

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 129 OF 2022

BETWEEN

**ASSENY ALEMYO MURO (SUE UNDER THE POWER OF
ATTORNEY OF GEOFFREY WILSON MURO) PLAINTIFF**

VERSUS

MY SPACE1ST DEFENDANT
HILLARY GODSON.....2ND DEFENDANT
DAUDI SAINI MASIMBI.....3RD DEFENDANT
LINA MSHANA.....4TH DEFENDANT
BERNARD JAIROS MWAISEMBA.....5TH DEFENDANT
CAROLINE RHOBİ KASUNTE.....6TH DEFENDANT
BONNY MWAİKUSA.....7TH DEFENDANT
SAPHİNER JAMES KASANGA.....8TH DEFENDANT
GOODLUCK BARAKA NYIONDO.....9TH DEFENDANT
VIOLET D MWANJALI.....10TH DEFENDANT
HENRY DAVID KALENGA.....11TH DEFENDANT
JOYCE GORDON MWAİPOPO.....12TH DEFENDANT
RASHİD ABDALLAH KİLUVİA.....13TH DEFENDANT
NASSİB BAKARİ MBAGA.....14TH DEFENDANT
ZAHRA OMARY MUYA.....15TH DEFENDANT
RACHEL KALAITA.....16TH DEFENDANT

EXPARTE-JUDGMENT

Date of last Order: 04/07/2023

Date of Judgment: 26/07/2023

Aille

A. MSAFIRI, J.

Initially on 03/6/2022 the plaintiff ASSENY ALEMYO MURO (Suing under the Power of Attorney of Geoffrey Wilson Muro) instituted a suit against the then defendant, MY SPACE. She was claiming that the defendant is in breach of the sale agreement executed between the parties on 19th day of December 2019, for the sale of her six plots of land then registered under Survey Plan No. 79292, Plots No. 175 -180 on Block "S" located at Goba Kunguru Area, within Kinondoni in Dar es Salaam.

However, other people who were not party to the suit, claiming interest on the suit property, filed Misc. Application No. 517 of 2022 before this Court, seeking for the leave of the Court to be joined in the main suit as interested parties. The application was granted and the 15 interested people were joined as the 2nd – 16th defendants in the main case i.e. the current Land Case No. 129 of 2022. As per the Court's order the plaintiff amended her Complaint to include the said 16 defendants. After being joined as defendants, the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 15th and 16th defendants settled the matter amicably with the plaintiff by filing a Deed of Settlement which was recorded in this Court as a Decree on 26th January 2022. *Alle*

The 13th and 14th defendants were not part of the Deed of Settlement, hence the case continued on merit between the plaintiff and the 1st, 13th and 14th defendants. However, on 15th November 2022, the 13th and 14th defendants while filing their Joint written statement of defence to the amended Plaint, they also filed Notice of Preliminary Objection to the effect that the plaintiff has no cause of action against them. The preliminary objection was argued by way of written submissions whereby the plaintiff through her advocate, conceded that indeed, the plaintiff has no cause of action against the 13th and 14th defendants, but her claims are against the 1st defendant, MY SPACE.

This Court delivered its ruling on the said preliminary objection and went on to strike out the names of the 13th & 14th defendants from this suit. Therefore, currently, the parties in the suit are the plaintiff and the original defendant, the 1st defendant, MY SPACE.

However, the 1st defendant has never appeared in Court or file her defence despite several efforts done by the plaintiff for the service. On 07th July 2022, with the Court's leave, the 1st defendant was served by publication in a Newspaper. After failing to appear as summoned, the Court ordered the case to proceed ex-parte against her. Before the

Atts.

commencement of ex-parte hearing, the issues for determination were framed by the Court. The issues were as follows;

1. Whether there was a Sale Agreement executed between the plaintiff and the 1st defendant.
2. If the answer to the 1st issue is in affirmative, then whether there is a breach of the said Sale Agreement by the 1st defendant.
3. To what reliefs are parties entitled to.

The plaintiff brought a total of three witnesses including herself to prove her case and a total of eight (8) exhibits were admitted in Court. I will analyse the evidence then determine the issues.

Asseny Alemyo Muro is the plaintiff and she testified as PW2 and stated that she is the wife of Geoffrey Muro who is the owner of suit land located at Goba Kunguru, now Ubungo District.

She produced a Marriage Certificate to prove that she is the wife of Geoffrey Muro. The Marriage Certificate was admitted in Court as Exhibit P3. She said that she and her husband bought the suit land in 1984 and later they added another piece of land in 1995 making a suit land to measure at 15,942 Square Metre. She tendered the two sale agreements on purchase of suit land one of 1984 and another of 1995. The two sale

Atts.

agreements were admitted collectively as Exhibit P4. She also tendered a survey plan which was admitted as Exhibit P5.

