

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO. 118 OF 2021

JUMA ABDALLAH ABDALHMAN PLAINTIFF

VERSUS

WAJIDALI JIWA HIRJI DEFENDANT

JUDGMENT

Date of Last Order: 27.05.2022

Date of Judgment: 17.06.2022

A.Z. MGEYEKWA, J

At the centre of controversy between JUMA ABDALLAH ABDALHMAN, the Plaintiff, and WAJIDALI JIWA HIRJI, the Defendant. The Plaintiffs prays for Judgment and Decree against the Defendant as follows:-

- a) *Payment of USD 41,500.00 being monthly rent for the period September, 2014 to July, 2021 at a rate of USD 500 per month, pursuant to Clause 1 (a) of the lease agreement.*

- b) *Payment of USD 140,000 being cash payment in lieu of furniture for each of the unfurnished apartments for the 14 units that rightly belong to the Lessor.*
- c) *Payment of USD 100,000.00 being the cost of alternative accommodation during the extended construction period, pursuant to clause 6.9.2. of the lease agreement.*
- d) *Payment of USD 46,080.00 being a refund of 80% of the rental fee that the Defendant has been collecting from two apartments (33 H & 33 K) from December, 2018 to July, 2021.*
- e) *Courts direction on the Distribution of the 41 apartments and other common areas and facilities between lessor and Lessee in accordance and manner stated in Clause 2 (d) and Clause 4.5 of the Lease Agreement.*
- f) *Interest on the decretal amount from the date the amounts became due until the final payment is made.*
- g) *Cost of the suit.*
- h) *Any other relief this Honourable Court deems fit to grant.*

In response to the Plaint, the Defendant file a Written Statement of Defence disputing all the claims and put the Plaintiff in strict proof of his unfounded allegations. The Plaintiff is not entitled to the sum of USD 41,500.00 since he was fully paid. The Plaintiff has been allotted 1/3 of the

fully furnished flats and has leased his flats after completion of the project. The issue of the addendum does not arise since the contract did not provide for an addendum. The Defendant urged this court to dismiss the entire suit with costs.

The facts, as can be deciphered from the pleadings and evidence on record go thus: the Plaintiff is claiming he is the lawful owner of a piece of land described as Plot No. 416, Toure Drive, Msasani Peninsular, Kinondoni District within Dar es Salaam registered under Certificate of Title No. 12701, LO No. 456403. On 28th August, 2014, the Plaintiff and the Defendant formalized their agreement by signing a lease agreement. As per the lease agreement the Defendant who was the lease had to pay the Plaintiff a sum of USD 500 per month exclusive of taxes for the first 20 years commencing from the date of signing the contract and from 1st September, 2014 up to July 2021. The Plaintiff pleaded that the Defendant did not pay the total amount of USD 41,9500.00.

According to the Plaintiff, it is alleged that the Defendant did not fully furnish the apartments after completion of construction of the apartments, and the costs of furnishing each apartment is estimated at USD 10,000.00. The Defendant constructed 41 apartments and other common areas out of

the lease agreement. The Plaintiff claims for distribution of 41 apartments and other common areas according to Clauses 2 (d) and 4.5 of the lease agreement. After completion of the project, the Defendant rented only two apartments of the lessor's. It is alleged that the Defendant was required to complete the project within 18 months from the date when he obtained a permit and the Defendant did not cover accommodation expenses for the extended construction period.

On 13th September, 2021 the Defendant filed a Counter Claim disputing the claims that as per the lease agreement the Defendant developed Plot No. 416 Toure Drive, Msasani Peninsular in Kinondoni District registered under CT No. 121701, lo 456403 according to the terms of the lease agreement. The Defendant paid the Plaintiff various sums however the Plaintiff failed to provide an EDF receipt for the sums received. The Defendant claimed that he had no further obligation to pay the Plaintiff since the Defendant paid the Plaintiff a total sum of USD 200,000.00 thus the Plaintiff's averments are untrue since the Plaintiff indebt the Defendant to a tune of USD 200,000.00 which should have been reimbursed and returned to the Defendant or compensated through rentals or surrender of an apartment.

