

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 315 OF 2023

(Originating from Land Application No. 103 of 2021 of the District Land and Housing Tribunal of Kinondoni at Mwananyamala delivered on 30th June 2023 by Hon. Mwakibuja, Chairperson)

REINFRIDA SKEETER EMMANUEL

(As legal representative of

EMMANUEL STANSLAUS MBANDOAPPELANT

VERSUS

MILACHEM TANZANIA LIMITED RESPONDENT

JUDGMENT

Date of last Order: 17/10/2023

Date of Judgment: 27/10/2023

A. MSAFIRI, J.

The appellant hereinabove having been dissatisfied with the judgment and decree of the District Land and Housing Tribunal of Kinondoni at Mwananyamala (herein as the trial Tribunal) in Land Application No. 103 of 2021 which was delivered on 30/6/2023, has appealed to this Court and advanced six (6) grounds of appeal namely;

- 1. That, the trial Chairperson erred in law and fact by failing to consider the agreed terms stated in Exhibit P5 and P6.*

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2. *That, the trial Chairperson erred in law and fact by compelling the Appellant to receive the amount of Tshs.10,178,058.00 as the remaining purchase price.*
3. *That, the trial Chairperson erred in law and fact by declaring the respondent as the lawful owner of Plot No. 573, Block 10, Sukari Street, Mwananyamala "A" Kinondoni Dar es Salaam with Title No. 49110 while the consideration was not paid in full.*
4. *That, the Honourable trial Chairperson erred in law and fact by awarding compensation of Tshs. 56,800,000/= to the respondent without any proof.*
5. *That, the Honourable trial Chairperson erred in law and fact by not considering the evidence adduced by the respondent, DW2 and DW3 during the trial.*
6. *That, the Honourable trial Chairperson erred in law and fact by not stating specifically the reliefs granted to the respondent in the judgment and decree.*

The appellant prayed for the court's order to nullify the proceedings and quash the judgment of the trial Tribunal.

The appeal was heard by way of written submissions whereby the submission in chief by the appellant was drawn and filed by Mr. Erick Kamugisha Rweyemamu, learned advocate for the appellant and the reply submission by the respondent was drawn and filed by Mr. Mbuga Emmanuel, learned advocate for the respondent. There was no rejoinder.

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Before going through the submissions, the brief back ground of the dispute is apposite.

According to the record of the proceedings before the trial Tribunal, the appellant herein is the administratrix of the estate of the late Emmanuel Stanslaus Mbandu. She mortgaged a suit property described as Plot No. 573, Block 10, located along Sukari Street, Mwananyamala A, Kinondoni District, Dar es Salaam, to secure a loan facility from EFC Tanzania Microfinance Bank Ltd (herein as EFC Bank). However the appellant defaulted on payment and the suit property was at the risk of being disposed of hence she entered an agreement with the respondent herein to sell the property to the respondent. The agreed purchase price was Tshs. 100,000,000.00 and the same was to be paid in instalments.

The two parties signed a sale agreement where the appellant received first Tsh.30,000,000.00, and later Tshs.13,500,000.00. The amount of Tshs. 46,321,946.00 was deposited in the account as directed by EFC Bank to clear the outstanding debt which the appellant owed the said Bank. The remaining unpaid amount was Tshs. 10,178,054.00 which the respondent claims the appellant has been avoiding to receive from the respondent, and the appellant has refused to endorse the documents

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for the transfer of ownership of the suit property in the name of the respondent.

Following the appellant's refusal to heed to her contractual obligations, the respondent decided to institute a suit against the appellant at the trial Tribunal, an Application No.103 of 2021 seeking among other reliefs, for the Tribunal's declaration that she was the lawful owner of the suit property, and vacant possession to her and that the appellant be compelled to receive the outstanding balance as an enforcement of the sale agreement.

