendant delayed vacating from the site Plot.

PW2 testified that they delayed to start building the 7 flat building since the Defendant delayed vacating, then later they noted that the Plot was reduced thus they had to prepare another drawing which again delayed the construction process for approximately one year. PW2 testified to the effect that later they managed to construct 1st to 7th floors whereas the 1st floor contained shop frames. He went on to testify that the Defendant was given four shop frames. PW2 said that he heard that the Defendant has sold all shop frames to Kimaro. He testified that the corridors which they used to pass through and transmit all service was blocked. He said that

the manager of the project informed the Defendant to demolish the wall since it was a safe way to pass through they promised to demolish it but to date, they have not demolished it. To substantiate his testimony he tendered a letter from BPM Studios to Ally Hussein Zungiza which was admitted and marked as exhibit P3.

There was another piece of evidence from the testimony of PW2. He testified to the effect that he is the owner and he is the managing director of Lulua Investment Ltd. PW2 testified that they received containers with building material but they could not proceed with the construction process. He lamented that they took a loan from the Bank to accomplish the project but they were unable to proceed with construction. PW2 also testified that they are in debt with TANESCO. PW2 testified that they are claiming to be paid Tshs. 574,000,000/= which includes Bank debts.

PW2 urged for this court to order the Defendant to pay them damages incurred and the costs of the case and the Defendant be ordered to demolish the said wall and pay the outstanding electricity bills. He ended his testimony by saying that he is ready to accomplish the construction and give the Defendants the rights they deserve.

When PW2 was cross-examined, he testified that he promised to give the Defendant 4 flats and hand over the building within 24 months. He

testified that as long as the Defendant occupied the four shop frames on the ground floor then he is the one who constructed the said wall. He testified that the corridor were open.

On his side the Defendant, testified to the effect that he is the administrator of the estate of the late Ally Hussein Zungiza, DW1 testify that he knows Lulua Investment Ltd, a company with which his father entered into a partnership in constructing a 7-floor building at Msimbazi Plot No. 10/11 Block 12 at Kariakoo. DW1 testified that the parties entered into the contract in 2007 and the construction was for 24 months the same was to be accomplished in 2009. He testified that the contract was not honoured to date and the reason for the delay was upon the Plaintiff. DW1 stated that they were required to vacate the suit land to allow the Plaintiff to start his project of construction.

It was his testimony that the Plaintiff did not accomplish the task within time because he was slow and to date the terms of the contract are not fulfilled. DW1 testified that they were required to occupy four shop frames and four flats, however, the Plaintiff gave them only the ground floor, and the flats are not handed to them to date. DW1 testified that they lodged a Land Case No. 77 of 2016 before this Court, the Plaintiff

was willing to settle the matter outside the court and promised to finish the project. However, he gave them only five shop frames while the contract stated four shops and four flats then the four flats were reduced to two flats. DW1 went on to testify that in the Deed of Settlement, they agreed to extent time of construction and the Plaintiff to accomplish the project within 14 months. DW1 testified that the Plaintiff did not honour the execution order, they were instructed to abide by the Deed of Settlement agreement.

DW1 denied the allegations that he has constructed a wall. He testified that the Plaintiff handed over the shops to them and they sold the said shops in 2013. DW1 testified to the effect that he did not receive any letter which instructed them to demolish the wall. He stated that the complaints are raised after they started to execute the Court. DW1 testified that there is another pathway that can be used by the Plaintiff to pass through his building materials and proceed with construction. DW1 urged this court to dismiss the suit with costs. He stated that they have not benefited from the project because the flats are unfinished.

When DW1 was cross examined, DW1 testified to the effect that there is no dispute that the parties agreed to build a seven-floor building. DW1 testified that the Plaintiff handed them shop frames in 2013. The shops are on the ground floor. DW1 testified that it was part of our agreement to construct shops and the Plaintiff honoured his partial promise. DW1 testified that the order of execution is pending before another court. DW1 testified that the family sold the shops and the buyer was Mr. Kimaro and he heard that Kimaro has built a wall. DW1 testified that he saw the place is joined by blocks but he is not the one who constructed the said wall since they sold it in 2013. DW1 said that the wall does not hinder the Plaintiff to proceed with his construction process.

DW1 said that he was not restricted to sell the shops, therefore they have not breached the contract for disallowing the Plaintiff to proceed with the construction process. DW1 admitted that the investor has incurred costs.