The Defendant in the Counter Claim prays for the dismissal of the Plaintiff's suit in its entirety with costs and Judgment and Decree be entered for the Defendant as follows:-

- (a) An order for issuance of EFD Receipts for sums received by the Plaintiff pursuant to the Lease Agreement.*
- (b) Repayment of USD 200,000.00 as per Lease Agreement.*
- (c) Interest in (b) above from September,, 2014 at the rate of 10% per annum up to the date of payment in full.*
- (d) Interest at Court rate from the date of Judgment to the date of payment in full.*
- (e) Costs of the suit.*
- (f) Such other or further relief this Court may deem fit and just.*

It is imperative at the outset to point out that, this matter has also gone through the hands of my learned sister Hon. Mango, J, 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 I have to evaluate the evidence adduced by the witnesses to determine and decide on the matter in controversy.

At all the material time, the Plaintiff was represented by Mr. Theophil Ikure Kimaro, learned Advocate while the Defendant had the legal service of Mr. Julius Kalolo Bundala, learned Advocate. During the Final Pre-Trial Conference, three issues were framed for determination as follows:-

- 1) *Whether any party has breached any terms or conditions of the Lease Agreement?*
- 2) *Whether the Defendant is entitled to be issued with Receipts or EFD Receipts for payments received and acknowledged to have been received by the Plaintiff in the Written Submission. located*
- 3) *What relief are parties entitled to?*

In what seemed to be a highly contested trial, the Plaintiff led evidence of one witness and the Defendants summoned two witnesses. The Plaintiff's case was founded on Mr. Juma Abdallah Abdalhaman, who testified as **PW1**. In a bid to establish their defence case, the Defendant paraded two witnesses; Mr. Wajidali Jiwa Hirji (**DW1**) and Andrew Rugarabamu who testified as **DW2**.

It is needful, though, to mention that the following exhibits were adduced in support of her testimony The Plaintiff's side tendered four (4) documented exhibits; a copy Certificate of Title (Exh.P1), a Lease Agreement Exh.P2),

Tax Invoices (Exh.P3) and Demand Notice and Correspondence (Exh.P4). On his side, the Defendant tendered four documented exhibits to wit; Notification of Disposition (Exh.D1), a Letter dated 12th September, 2019 (Exh.D2), Agreement (Exh.D3), and Bank Statements (Exh.D4).

After the trial, the Advocates from both parties were allowed to address the Court by way of written submissions. Both learned Advocates complied with the court order and their final submissions were considered in articulating this Judgment.

Mr. Kimaro was the first one to kick the ball rolling leading PW1 to express the facts. PW1, a retired officer testified to the effect that he lodged a claim against the Defendant and the issue of controversy is on a Lease of Agreement. The Plaintiff said that the parties signed a Lease Agreement on 28th August, 2014 with respect to Plot No. 416 located at Toure Drive Msasani Peninsula. To substantiate his testimony, PW1 tendered an original Certificate of Occupancy with registration No. 121701 which was admitted as exhibit P1. PW1 also tendered a Lease Agreement dated 28th August, 2014 the same was admitted and marked as exhibit P2.

The Plaintiff testified to the effect that, he vacated the suit land and paid overdue land rent taxes while the Defendant obtained a building permit and proceeded with building a multistore building containing 24 apartments. PW1 testified that the Defendant constructed 24 apartments and as per the lease agreement, DW1 was required to give him 8 apartments or rent the apartments at a discounted rate of 80% of the rental fee. The Plaintiff testified that the construction was accomplished within 48 months and Defendant paid him USD 60 for rent for a duration of 18 months. PW1 testified to the effect that he was not paid money for accommodation rent regarding the extended construction period.