On her part, the now appellant who was then the respondent denied vehemently the claims of the then applicant and stated that there was no mutual agreement reached between the applicant and the respondent due to the fact that the consent from the beneficiaries of the estate of the late Stanslaus Mbandu was not obtained regarding the sale of the disputed property. And that she has no capacity to enter into the sale agreement without obtaining the beneficiaries consent.

The trial Tribunal having heard the Application, granted the Application with costs in favour of the applicant (now respondent). The then respondent was aggrieved and has lodged this appeal challenging the decision of the trial Tribunal.

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In determining this appeal, I will not reproduce all what was submitted by the learned advocates of the parties but I have well considered them. Hence I will go to the determination of the grounds of appeal as they were presented in this Court.

In the first ground, Mr. Rweyemamu submitted that the trial Chairperson erred when he failed to consider the agreed terms stated in Exhibit P5 and P6 by which the said exhibits were the sale agreement which was entered between the two parties (appellant and the respondent) on 15/3/2020, particularly on clause 4 of the said agreement.

That, the trial Chairperson was supposed to award the reliefs basing on the default clause enshrined in exhibits P5 and P6 as agreed by parties. That by not considering the terms of the said clause, the trial Chairperson made a gross error and that the trial Chairperson's decision was not specific on which relief the respondent was entitled.

Mr. Mbuga, replying on the 1st ground, submitted that, this ground of appeal cannot stand as it is the new fact which has been raised at the appeal stage. He said that, looking at the pleadings at the trial Tribunal, the only defense the appellant raised was that the appellant did not seek the consent of the beneficiaries when entering agreement with the *Alle*.

respondent hence the agreement was not executable. That, this new ground was not even the issue before the trial Tribunal.

In alternative, Mr. Mbuga submitted further that, during the trial, both parties agreed that the reason why the appellant did not want to receive the remaining amount of Tshs. 10 Million is that she did not have consent of the beneficiaries. And the appellant when being cross examined, admitted that the issue of payment was not an issue. That, it was the appellant who prevented respondent from paying the remaining sum.

He pointed that under Section 53 of the Law of the Contract Act, Cap 345 R.E 2019, it is provided that where a person prevents another person from discharging his duty then the contract becomes voidable but at the option of that person and that he is entitled to compensation.

Mr. Mbuga argued that the option whether to continue or not to continue with the contract is the option of the respondent who was prevented from discharging his promises. That that was the reason the respondent sought decree for specific performance mainly to order the appellant to receive the remaining balance of Tshs. 10,178,064.00.

In determination of this 1st ground, I read the records of the trial Tribunal specifically on Exhibits P5 and P6 which is the same document, *Atle*

the sale agreement between Reinfrida Emmanuel Mbando (the administrator of the estate of the late Emmanuel Stanslaus Mmbando). The claimed clause 4 which is the default clause in the sale agreement read as follows;

4. DEFAULT CLAUSE

In addition to what is elucidated in paragraph 1, and 3 herein, the parties hereto further agrees that;

- a. That the purchaser, having presented himself as having capacity and desire to purchase the property, and having conducted legal due diligence on the property, shall purchase the property in accordance to the terms set out herein. Failure to purchase, other than by virtue of breach by the owners, shall entitle the owners to forfeit the advance payment.*
- b. The vendor having presented themselves as having capacity and mandate to cause execution of the sale agreement, shall have a duty to do so. In the event of failure to cause execution of the sale agreement as envisaged herein the owners shall refund all the advanced payment.*

The appellant's argument is that the trial Chairperson erred in law and fact by failing to consider the terms of herein above default clause.

According to the appellant, the trial Tribunal, having found that there is

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breach of the sale agreement on her party, it should have then ordered the appellant to reimburse the respondent on the amount paid.