PW2 said further that in 2004, her husband Geoffrey Muro developed health complications so he had to move to Machame, Moshi for treatment. That, Geoffrey Muro gave PW2 a power of Attorney to handle all matters concerning the suit land. The special Power of Attorney was tendered and admitted in Court as Exhibit P6. PW2 stated further that, after the suit land was surveyed, it was divided into six (6) plots which are Plots No. 175, 176, 177, 178, 179 and 180, Block "S" Goba, Kunguru, Kinondoni, Dar es Salaam. That the special power of Attorney which was granted to PW2 by her husband mandated her to manage the said plots.

PW2 testified that, in 2019, she and her family decided to sell the suit land and the purchaser was the 1st defendant, MY SPACE which is a company.

That the 1st defendant agreed to buy the whole suit land for the amount of TZS.360 Million. That, the plaintiff and 1st defendant entered a sale agreement, whereby they agreed that the 1st defendant will purchase the suit land for TZS. 360 Million and the money will be paid in four instalments. In each instalment, the 1st defendant was to pay TZS 90

Alls.

Million. PW2 tendered the said Sale Agreement which was admitted in Court as Exhibit P7.

She stated further that, it was agreed by the parties to the sale agreement that, the purchaser shall be entitled to the ownership of the suit land after completion of all four (4) instalments. That this was as per clause 4 of the sale agreement exhibit P7.

PW2 said that, the purchaser (1st defendant) breached the sale agreement by failing to pay the purchase price as per the terms of agreement. That this time the 1st defendant paid only TZS.70 Million and failed to pay the money as per the agreement. That, the plaintiff's lawyer served the 1st defendant with demand notice on various times but in vain. Later, PW2 and the 1st defendant decided to enter another following up agreement, (the second agreement) which was signed on 22/9/2020.

That, in the second agreement which was admitted as Exhibit P2, the parties agreed that the payment of purchase price shall be made in three instalments. However, the 1st defendant again defaulted in payment of the purchase price as per the agreement, paying only TZS 50 Million. PW2 stated that, in total the 1st defendant paid only TZS. 120 Million only out of TZS 360 Million which she was supposed to pay for buying the suit land.

Alle.

She added that, she and her daughter who testified as PW1 opened a joint account at CRDB Bank for the purpose that the 1st defendant would deposit the purchase money into the said Bank. She identified the Bank statements of the said Bank account which was admitted in Court as Exhibit P1.

She testified further that the 1st defendant deposited money into the said Bank account by using various names. That, on 12/10/2019, the 1st defendant deposited TZS.20 Million, on 21/4/2021 the 1st defendant deposited TZS. 50 Million, and on 27/7/2020, the 1st defendant deposited TZS. 50 Million. She averred that the 1st defendant has breached the sale agreement.

PW1 was Julieth Geoffrey Muro who testified to be a daughter of the plaintiff, PW2. Her evidence is similar to the evidence of PW2, and she confirmed to have opened a joint Bank account with her mother, the plaintiff in their names. She stated that the account received money from the 1st defendant for the sale of the suit land. She tendered a Bank statement which was admitted as Exhibit P1.

PW1 said that she was a witness on the second agreement between the plaintiff and 1st defendant. She tendered the said second agreement which was admitted as Exhibit P2. She said that the second agreement *Alle.*

was on the payment of the purchase price of the suit land. That, the agreement between the parties was for the 1st defendant to pay TZs. 360 Million but she paid only TZS. 120 Million. She maintained that, the 1st defendant has breached the agreement and caused the loss to the plaintiff.

PW3 was Tony Richard Mushi. He stated that he is a lawyer practising as an advocate. He identified Exhibit P2 which he said it is the agreement which he drafted, and that he has witnessed the agreement. That, he drafted both agreements i.e. Exhibits P2 and P7. That the 1st defendant failed to perform the terms of agreements.


He said further that, Clause 4 of the sale agreement Exhibit P2 stated that the 1st defendant/purchaser shall occupy and use the suit land only when she had completed payment of the whole purchase price.

He added that however, the 1st defendant breached the agreement by starting to sell some pieces of land in dispute to other people without knowledge of the plaintiff. That after the plaintiff has instituted this suit and successfully applied for an order of temporary injunction, those people who had bought pieces of land in suit land from the 1st defendant came forward and prayed to be joined in the main case. *Alles*

PW3 stated that later, some of the 15 people who had sought and granted leave by the Court to join the main case as necessary parties, agreed with the plaintiff to settle the dispute out of Court.