In his testimony, PW1 testified that the Defendant did not furnish the 11 apartments. In his view, a standard fully furnished apartment comprises; beds side tables, a dressing table, a sofa, beds, a dining table and chairs, a TV, a Kitchen-cooker, a fridge, a washing machine, balcony-garden chairs, and microwave. PW1 testified that the apartments were habitable. He further alleged that DW1 has rented 2 apartments No. 33 HD and No. 33A to collect the interest of PW1 debt. To substantiate his testimony he tendered a copy Tax Invoice receipt dated 25th June, 2019 (Exh.P3), letters and receipts the same were collected and marked as exhibit P4 collectively. PW1 testified that

the Indian Ocean Apartment owed him USD 27,300 plus VAT = USD 32,214. PW1 testified that in December, 2018, DW1 served him with a notice of demanding him to pay service charges.

The communication and correspondence did not bear any fruit hence the Plaintiff resorted to a court of law. The Plaintiff urged for this Court to order Defendant to give him in total 13 apartments, to pay rent areas which exceed the contract, USD 10,000/= for furnishers of each apartment, he demanded rents of the 2 apartments. PW1 also urged this court to order DW1 to pay the costs of suits, the interest of all payments and any other reliefs as this Court thinks fit.

The first Defendant resisted the Plaintiff's claims with some force. DW1 testified that the discussion in developing the Plot No. 416 and signing the long term lease took approximately 6 months. The signatories were Mr. Juma and his wife, Radhia Juma, DW1, and his wife. DW1 said that the project was a joint venture parties agreed to construct 24 commercial residential flats. DW1 went on to testify that the lease agreement was registered on 05th September, 2014 and the lessor and his wife acknowledged to have received the payment upon executing the lease agreement, PW1 acknowledged to have received the full amount in advance and PW1's wife

also signed the said agreement. To substantiate his testimony, DW1 tendered a spousal consent, Land Form No. 29, Land Form No. 30, contract for disposition, and Right of transfer for rights of occupancy collectively were admitted and marked as Exhibit D1.

In his testimony, DW1 admitted that PW1 was not given the whole loan, amounting to USD 300,000 instead he gave him USD 200,000/= because they agreed to extend the construction from 24 flats to 40 flats. DW1 went on to testify that PW1 was already in possession of the 13 flats therefore, it does not make sense for PW1 to demand alternative accommodation and the agreement did not state anything regarding expansion. DW1 stated that it is not right to demand 80% of the rental fee because PW1 is collecting rent since 2019. The 1st Defendant said that they remained PW1 through text and WhatsApp messages to repay the loan without success. DW1 stated that PW1 did not refuse to pay the loan but he raised the issue of interest not to be deducted unilaterally. To substantiate his testimony, DW1 tendered copies of letters, the same were admitted and marked as exhibit D2 collectively.

DW1 further testified that the long-term agreement does not show the list of furniture to be provided. It was his testimony that as far as it was joint venture project then it was the land lords' responsibility to provide the furniture as required by the tenant. DW1 testified to the effect that he has raised a counterclaim; he wants PW1 to repay the loan since the same is provided in the lease agreement. On their side, DW1 stated that they have issued all taxes invoices and e-receipts paid to Mr. Juma. DW1 testified to the effect that he took a loan from the Bank and he is supposed to pay interest on the amount paid to Mr. Juma. To substantiate his testimony he tendered a Bank Statement date 18th February, 2022 (Exh. D4).

The second witness, Andrew Rugarabamu testified to the effect that he is working with the Solicitor General Office since 18 May, 2020. Before he was working with the National Housing Cooperation from December, 2011 to 18th May, 2020. DW2 said that he prepared the Deed of Novation; the document relates to the change of the company name from Heaven of Peace Apartment Ltd to Indian Ocean Apartments. DW2 stated that in partnership contracts the phrase fully furnished includes; wardrobes, kitchen cabinets, and sanitary (fitted equipment). He testified that other contracts specifically

include a list the items apart from full furnished, but the contract at hand relates to fitted features to the apartment.

Having heard the testimonies of both parties and considering the final submission of all learned counsels, I should state at the outset that, in resolving the controversy before me, I will be guided by the principle set forth in civil litigation. The general rule, therefore, is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. Section 110 of the Evidence Act Cap.6 [R.E 2019] places the burden of proof on the party asserting that partly desires a Court to believe him and pronounce judgment in his favour. For ease of reference, I reproduce section 110 (1) of the Evidence Act, Cap.6 [R.E 2019] hereunder:-

“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 ant fact, it is said that burden of proof lies on that person.”