At the Final Pre-Trial Conference, the Plaintiffs and the Defendants proposed the following issues which were adopted by the court as follows:-

- 1. Whether the Defendant constructed the disputed wall in the suit premises. If the 1st issue is affirmative.*

2. *Whether the construction of the disputed wall in the suit premises by the Defendant was illegal.*
3. *Whether the Plaintiff suffered damages.*
4. *To what relief are the parties entitled to*

The first issue for determination as agreed is *Whether the Defendant constructed the disputed wall in the suit premises. If the 1st issue is affirmative.* The evidence advanced by the Plaintiff is quite overwhelming that parties entered into a contraction contract with respect to Plots. 10 and 11 Block 12 is located at Mnazi Mmoja, Kariakoo in Dar es Salaam. The Plaintiff was the one to construct a building and while the construction was ongoing the pass-through way was blocked. The issue of who constructed the wall should not detain much time of the court. I am saying so because the contract was between the Plaintiff and the Defendant and the construction was not complete which means both parties were responsible to make sure that the construction proceed without any hindrance from the Plaintiff and the Defendant.

There is no dispute that the project is ongoing and the entrance to the building is blocked I am saying so because both parties admit that there is a wall that is constructed that was not there before the parties entered into the contract.

In the situation at hand, none of the parties deny that there is a wall at the suit premises and the Defendant was given four shop frames on the ground floor and he admitted that he sold those shop frames to one Kimario without informing the Plaintiff. Kimario was not part of the contract. For ease of reference, I reproduce part of paragraph 3 (i) of the contract hereunder:

“ the Investor will clear and prepare the site for and will erect and complete in a thorough and workman-like manner...”

From the above excerpt, the investor will clear and prepare the site for and will erect and complete it in a thorough and workman-like manner. In accordance with the contract, the investor had a duty to clear and prepare the site for that reason whatever is installed on the site which hinders the construction he has the right to clear it including the wall which was constructed in the pathway.

The Plaintiff took initiative to inform the Defendant by issuing three letters. The first letter from Focus Construction Co. Ltd to the Local Government at Mnazi Mmoja within Dar es Salaam Region (Exh.P1). Second letter prepared by Lulua Investment Limited to the Defendant date another letter from d 7th September, 2017 (Exh.P4) dated 10th July, 2017 the same was copied to the Street leader Mnazi Mmoja. The third letter

from BPM was addressed to the late Ally Hussein Zungiza copied to the Chairman of Mnazi Mmoja Street. The Chairman of Mnazi Mmoja acknowledged the receipts of both letters. However, no action was taken to resolve the matter. Even if the Defendant claims that he was not informed by the Plaintiff but since the Street leader of Mnazi Mmoja was aware of the matter that means the whole issue was well known to the Defendant and the Street leader of Mnazi Mmoja.

On his side the Defendant was bound by the contract specifically Clause 12 of the contract (Exh.P2). For ease of reference, I reproduce Clause 12 of the contract hereunder:-

“ it is the responsibility of the present landowner to hand over the plot to the investor for construction free from any tenants and other legal issues now and thereafter ”

The aforesaid excerpt, in interpreting Clause 12 of the contract, it is my considered view that, the Defendant was fully responsible to facilitate the Plaintiff to accomplish the project. It does not make sense why the Defendant did not cooperate to remove the wall which was hindering the Plaintiff to accomplish his task smoothly, while both parties have an interest in the ongoing project. Therefore, this issue is answered in the affirmative.

Newt for consideration is the second issue *whether the construction of the disputed wall in the suit premises by the Defendant was illegal*. The terms and conditions stipulated in the contract are not fulfilled therefore definitely the construction of the wall is illegal. It is prudent to demolish the wall to pave the way for the contractors to proceed with construction. To maintain the wall in its current state does not add value or solve the dispute at hand. Thus, the proper solution is to demolish the said wall. Constructions must go on and allow parties to continue with their daily business. In that regard, I am satisfied that the Plaintiff has proved his case.

It is cardinal principle of evidence that he who alleges must prove. This principle is enshrined in our law of evidence under section 110 (1) of the Law of Evidence Act, Cap. 11 of the Laws of Tanzania. This provision reads:

“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.”

The onus is upon the Plaintiff to prove that the parcel of the suit land belongs to her. The issue is therefore answered in the affirmative.