It is trite law that parties are bound by their terms of agreement and the Court will not interfere except in enforcement of the terms of that agreement. In this I am guided by the provisions of Section 37(1) of the Law of Contract Act (supra) which provides that an agreement entered by parties is binding upon the said parties. This principle of law has been elaborated further in numerous cases by the Court of Appeal and even this Court. To name few, this principle of law was observed in the case of **Mariam E. Maro vs. Bank of Tanzania**, Civil Appeal No. 22 of 2017 [2020] TZCA 1789, where the Court of Appeal held thus;

"It is the law that parties are bound by the terms of the agreement they freely enter into...."

During the proceedings at the trial Tribunal, among the reliefs sought by the applicant who is now the respondent is for an order of the Tribunal to compel the respondent to receive balance of an outstanding amount of Tshs. 10,178,064.00 as an enforcement of the sale agreement.

Hence, here the duty of the trial Tribunal was to enforce the clauses of the sale agreement since the parties to the agreement are in dispute.

See also the case of **Unilever Tanzania Ltd vs. Benedict Mkasa t/a**

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Bema Enterprises, Civil Appeal No. 41 of 2009, CAT at DSM (unreported) where it was held that it is not the role of the courts to redraft clauses in agreements but to enforce those clauses where parties are in dispute.

Also in the Black's Law Dictionary, 8th Edition at page 1435 the term "specific performance" is defined as;

" an equitable remedy in the law of contract whereby a court issues an order requiring a party to perform specific act, such as to complete performance of the contract."

Hence in the present matter, the role of the Tribunal was to enforce the specific performance of the terms of the sale agreement as it was among the reliefs pleaded by the applicant.

During the trial, the evidence on record shows that, the applicant (now respondent) successfully established that she adhered to the terms of sale agreement entered between the parties. That she paid Tshs.46,321,946.00 to EFC Bank to clear the loan which the appellant owed the EFC Bank. The money was part of consideration of sale. The payment was made by swift as it was proved by Exhibit P3 collectively. This payment was not disputed by the appellant during the trial. *Alle*

Furthermore, the then applicant through her witness one Chankani Mapenzi Mhina (PW2) who stated to be a Director of the applicant, adduced evidence that there was a sale agreement between the parties where the plaintiff purchased the suit property for consideration of Tshs One Hundred Million only. That the respondent through PW1 paid 30 Million to the appellant as first instalment. That it was agreed that the remaining 70 Million will be paid upon the appellant's hand over of the Title Deed of the suit property. PW2 stated that the appellant had an outstanding facility at EFC Bank and the respondent paid the whole sum through her Bank, KCB. Then later PW2 paid a total of Tshs. 13,500,00/= to the appellant. He tendered the payment voucher which was signed by the appellant and it was admitted as Exhibit P7. And the amount remaining is Tshs.10,178,064.00 which the appellant has refused to receive claiming that the beneficiaries of the suit property did not consent the sale.

In her evidence, among other things the appellant testifying as DW1, she agreed to enter sale agreement with the respondent on the suit property as per exhibit P6. She admitted to receive money as consideration from the appellant, Tshs. 13.5 Million, Tshs.11 Million and 46 Million which was deposited to her account at EFC Bank where she had

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a loan. However she argued that the beneficiaries of the estate of Emmanuel Mbando refused to sign the agreement. She stated further according to Exhibit P6, there was breach of agreement hence she is ready to refund the money as per the terms of the agreement.

Did the trial Chairperson erred to enforce the performance of the sale agreement? It is my finding that the trial Chairperson did not error in his findings and decision. In his analysis, the trial Chairperson found that the appellant was in breach of the sale agreement as she has refused to receive the remaining sum and has refused to sign the transfer documents despite the fact that she admits to receive a total of Tshs. 70,500,000.00 out of agreed Tshs. 100,000,000.00.

From this, the trial Chairperson decision to grant the reliefs sought by the respondent was right and correct in law. Performing its duty as a court of law, the trial Tribunal having determined the dispute between the two parties to the agreement, performed its duty of enforcing the parties to perform the agreement which includes each party executing their obligations as per the agreed terms.