In the case of **Hemedi Said v Mohamedi Mbilu** (1984) TLR 113 it was held that:-

“He who alleged must prove the allegations”.

Similarly, in the case of *Nsubuga v Kavuma [1978] HCB 307* the High Court of Uganda held that:-

"In civil cases, the burden lies on the plaintiff to prove his or her case on the balance of probabilities."

Another salient principle of the law that will guide this Court in the course of determining this suit is "Parties are bound by their pleadings." Pleadings in this sense include the Plaint, Written Statement of Defence, affidavits, and reply therein if any. Therefore, in its broader meaning pleadings include all documents submitted and annexed thereto and those which were listed along with the plaint or produced before the first date of hearing of the suit. The Court is required and expected to examine the entire pleadings and the totality of evidence tendered, together with an assessment of the credibility of the witnesses who appeared before the Court. The evidence adduced before the Court must be weighed and not counted.

The above underlying principles and case laws shall guide my evaluation and analysis of the evidence that was presented by parties in this suit, pleadings together with the final submissions by the learned counsels, and with earlier framed issues by the court will be resolved seriatim.

The first issue for determination is *whether any party has breached any term or condition of the Lease Agreement.*

Breach of contract is defined in ***Black's Law Dictionary 5th Edition on page 171*** as to where one party to a contract fails to carry out a term. Further, in the case of ***Nakana Trading Co. Ltd Vs Coffee Marketing Board Civil Suit No. 137 of 1991*** court defined a breach of contract as to where one or both parties fail to fulfil the obligations imposed by the terms of the contract. The breach of the agreement for which the first issue is supposed to answer is with respect to the lease agreement (Exh.P2) which is a construction lease agreement. The evidence on record reveals that the parties had a good business relationship. Unfortunately, their friendship went sour after the misunderstandings between the parties. What is apparent is that the Plaintiff donated the land to the Defendant and DW1 in return obtained a building permit and constructed the apartments.

It was the Plaintiff's case that the lease agreement was not honoured by the Defendant. Examining the evidence on record, the parties entered into a lease agreement and the same was prepared on 28th August, 2014. Therefore, there is no dispute that both parties executed the sale agreement

that was admitted into evidence as exhibit P2 and both parties were witnesses to that agreement.

In any case, the parole evidence rule demands that this court should concentrate on the terms of the lease agreement that was executed between the parties and presented in evidence (Exh.P2).

As rightly stated by bot parties, the Defendant is the one who developed the apartments as by Clause 2 (a) of the lease agreement. The lessee hereby covenants with the lessor that all the twenty-four apartments shall be fully furnished by the Lease Agreement. For ease of reference let me quote the Clause, it reads:-

"The lessee hereby covenants with the lessor to construct on the demised premises, at his own costs, a multi-story building with twenty-four apartments/ units subject to approval from relevant authorities."

Reading the above Clause, the Defendant was obliged to construct a building with 24 apartments and in accordance with Clause 2 (e) of the lease agreement, after completion of the Contract, the lessee shall automatically rent the eight apartments from the lessor. However, the facts of the case show that the Plaintiff rented his apartments the same is evident by

correspondence made between the two parties (Exh.P4) whereas the Plaintiff was the one who called the Broker to show him his apartments.

In their testimonies, PW1 claimed that the Defendant was required to fully furnish the 8 apartments with beds side tables, a dressing table, a sofa, beds, a dining table and chairs, a TV, a Kitchen-cooker, a fridge, a washing machine, balcony-garden chairs, and microwave. However, the Defendant on his side claims that he has furnished the apartments as per the lease agreement and the listed items were not part of the contract. He also claimed that the Plaintiff proceeded to rent his apartments and did not raise any complaints.

