

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO. 224 OF 2023**

WILMAR TANZANIA LIMITED PLAINTIFF

VERSUS

DIPSI CONPRO LIMITED DEFENDANT

JUDGMENT

Date of last Order: 14/9/2023

Date of Judgment: 29/9/2023

A. MSAFIRI, J.

The plaintiff, Wilmar Tanzania Limited, has instituted this suit against Dipsi Conpro Limited, the defendant. Both are limited liability companies incorporated under the laws of Tanzania.

According to the plaint, the plaintiff claims that, sometimes in 2016, the defendant offered the plaintiff to purchase her landed property located on Plot No. 2012 Block L Mbagala Area, Temeke Municipality, Dar es Salaam. (herein as plot in dispute), an offer which was accepted by the plaintiff, and the parties entered a sale agreement and the agreeable purchase price was USD 1,600,000.00. That, the plaintiff managed to pay the entire consideration as agreed and in December 2019, the plaintiff

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received the Title Deed of the plot in dispute along with other relevant documents from Exim Bank where the plot in dispute has been mortgaged to secure a facility. That, the said documents which were handed over to the plaintiff permits her to initiate transfer process of the plot in dispute into his name. That, since December 2019, the plaintiff has been constantly making follow ups to the defendant to ensure all land forms for transfer of the Plot in dispute are delivered to her but without any success. That, the plaintiff has been tracing the defendant but neither the offices of the defendant's company nor either of the Directors' whereabouts is known.

Hence, the plaintiff prays for judgment and decree against the defendant as follows;

1. Declaratory order that the plaintiff is the lawful owner of the piece and parcel of Land, Plot No. 2012 Block 2 Mbagala Area in Temeke Municipality Dar es Salaam with Title Deed No. 86345.
2. An order against the defendant or its agents or assignee or any person who hold any rights on behalf of the defendant in the plot in dispute, to deliver vacant possession to the plaintiff.
3. Payment of general damages to be assessed by the Court.

Alls.

4. Court interest at 12% from the date of judgment until the claimed amount will be paid in full.
5. Costs of this suit.
6. Any other reliefs this Honorable Court deem fit to grant.

The defendant has never appeared in Court or file her defence. The service of the defendant was effected through the Court Process Server. However, the same deponed an affidavit of service stating that the defendant could not be traced at the pointed residence and there was no forwarded address.

Having been satisfied that the defendant was duly served, the Court ordered substituted service by publication whereby the defendant was served by a publication in a newspaper on 15/8/2023. By 04/9/2023, the defendant had neither appeared in Court nor filed his written statement of defence. The Court then ordered the hearing of the case to proceed ex-parte against the defendant. Before the commencement of ex-parte hearing, the Court framed issues for determination as follows:-

- i) Whether the plaintiff is the lawful owner of the suit property.
- ii) To what reliefs are the parties entitled to.

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During the ex-parte hearing, the plaintiff had one witness who testified by filing witness statement. The statement was adopted by the Court as evidence in chief of the witness.

In her evidence, PW1, Lulu Mathias Kissambu stated that she is an employee of the plaintiff's company in the capacity of head of legal services. That, initially, the plaintiff company was called Munah Wilmar East Africa Ltd which later on was changed to be known as Wilmar Tanzania Limited, the name which exist to date. She tendered the Certificate of change of name which was admitted in Court as Exhibit P1.

She said that following the plaintiff's interest to purchase the land property and the defendant willing to purchase the same, a sale agreement was entered between the parties whereby the plaintiff agreed to purchase the plot in dispute. She tendered the sale agreement which was admitted as Exhibit P2.

She testified further that, it was agreed between the parties that the purchase price will be USD 1,600,000, and since the Title Deed of the plot in dispute was in the custody of Exim Bank, then the entire purchase amount shall be paid to the defendant's account at the said Exim Bank with the view of servicing the outstanding loan. That it was further agreed that the Title Deed of the Plot in dispute shall be delivered to the plaintiff

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once the entire purchase price was paid in full. PW1 stated further that, it was agreed as per the sale agreement that all other necessary process for handling transfer process including signing of the requisite documents shall be delivered to the plaintiff for the transfer process of the plot in dispute into her name; and that a vacant possession of the plot in dispute shall be delivered to the plaintiff once the entire purchase consideration is paid in full.

That the plaintiff paid the agreed purchase amount by way of transfer of the said amount from her Azania Bank Account to the defendant's account at Exim Bank. She tendered the Bank statement with her affidavit of authenticity which were admitted collectively as Exhibit P3.

PW1 testified further that following the payment of the purchase price in full, Exim Bank released the Title Deed of the plot in dispute to the plaintiff, along with the memorandum of satisfaction. That the documents were delivered to the plaintiff company for the purposes of dealing with the process of discharging the Title Deed from the registered mortgage and the Title Deed on the disputed property was indeed discharged from the said mortgage.

Alls.

The discharge form and a copy of memorandum of satisfaction, were admitted in Court as Exhibit P5 collectively, while a Certificate of Title on suit property was admitted as Exhibit P6.

PW1 stated that despite the plaintiff's efforts, the defendant failed to perform his party to the contract including availing the plaintiff with the transfer documents, and refusing to give vacant possession of the suit property. That, the defendant refused to comply with the terms of agreement despite several reminders for number of years. Hence, on 27/12/2019, the plaintiff sent a letter to the defendant's Managing Director, which was received, the letter was requiring the defendant to comply with the agreed terms which the defendant did not, therefore the plaintiffs' Directors resolved to institute the current suit to secure the plaintiff's legal rights.