It trite law that a party seeking equity should come to equity with clean hands. I find the conducts of the appellant not to be clean as it is obvious that she breached the terms of the agreement purposefully and

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stated that she is ready to refund the respondent. However, the respondent cannot be allowed to benefit from her own wrongs as allowing that will make this Court to be part to the blessing of such wrongful acts. I say so for the reason that the appellant willingly and voluntarily entered into an agreement of sale with the respondent. She received the money as consideration from the respondent, and even the respondent cleared the loan of the appellant at EFC Bank. The respondent did all that expecting the appellant to honour her part of the agreement. It is my view that in the circumstances, the trial Chairperson was correct in law to grant the sought relief.

I am also of the view that the trial Chairperson was correct not to consider the default clause No.4 as what he did was to look at the agreement as a whole and not only the stated clause. On the sale agreement as a whole, each party has a duty to perform the terms of the agreement and what the trial Chairperson did was to enforce the specific performance of the whole agreement.

Having reasoned that, I find the 1st ground of appeal to have no merit and I dismiss it.

On the 2nd ground, the counsel for the appellant Mr. Rweyemamu submitted that the trial Chairperson erred in law and fact by compelling

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the appellant to receive the amount of Tshs.10,178,064.00 as the remaining amount of purchase price. That the trial Tribunal has no jurisdiction to compel any party in dispute to receive the remaining balance. That the whole of Part V of the Land Disputes Courts Act, Cap 216 R.E 216 does not provide such jurisdiction to the trial Chairperson. That, this is due to the fact that the parties to the agreement has already agreed on the mode of payment. That, the respondent was supposed to pay the remaining amount to the appellant as per their agreement on mode of payment and it was not the duty of the trial Tribunal to compel the appellant to receive the amount.

Mr. Mbuga replied on the 2nd ground that the trial Tribunal has jurisdiction on land matters as per Section 34 of the Land Disputes Courts Act. That the appellant having blocked the respondent to perform his obligation, the contract becomes voidable at the option of the respondent whether to seek damages or specific performance so that the Tribunal can issue a specific performance decree for the appellant to comply. The counsel cited the case of **Unilever Tanzania Ltd vs. Benedict Mkasa(supra)** where the Court of Appeal provided among other things that the court has power to enforce performance of agreement. *Adelle*

This will not take much of my time as I have already discussed the issue of power of the court to enforce parties to performance of their agreement. While determining 1st ground of appeal it was my finding basing on the principle of law set in the provisions of the Law of Contract Act and case law that parties are bound by their agreements but the court have powers, when parties are in dispute over the said agreements, to enforce the performance of the agreements.

In this I firmly believe that the trial Tribunal had jurisdiction and powers to compel the appellant to perform her obligations in the agreement which she has entered willingly and voluntarily. I also find this ground to have no merit and I dismiss it.

On the 3rd ground of appeal, Mr. Rweyemamu submitted that the trial Chairperson erred by declaring the respondent as the lawful owner of the suit property while the consideration was not paid in full. That the respondent breached the sale agreement by failing to adhere to the provision of Section 10 of the Law of Contract on the terms of consideration. That, according to sale agreement, the consideration is Tshs 10,000,000.00 which was supposed to be paid into two instalments. The first instalment was Tshs. 30 Million which was paid on the date of execution and the second instalment was 70 Million which was to be paid

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upon the discharge of the Title Deed by EFC Bank and delivered to the respondent.

That, the respondent filed the case while the respondent has not been paid the consideration in full. That by failing to pay the remaining balance in full, the respondent breached the sale agreement.

In response, Mr. Mbuga submitted that according to the evidence in Exhibit P6, the sale agreement shows that the respondent paid the appellant Tshs. 30 Million on the date of signing the agreement and that this was not disputed by the appellant. Also the evidence shows that the respondent paid Tshs. 46,321,946 which was paid at EFC Bank to clear the appellant's loan at the said Bank. The appellant admitted that during the trial. The appellant also admitted to receive Tshs. 13,500,000 from the respondent. This total the amount of Tshs. 89,821,946.00 which the appellant received as consideration of the sale.