In my considered opinion, I fully subscribe DW1's testimony, the evidence shows that the Plaintiff did not tender any correspondence which shows that he reminded the Defendant to furnish the apartments. During cross-examined, PW1 said that he rented the apartments because he needed money. In my view, the Plaintiff's action of renting the 8 apartments was contrary to the lease agreement which required the Defendant to rent the Plaintiff's apartments at a rent equivalent to 80% of the rental fee until full recovery of the loan amount.

Moreover, strangely, the Plaintiff is demanding the Defendant to honour the lease agreement while in his pleadings, the Plaintiff denied having paid the outstanding service chargers for the main reason that there was no any formal handover of the apartments (Exh.P4). The Plaintiff went further to claim that in absence of formal handover document the claims for service chargers were baseless. In other words, the Plaintiff's claims in regard to fully furnished apartments is an afterthought. It is worth noting to remark that as a matter of principle, pleadings in a case have the function of putting notice of a case that parties to the proceedings are bound by their own pleadings with no room for unilateral deviation therefrom. This principle was accentuated by the Court of Appeal of Tanzania in the case of **James Funke Gwagilo v Attorney General** [2004] TLR 161. The Court of Appeal of Tanzania reiterated in its most recent decision in **Paulina Samson Ndawavya v. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 (unreported) wherein the superior Bench remarked as hereunder:-

*"From that same decision, we reiterated another equally important principle of law that **parties are bound by their own pleadings and that no party should be allowed to depart from his pleadings thereby changing his case from which he had originally pleaded.**"*
[Emphasis added].

Applying the above authority in the instant case, it is clear that the Plaintiff cannot depart from his claims that nothing can be done in the absence of formal handing over document. Therefore, Plaintiff's claims does not give this court the impression that he has the right to demand DW1 to fully furnish his apartments since PW1 has already occupied the said apartments without formal handing over documents. Therefore, the extent of breach and what he owes the Defendant is immaterial.

With respect to the issue of two rented apartments; the Plaintiff testified to the effect that DW1 was in full possession of two apartments; 33H and 33K since December, 2018. In his final submission, Mr. Kimaro complained that the cumulative amount received by DW1 from apartments 33H and 33K is only USD 11,500 while the Plaintiff is demanding USD 46,000. The DW1 on his side claimed that he took possession of the 33H and 33K apartments because he owed PW1 an outstanding amount of service charges and the loan to the tune of USD 200,000. I am in accord with the Plaintiff's counsel that there were no justifiable reasons for the DW1 to occupy the Plaintiff apartments.

I understand that the Defendant wanted to recoup the loan advanced to the Plaintiff and service his bank loan but the option taken to rent the two

apartments of the Plaintiff was not proper. Had it been that Defendant wanted to recover the outstanding amount from PW1 then DW1 was required to comply with the conditions laid down in the lease agreement to occupy one apartment instead of two apartments. Mr. Kimaro is complaining that DW1 rented 33H and 33K apartments and received USD 11,500, this fact is not proved by any documentary evidence therefore this court cannot rely on mere words, thus this allegation is devoid of merit

Another area of controversy is with respect to the extended project. The Plaintiff claims that the Defendant was required to accomplish the construction of the building within 18 months and that the Defendant was required to construct 24 apartments units instead of 40 apartments. The PW1 also demands to be paid money for renting during the extension period. I have read the lease agreement and noted that the addendum of the said contract does not form part of the lease agreement or was not part of their agreement (Exh.P2). Thus, I am in accord with DW1 testimony that the addendum is not part of Lease Agreement. Therefore, I am not prepared to accept the Plaintiff's argument that the Defendant was required to pay him money for renting during the period of extended project. In my view, the Plaintiff's claims in regard to accommodation payment is an afterthought, therefore, the same is disregarded. The first issue is answered in the

affirmative whereby both parties have breached the contract to the extent explained above.