Having gone through the whole evidence adduced by the plaintiff and her witnesses, I will determine the issues guided by the cardinal principle that whoever desires a Court to give judgement in his/her favour, he/she must prove that the facts they allege or claim, do exist. The principle is laid under the provisions of the Evidence Act, Cap 6 R.E 2019, Sections 110, 112 and 115.

This principle is also elucidated in numerous decisions of the Court of Appeal and this Court. In the case of **Ernest Sebastian Mbele vs. Sebastian Sebastian Mbele & 2 others**, Civil Appeal No. 66 of 2019, CAT (Unreported), the Court of Appeal at Iringa held that;

"The law places a burden of proof upon a person who desires a court to give judgement and such a person who asserts the existence of facts to prove that those facts exist. (Section 110 (1) and (2) of the Evidence Act). Such facts are said to be proved when, in civil matters its existence is established by a preponderance of probability". 

Guided by this principle, in this matter before me, the plaintiff bears the evidential burden to prove her case on the balance of probabilities despite that the hearing was ex-parte against the 1st defendant.

The first issue as to whether there was a sale agreement executed between the plaintiff and the 1st defendant is answered in affirmative. The evidence is clear by PW2, PW1, PW3 and Exhibits P2 and P7 that there was a sale agreement between the plaintiff as a vendor and the 1st defendant as a purchaser. The agreement was entered on 19 December 2019. It shows that the plaintiff as a vendor sold the land in dispute which is described as six plots No. 175 – 180, Block "S", Goba Kunguru, Kinondoni Municipal, to the 1st defendant who is known as Getrude Sabas Mlay t/a MY SPACE.

That the size of the plots as a whole is 15943 square metres, and the sale price was TZS. 360 Million.

As per Exhibit P7, Clause 1 shows that the payments was to be done in four instalments from 15/11/2019 to 15/08/2020 and in each instalment, the purchaser had to pay TZS. 90 Million. Clause 4 of the agreement shows that after payment of the whole amount as per clause 1, the purchaser shall be the lawful owner of the land in dispute. *Aulle*

The sale agreement was signed by both parties and attested by the advocate Tony Richard (PW3). This sale agreement was executed by parties as it is shown in the plaintiff's evidence that, the 1st defendant started to effect the agreement by starting paying the first instalment although she did not pay the whole agreed amount.

According to the evidence of PW2 and Exhibit P1 which are Bank statements, for the first payment paid in 12 October 2019, the 1st defendant paid only TZS. 20 Million. After that, there was no any other payments until 21 April 2021 where the amount paid was only TZS. 50 Million and they were deposited in the joint account of Julieth Geoffrey Muro and Asseny Alemyo Muro.

By this evidence, it is clear that there was indeed a sale agreement between the parties where by the parties started to execute it although the 1st defendant breached the said sale agreement. The first issue is answered in affirmative.

This comes to the determination of the second issue which is if the first issue is in affirmative, then whether there is a breach of the said sale agreement by the 1st defendant.

It is in the evidence of the witnesses PW1, PW2 and PW3 that the 1st defendant breached the sale agreement which was entered on 19 *Alle-*

December 2019 by failing to pay the purchase money as per the clauses of the agreement.

Instead of paying the first instalment of TZS 90 Million by 01 December 2019, the 1st defendant paid only TZS. 20 Million and by 23 August 2020 which was the last date for the fourth instalment and payment of the last TZS 90 Million, the 1st defendant has not paid any other amount beside TZS. 20 Million which was paid initially.

However, after communication between the plaintiff and the 1st defendant about the 1st defendant's default in payment as per the agreement Exhibit P7, the parties decided to enter another agreement.

By this, the parties decided to enter another agreement for reconciliation with new terms but in consideration of the amount which the 1st defendant has already paid. This second agreement was entered on 22 September 2020.

In Exhibit P2, it shows that the parties entered the reconciliation agreement, reconciling the terms of previous agreement. In the agreement, the parties agreed that the vendor (plaintiff) was selling the land in dispute for TZS. 360 Million. That the purchaser has already paid TZS. 70 Million only and the outstanding payment as of 22 September

Alle.

2020 when the second reconciliation agreement was entered is TZS. 290,000,000.

The parties agreed on mode of payment whereby they should be effected by purchaser in three instalments, i.e. first instalment; TZS. 60 Million by 01/10/2020, the second instalment; TZS. 170 Million by 15/11/2020 and the third instalment; TZS. 60 Million by 20/12/2020.

PW2 stated that, despite the new agreement, the 1st defendant paid only TZS 50 Million, making the total payment to be TZS. 120 Million. PW3, stated on how he made efforts to communicate with the 1st defendant and reminding her of her obligation to make payments as per the terms of the agreement, but with no success.