Mr. Mbuga argued that the reason the respondent failed to pay the remaining balance is on the lower Tribunal's evidence that the appellant refused to receive the money claiming that she has no consent of beneficiaries to sell the suit property. He said that it was the appellant who prevented the respondent from paying the remaining balance for the reasons which are not good in law. That, the ownership pronounced by *Atle*.

the Tribunal was subject to specific performance of the remaining amount to be paid by the respondent and received by the appellant.

Exhibit P6 which is the sale agreement shows the mode of payment of the purchase price which was Tsh. 100,000,000.00. It shows that, Tshs 30,000,000.00 was paid on the date of signing the agreement and the vendor (appellant) acknowledged the receipt. It also shows that Tshs.70,000,000.00 was to be paid upon the consent for the title deed of the property is discharged by the EFC Bank and delivered to the purchaser. It is in evidence that after the amount of Tshs. 46,321,946 was paid to EFC, the Bank released the Title. By that time the remaining balance was Tshs 10,178,064.00 which the evidence adduced during the trial shows that the appellant refused to receive on ground of lack of consent from the beneficiaries.

It is my view that the sale agreement did not specify the timeline for the payment of the consideration. Furthermore, the appellant has already consented to their mode of payment as she agreed to receive the consideration in instalments until remained the last balance when she came with a reason of consent of the beneficiaries.

Having gone through the evidence adduced in trial, the mode of payment has never been in dispute between the parties but rather the *Appellee*.

last minute change of heart of the appellant after having received a large part of agreed purchase price with reason of the consent of beneficiaries. On the issue of the consent of the beneficiaries, I agree with the findings of the trial Chairperson that the evidence shows that the beneficiaries were aware of the sale and I agree with it. I again agree with the trial Chairperson's findings that even if there could not be consent of the beneficiaries, the appellant as the administrator had legal mandate to enter sale agreement and that it is not the requirement of the law to seek consent from beneficiaries before selling the property in the estate.

I find that the trial Chairperson did not error to declare the respondent the owner of suit property as the Tribunal was using its powers to compel the parties to perform the agreement. The Tribunal has also compelled the appellant to receive the remaining balance so that what follows was for the respondent to acquire ownership of suit property as per the purpose of the sale agreement. The 3rd ground has no merit and is hereby dismissed.

Before determining the 4th and 6th grounds of appeal together as I find them to relate on the same issue, I will determine the 5th ground where Mr. Rweyemamu submitted that, before signing the purported sale agreement, the respondent ought to have obtained the beneficiary

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consent because the property in dispute is the property of the deceased named Emmanuel Stanslaus Mbando. That the trial Chairperson did not consider the evidence of DW1 and DW3 and the respondent during the trial who testified that all beneficiaries of the said estate did not consent the sale. He added that on Exhibit P6, the appellant signed in her individual capacity not as an administratrix.

Mr. Mbuga contested the above submissions and stated that it is trite law that when the administrator is entering a sale agreement he or she do not require the consent of the beneficiaries. He referred the Court to the cases of **Said Mpambije Kamaga & Another vs. Nyamende Swetu Fundikira & 3 others**, Civil Appeal No. 430 of 2022 (Tanzlii).

Again I have already discussed the issue of consent of beneficiaries when determining the 3rd ground of appeal where I joined hands with the trial Chairperson that it is not the requirement of the law for the administrator to seek consent of the beneficiaries when entering the sale agreement. Hence it is also not the requirement of the buyer to seek consent of the beneficiaries when buying a property.