Next for consideration is the second issue, whether the Defendant is entitled to be issued receipts on payments made to and acknowledged by the Plaintiff. The lease agreement stipulates the requirement of the lessee to pay the lessor USD 500.00 per month and USD 8,000/= per month for 21st to 40th year as rent. The lessee shall pay the lessor USD 1,000 per month from the 40th year to the 97th years of the lease period. In his testimony DW1 testified to the effect that the Defendant effected the payments, the same is evident by (Exh.D3). However, forcing or demanding the Plaintiff to issue the EFD receipts in a civil matter sounds awkward. Therefore, this issue cannot be implemented by this court. Furthermore, the issue of interest of 10% per annum is not supported by any documentary evidence thus these prayers crumbles.

The Plaintiff admits that he did not pay USD 200,000 to the Defendant to date. The concession is tantamount to admission to the breach of contract. However, PW1 complained that the DW1 gave him a loan to the tune of USD. 200,000/= instead of USD. 300,000/=. I have scrutinized Clause 6.9.3 and Clause 6.9.4, the lessee was required to advance to the lessor a sum of USD

300,000.00 by a loan, and the same was required to be disbursed in installments. The loan advanced by the lessee to the lessor shall be deducted by the lessee from the rent of the eight apartments as per Clause 2 (e). There is no dispute that the Defendant owed the Plaintiff USD 200,000. Had it been that the Plaintiff paid the loan then he could be in a better position to claim the remaining amount to the tune of USD 100,000 but since PW1 did not refund USD 200,000. And since the Plaintiff rented his own apartments then DW1 could not rent 8 apartments from the lessor at 80% of the market rate. Pursuant to lease agreement Clause 6.9.5. For ease of reference, I reproduce Clause 6.9.5 hereunder:-

“ That in case of parties failure to conclusively execute a lease of the eight (8) apartments in favour of the lessee as per Clause 2 (e) and 6.9.4 above, the lessor shall repay the loan of United States Three Hundred Thousand (USD 300,000) only to the lessee by either unconditionally surrendering one apartment to the lessee or authorizing his tenants to remit their rents to the lessee continuously until full discharge of the outstanding sum.

Guided by the above Clause 6.9.5, it is clear that the Plaintiff has failed to repay the loan to the tune of USD 200,000, therefore, I order the Plaintiff

(lessee) to surrender one apartment to the Defendant (lessor). The second issue is partly allowed.

I now turn to the third issue. *What reliefs' parties are entitled to.* The Plaintiff in Plaintiff has listed several relief. The law requires every claim must be proved, however, most of the Plaintiff's claims were mere words and the documents tendered did not prove the amount claimed by the Plaintiff. Regarding prayers (a), (b), (c), (d), and (f) this court is not moved to grant the said prayers for the main reason that the issue of fully furnished apartments failed miserably after the Plaintiff started to rent the apartments. These prayers crumbles. However, I find logic in prayer (e) the distribution of apartments and facilities to be shared as per Clause 4.5 common areas the holding ration is 1/3 lessor and 2/3 lessee.

In the counter claim, the Defendant has prayed for an order of issuance of EFD receipts for the sum received by the Plaintiff, this prayer is not granted and the reasons have been stated above. Therefore, in the Counter Claim; I find logic in prayer (b), the same is granted, however, prayers (a), (c) and (d) crumbles.

In the upshot, I order the Plaintiff (lessee) to pay the Defendant USD 200,000.00. The Plaintiff to surrender one apartment to the Defendant

(lessor) and the Plaintiff is required to pay the outstanding service charges amounting to USD 29,706 to the Defendant. However, the money collected by DW1 in regard to one apartment which was taken by DW1 contrary to the lease agreement be deducted from the outstanding service chargers. The Plaintiff's suit and the Counter Claim are partly allowed to the extent explained above. Each party to bear his own costs.

Order accordingly.

DATED at Dar es Salaam this 17th June, 2022.


A. ZIMGEYEKWA
JUDGE
17.06.2022

Judgment delivered on 17th June, 2022 in the presence of Mr. Theophil Kimaro and Eva, learned counsels for the Plaintiff and Mr. Richard Madibi, learned counsel for the Defendant.


A. ZIMGEYEKWA
JUDGE
17.06.2022

Right to appeal fully explained.