The letter sent to the defendant and the plaintiff's board resolution to institute a suit against the defendant were admitted in Court as Exhibits P7 and P8 respectively. PW1 concluded that the act of the defendant's failure to honour the terms of agreement has made the plaintiff unable to enjoy the right to use her property and hence she prayed for the Court to grant the reliefs prayed by the plaintiff.

Alls.

Having gone through the evidence presented both oral and documentary, I will now determine the framed issues, the first one being whether the plaintiff is the lawful owner of the suit property.

It is a principle of law that whoever desires a Court to give judgment in his/her favour, he/she must prove that the facts they allege or claim, does exist. This principle law is set under Sections 110 and 112 of the Evidence Act, Cap. 6 R.E 2022. This principle has been emphasized also by case law in numerous cases among them is the case of **Ernest Sebastian Mbele & 2 others**, Civil Appeal No. 66 of 2019, CAT at Iringa, (unreported) where the Court of Appeal held that;

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

Guided by the above principle, on the case at hand, the plaintiff bears the evidential burden to prove her case on a balance of probabilities despite that the hearing was one sided (was ex-parte against the defendant).

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The plaintiff in her evidence through PW1, has established that she has entered a sale agreement with the defendant, where the latter agreed to sell to the former a plot in dispute. The plot in dispute has previously been mortgaged by the defendant as a security at Exim Bank. It was agreed as per the sale agreement admitted as Exhibit D2 that the purchaser (the plaintiff) shall pay the entire purchase price to Exim Bank to discharge the said mortgage.

The plaintiff went on to pay the said purchase price, a total of USD 1,600,000. This is clearly seen in the Bank statement of the plaintiff (Exhibit P3) in her account at Azania Bank where it shows that on 16/5/2016 the plaintiff transferred by TISS an amount of UDS 800,000/= from her Azania Bank account to the defendant Dipsi Conpro Ltd. Again on 03/12/2016, the plaintiff transferred by TISS, an amount of USD 800,000 to the defendant, making a total of USD 1,600,000, which is the agreed purchase price.

To confirm that the said amount was paid, Exim Bank, released the security and handed over the original Certificate of Occupancy of the plot in dispute to the plaintiff, also the property was discharged from the mortgage, as evidenced by Exhibit P4.

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It is trite law under Section 37 of the Law of Contract Act, Cap 345 R.E 2019 that parties to an agreement or contract, are bound by the terms of their agreement. Hence, since the defendant has voluntarily sold the plot in dispute, and the plaintiff has fulfilled his obligation by paying the purchase price as agreed, then the ownership of the plot in dispute has shifted from the defendant to the plaintiff by right of purchase. The plaintiff is currently in custody of the certificate of occupancy of the plot in dispute, having gotten it after paying the purchase price as agreed.

From the whole of evidence, this Court has been satisfied that the plaintiff legally purchased the plot in dispute from the defendant, hence he is the lawful owner of the same. The first issue is answered in the affirmative.

The second issue is on the reliefs' entitlement of the parties. The plaintiff have prayed to be declared the lawful owner of the plot in dispute. Since she has established on a balance of probability that she lawfully bought/purchased the plot in dispute from the defendant, she is entitled to the ownership of the said plot. The defendant is bound by the terms of the sale agreement to fulfill his obligation as a vendor and hand over all the documents necessary for the plaintiff to process and complete the transfer of Title of ownership from its current name to the name of the

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plaintiff as per the terms of the sale agreement. I find also that the plaintiff is entitled to the vacant possession of the plot in dispute as its lawful owner. She is also entitled to the costs of this suit.

The plaintiff have prayed for payment of general damages to be assessed by the Court. She has left the assessment of general damages to the discretion of the Court as she did not propose how much to be awarded. In the case of **Antony Ngoo and Another vs. Kitinda Kimaro**, Civil Appeal No. 25 of 2014 (unreported), the Court held that;

"The law is settled that general damages are awarded by the trial Judge after consideration and deliberation on the evidence able to justify the award. The judge has discretion in the award of general damages. However, the Judge must assign a reason ..."

Basing on the above principle set in the cited case, this Court has to assess the general damages basing on the evidence by the plaintiff. Unfortunately, there is no scintilla of evidence which was established by the plaintiff which could enable the Court to assess the damages and hence exercise its discretion and award the plaintiff the claimed general damage. *Aille.*

There is no evidence of whether or how the plaintiff have suffered any damage by the defendant's acts of breach of terms of the sale agreement. The plaintiff has merely claimed in the plaint that the non-compliance of the terms of sale agreement by the defendant has occasioned loss to the plaintiff as she has failed to use plot in dispute for her own use in a day to day business transactions.

However, in her evidence, the plaintiff has failed to show how the claimed loss has been occasioned and what kind of use of the plot in dispute the plaintiff has planned and failed due to the acts of the defendant. The Court was never told whether the plot in dispute is a residential, business or industrial building. The Court was left in total darkness on the claims of loss by the plaintiff. In the circumstances, the Court cannot award the relief which is/ are based on mere passing words without any proof. The Court will not grant the claimed general damages as there is no base upon which to asses and award the same.

Having considered the relief entitlement by the plaintiff, I also find that the defendant have no any entitlement and I proceed to enter the judgment in favour of the plaintiff.

In upshot, I hereby orders as follows;

A handwritten signature in black ink, appearing to read "Aelle".

1. It is declared that the plaintiff is the lawful owner of the piece and parcel of land located on Plot No. 2012 Block L Mbagala Area in Temeke Municipal, Dar es Salaam with Title Deed No. 86345.
2. Order the defendant, or her agents, assignee or any person holding any rights on behalf of the defendant on the plot in dispute, to give vacant possession of the same to the plaintiff.
3. Costs of this suit shall be borne by the defendant.

It is so ordered.

Right of appeal expressly explained.



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A. MSAFIRI

JUDGE

29/9/2023