I will combine the third and fourth issues whether the Plaintiff suffered damages and to what relief are the parties entitled to. Additionally, the Plaintiff craved a number of reliefs in the Plaint. The Plaintiff did not accomplish his task within time and he took several steps to accomplish his project but the Defendant was not ready to offer his assistance. Therefore, it is true that the Plaintiff suffered damages but the said damages must be proved. Starting with the general damage, the established position is that the law presumes an award of damages is the domain of the trial court, done after a thorough assessment of the claim, supporting documents, and all the prevailing conditions. Again, award of damages is a discretionary remedy that is preceded by the court's satisfaction that the Defendant's alleged wrongdoing has been proved and confirmed by the court. This is consistent with a long-standing decision of **Stroms v Hutchison** [1905] A.C. 515 in which Lord Macnaghten stated as hereunder:

"General damages "are such as the law will presume to be the direct natural or probable consequence of the act complained of."

In the landmark case of **Cooper Motors Ltd v Moshi Arusha Occupational Health Services** [1990] TLR 90, it was held that:-

"...the mere statement or prayer of a claim for 'damages' will not support a claim for any particular injury or loss other than general damages."

Applying the above authorities in the instant case, it is clear that the Plaintiffs proved that the project is unaccomplished to date. Although scrutinizing the evidence on record, it seems both parties breached the contract. The Plaintiff on his side testified to the extent that the reason for his delay to accomplish the project is because the Defendant did not remove the wall which hindered him to proceed with construction. PW2 complained that the Defendant did not vacate the suit land within time and again they had to prepare another drawing of the building. However, no evidence was produced in court to support his claims.

On the Defendant's side, he did not adduce good reasons for failure to cooperate and demolish the said wall. Therefore, I think the visible damage is the delay in accomplishing the project as the Plaintiff tendered several letters (Exh.P1, Exh.P3, and Exh.P4) to prove his claims. Thus, he deserves general damages.

The Plaintiff prayed for this court to order the Defendant to demolish the wall as I have stated above the only solution to this dispute is to demolish

the wall in case of the claims raised then the same be directed to the Defendant who failed to cooperate with the Plaintiff.

The last prayer is about the costs of the suit. The award of costs is at the discretion of the court as provided for under Section 30 of the Civil Procedure Code Cap.33 [R.E 2019]. It is a fact that the Plaintiff would not have bothered to come to court if the Defendant had messed up, as a result, the Defendant acts necessitated the plaintiff to incur costs in hiring an advocate, filing fees, transport et cetera and therefore.

On my part, I think the Plaintiff is entitled to the costs of the suit. I shall demonstrate. In the case at hand, the Plaintiff has prosecuted this case to its finality and, certainly, has incurred costs in this endeavour. These are costs involved in the suit, the Defendant must shoulder and I find no sufficient reason why the Plaintiff should be deprived of the same.

In the case of **Bowen, L.J. in Cropper v Smith** (1884), 26 Ch. D. 700, at p. 711, quoted by the High Court of Uganda in **Waljee's (Uganda) Ltd v Ramji Punjabhai Bugerere Tea Estates Ltd** [1971] 1 EA 188 in which His Lordship stated:

"I have found in my experience that there is one panacea which heals every sore in litigation and that is cost. I have very seldom if ever, been unfortunate enough to come across an instance where

a party ... cannot be cured by the application of that healing medicine".

These are foreseeable and usual consequences of litigation that Defendant must shoulder. Based on the foregoing, I find and hold that the Plaintiff is entitled to the costs of this suit.

In the upshot, the case is decided for the Plaintiff, and I proceed to declare and decree as follows:-

- 1) The Defendant to demolish the wall within two months from the issuing of this judgment to allow the Plaintiff to accomplish the project.
- 2) The Defendant to pay general damage to the tune of Tshs. 2,000,000/=.
- 3) The Defendant shall pay the Plaintiff half costs of this suit.

Order accordingly.

Dated at Dar es Salaam this date 12th April, 2022.



A.Z.MGEYEKWA

JUDGE

11.04.2022

Judgment delivered on 12th April, 2022 in the presence of the Plaintiff and Mr. Abdul Aziz, learned counsel for the Defendant.



A.Z.MGEYEKWA

JUDGE

12.04.2022

Right to appeal fully explained.