About the claim by the appellant that she signed the sale agreement in her individual capacity, I find the claim to be baseless and misconceived as the sale agreement at Exhibit P6 shows clearly that the sale agreement

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was between Reinfrida Emmanuel Mmbando (Administrator of the estate of Emmanuel Stanislaus Mmbando) and Milachem Tanzania Ltd. P.O.Box 33638, Dar es Salaam.

I find this ground of appeal to have no merit and it is also dismissed.

As already said, the 4th and 6th ground of appeal will be determined in consolidation. In the said grounds, Mr. Rweyemamu submitted that the trial Chairperson erred by awarding compensation of Tshs. 56,800,000/= to the respondent without proof. That the respondent neither produced nor tendered any document to prove his claims of specific damage.

Mr Rweyemamu also submitted that the trial Chairperson erred by not stating specifically the reliefs granted to the respondent in the judgment and decree. He cited the case of **Biscut Njau & Francis Mbowe vs. Harith Hanafi Mhina**, Land Appeal No. 8 of 2022, HC Tanga which states that a judgment must specifically state which relief is granted.

In reply, Mr. Mbuga replied only on the 6th ground and argued that the cited case of **Biscuit Njau(supra)** cited by the counsel for the appellant is distinguishable from the current case as in the latter case, all reliefs sought by the respondent were granted and the decree shows that the reliefs are granted. *Alle*

Beginning with the award of specific performance of Tshs.56,800,000/= which the respondent has pleaded and was granted by the trial Tribunal, it is trite law that specific damages has to strictly be proved. This was emphasized in the Court of Appeal case of **Peter Joseph Kilibika & one another vs. Patric Aloyce Mlingi**, Civil Appeal No.37 of 2009, CAT at Tabora (Unreported) where it was held that the law is very clear that special damages must be proved specifically and strictly. The Court of Appeal further reiterated their decision in the previous case of **Zuberi Augustino vs Anicet Mugabe**, [1992] TLR 137 (CA) at page 139 where it was held that;

"It is trite law and we need not cite any authority, that special damages must be specifically pleaded and proved."

Guided by the above principle of law, it was mandatory in the instant matter during the trial that having claimed to be paid specific damages, the respondent had duty to prove the claims. However, I have read the proceedings and satisfy myself that there is no evidence by the respondent to prove how she has suffered and hence entitled to the claimed damages. Even the trial Tribunal in its analysis of evidence and findings, did not show how it has reached to the conclusion of awarding the respondent the claimed specific damages. I agree with the *Adls.*

submissions by the counsel for the appellant on the 4th ground of appeal that the specific damages awarded was not proved.

For that reason, I find the 4th ground to have merit and I allow it.

On the 5th ground on the issue of the judgment and decree not specifically stating the reliefs granted, I find the same not to be fatal as to render the judgment and decree of the trial Tribunal a nullity. It is shown in the judgment at page 22 that the reliefs are granted as prayed...

"Hivyo Baraza linatoa nafuu kama zilivyoombwa na Mdai ambaye amepata hasara kwa kitendo cha Mdaiwa kuvunja Mkataba bila sababu zozote za kisheria"

In the Decree, the reliefs prayed are listed and then it is stated as follows;


"Maombi yamekubaliwa kwa gharama"

It is my view that the judgment and decree in the present matter were not ambiguous as it was found in the cited case of **Biscuit Njau(supra)**. The trial Chairperson clearly stated that the reliefs are granted as claimed. This means that the trial Tribunal has granted all the reliefs claimed by the respondent. I also dismiss this ground of appeal. *Atle*

In upshot and foregoing reasons this appeal fails as all grounds of appeal are dismissed except for the 4th ground of appeal which is allowed. The appeal is dismissed but on the 4th ground, the specific damages awarded by the trial Tribunal are hereby quashed and set aside. The rest of the awards as granted by the trial Tribunal remains intact.

Costs of the appeal to be borne by the appellant.

It is so ordered.

 *A. Msafiri*
A.MSAFIRI
JUDGE
27/10/2023