This evidence is also cemented by Exhibit P8 collectively which are various documents which shows communications and efforts of conciliation between the plaintiff and the 1st defendant, the plaintiff through her advocate reminding and demanding the plaintiff to execute the terms of their agreement.

By Exhibit P8, it is crystal clear that the 1st defendant was aware that she is in breach of the sale agreement but did nothing to honour the same. She was reminded of her obligations on several times and on 24 March 2021, the plaintiff through her advocate issued the Demand Notice *Alle*.

asking her to make payments within 14 days from the date of the Notice. Still the 1st defendant failed to make the payments as required.

As I have observed earlier, the 1st defendant has breached the agreement as being part of the agreement, she was bound by the terms of the said agreement. It is trite law under the provisions of Section 37(1) of the Law of the Contract Act, Cap 345 that an agreement entered by parties is binding upon them. From this analysis, the second issue is also answered in affirmative.

The third issue is on the reliefs' which the parties are entitled with. The plaintiff has claimed for the following reliefs in her Plaint;

1. That this Honourable Court declares that the 1st defendant is in breach of the sale agreement executed between the parties on the 19th day of December, 2019 for the sale of her six plots of land that registered under Survey Plan No. 79292 Plots No. 175 to 180 on Block "S". Goba Kunguru Area within Kinondoni in Dar es Salaam.

There is evidence that the parties i.e. the plaintiff and 1st defendant entered another agreement which was signed by parties on 22 September 2020. The new agreement states that it is a conciliation agreement after the initial agreement.



In my view, the 1st defendant has also breached the terms of agreement dated 22 September 2020. Hence, I declare that the 1st defendant is in breach of both agreements entered between the parties on 19th December, 2019 and 22 September 2020.

2. Permanent injunction restraining the defendants, parties, their agents, workmen or any other authority from interfering how so ever with the disputed piece of land.

In this relief, I find that the suit land is already sold to other people who were joined as necessary parties to this suit but has already settled the matter amicably with the plaintiff. These parties who are the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 10th, 11th, 12th, 15th, and 16th defendants, each occupy some pieces of land in the suit land, as per the settlement between them and the plaintiff.

Hence this Court cannot order permanent injunction generally to the suit land. Therefore, the injunction sought is entered against the 1st defendant only and is limited to the area of the suit land which is still owned by the plaintiff.

3. Order the plaintiff to return back the transaction made by the defendant in respect of the sale of the disputed piece of land. *Alle.*

Here, it seems the plaintiff wants this Court to order her to return the paid sum by the defendant, back to the said defendant.

However, I am of the view that the plaintiff is misconceived or misdirected in her prayer. I say so because as per the clause five (5) of the agreement entered on 22 September 2020, it is stated that in the event that the purchaser has failed to make payments as per the agreement, then the vendor shall not refund the already paid amount until she has found another purchaser.

Hence, as per this clause of the agreement which is binding to the parties, the plaintiff who is the vendor shall be required to make payment to the plaintiff only when she acquires the new purchaser of the disputed land. But if the plaintiff has already sold the suit land to other buyers then she is bound by the terms of the agreement to make necessary payments as per the terms of the said agreement.

4. That, this Honourable Court declares that the plaintiff is a legal owner of the disputed piece of land.

In my view, the Court should be careful in granting this relief. I said so because, first, there is no dispute before this Court on the ownership of the suit land by the plaintiff. Second, there is evidence that the plaintiff and the parties who were initially joined as *Aella*

the plaintiff is unknown to the Court so even the value of it cannot be determined. The relief is not granted.

6. General damages to the tune of TZS. 90,000,000/=. This relief is granted.

7. Costs of the suit.

8. Any other relief(s) that this Honourable Court finds fit, just and equitable to grant.

As the plaintiff have proved her case as per the required standard in civil cases, this suit is decided in her favour and I hereby order as follows;

- i. That, the 1st defendant is in breach of agreements entered between the parties on 19th December 2019 and 22nd September 2020 for the sale of the plaintiff's six plots of land registered under Survey Plan No. 79292 Plots No. 175-180 on Block 'S' located at Goba Kunguru Area within Ubungo District (then Kinondoni) in Dar es Salaam. (herein as suit land).
- ii. A permanent injunction is hereby ordered, restraining the 1st defendant, her agents, workmen or any other authority from interfering howsoever with the disputed piece of land specifically on the part which is currently owned by the plaintiff. *Alls-*

- iii. The 1st defendant to pay the plaintiff general damages to the tune of TZS. 90,000,000/=
- iv. Costs of the suit to be borne by the 1st defendant.

It is so ordered.

Right of appeal explained.


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A. MSAFIRI
JUDGE
26/7/2023.

