

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO. 198 OF 2022**

**SALILI MIKIDADI MOHAMED (as the
Administratrix of the estate of the late
FUAD KIPANDE MUSSA PLAINTIFF**

VERSUS

SAID HAMIAR MOHAMED DEFENDANT

JUDGMENT

Date of last Order: 17/10/2023

Date of Judgment: 06/11/2023

A. MSAFIRI, J.

The plaintiff have instituted this suit against the defendant claiming that the defendant has breached his fundamental contractual obligations to construct eight storeyed building on Plot No. 2, Block 34 at Nyamwezi Street, Kariakoo Area, Ilala District, Dar es Salaam. That the defendant has furthermore breached agreed division of the said building. The plaintiff prays for the termination of contract caused by the said breach. The plaintiff also prays for the removal of the defendant's name from the Title Deed as the co-owner of the said building, an order for eviction of the defendant from the land in dispute

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and permanent injunction restraining the defendant from interfering anyhow in the said building, payment of damages and costs of this suit.

The defendant filed his written statement of defence in which he denied each and every claim against him by the plaintiff in the plaint. He also filed a counterclaim against the plaintiff in which he claimed for the total payment of TZS 3,337,600.00, which is TZS 2,800,000/= being cost of erecting the building in Plot No. 2 Block 34 Nyamwezi Street, Kariakoo, Dar es Salaam and expected rent of TZS 537,600,000/=, being the rent that the plaintiff in the counterclaim could have collected from the date he was stopped from construction of the building to date.

He prayed that the plaintiff's case be dismissed with cost and his claim in the counterclaim be granted.

The main case and counterclaim were heard together and will also be determined and decided at the same time.

At the hearing, the plaintiff was represented by Mr. James Bwana, learned advocate while the defendant was represented by Mr. Josephat Mabula, learned advocate. Before the commencement of the hearing, five issues were framed by the Court as agreed by parties. The same are as follows;

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1. Whether the defendant breached the construction agreement entered between him and Salum Mussa Kipande and Fuad Kipande Mussa on the suit property.
2. Whether the injunction by the District Land and Housing Tribunal of Ilala in Land Case No. 286 of 2019 was a frustrating event in the said construction agreement.
3. Whether the plaintiff's complaint is still valid after the addendum contract which was entered on 31st October 2022.
4. Whether the plaintiff in counterclaim has experienced loss of rent which he could have collected from the date the construction of the building was stopped, to date.
5. To what reliefs are parties entitled to.

On 10/8/2023 the hearing of the suit took off with the plaintiff's case. The plaintiff side had one witness who is the plaintiff herself Salili Mikidadi Mohamed who has sued as administratrix of the estate of the late Fuad Kipande Mussa. Testifying as PW1 she said that the late Fuad Kipande Mussa was her biological mother who passed away in 29/4/2009. That when she died, one Mikidadi Mohamed Mgeni who is the plaintiff's biological father was appointed to be administrator of the estate of the late Fuad Kipande Mussa. She produced a copy of letter of *Atto*.

the said appointment which was admitted as Exhibit P1. That the administration was granted on 02/12/2009 by Kariakoo Primary Court in Probate Cause No. 142 of 2009.

She said that the administratorship of Mikidadi Mohamed was cancelled by the same Kariakoo Primary Court on reasons that the administrator has failed to conduct his duties such as for ten years he was unable to complete his duties and closed the estate. Also the administrator was making decisions about the estate without involving the heirs and beneficiaries of the estate.

PW1 stated that after the said cancellation, she, the plaintiff was appointed the administratrix on 13/01/2023 and she produced a letter of the appointment which was admitted as exhibit P2. She testified further that, during her lifetime, Fuad Kipande Mussa together with her sibling brother Salum Mussa Kipande jointly owned the land on Plot No. 2, Block 34, located at Nyamwezi Street, Kariakoo area. (herein as suit property). That the siblings inherited the property from their father the late Kipande Mussa. That in their joint ownership, the late Fuad and her brother Salum (who is also deceased), entered into Construction Agreement with the defendant Said Hamiar Mohamed to develop the suit property by constructing an eight storeyed building on the property.

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She produced a photocopy of the agreement on the reason that the original one was in the custody of the defendant. The agreement was admitted in Court as exhibit P3.

She said that the agreement was entered between the late Fuad Kipande Mussa and her brother Salum Mussa Kipande on one side and Said Hamiar Mohamed on another side. That, it was agreed by parties that, in consideration of acquiring 60% of the ownership of suit property, the defendant Said Hamiar undertook to construct an eight storeyed modern building on the suit property. The siblings Fuad and Salum remained with 40% of the ownership of suit property.

PW1 said that according to the agreement, the construction was to take effect immediately from the date of commencement of the contract and be completed within two years. That, after the contract was signed and took effect, the suit property was jointly owned by three people namely the defendant who owned 60%, Salum Mussa Kipande owned 26.6% and Fuad Kipande Mussa owned 13.4% of the property. She produced a copy of the Certificate of Right of Occupancy on the reason that the original document was in custody of the defendant. The same was admitted as exhibit P4. PW1 also produced a copy of the building permit which was issued for the purpose of the construction of the

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building at the suit property as per the contract. The photocopy of the permit was also admitted as exhibit P5.

That upon the issuance of building permit, the construction started in 2009. That the construction started whereas the five storeyed building was erected. That in 2010, there was an injunction on the suit property where one Sadikiel Meta has instituted a suit against Kipande Mussa claiming that he has loaned the said Kipande Mussa some amount of money. That, however the suit was dismissed by the District Land and Housing Tribunal of Ilala. She produced the Judgment of the said District Tribunal which was received for judicial notice.

PW1 testified that the defendant has breached the construction agreement as until now the construction is still at the stage of five floors building and the remaining floors are yet to be completed. That the construction has stopped and even the already constructed part have not been finished. That the defendant have failed to hand over to her, the administratrix, the part of ownership of the late Fuad Kipande Mussa. She prayed that the whole ownership of the suit property be reverted to the heirs as the constructor is in breach of the agreement for failure to complete the construction within two years as per the agreement.

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On the counterclaim, PW1 denied vehemently the claims of the defendant against her, the plaintiff. She said that the claims are null and void because the ownership and control of the suit property is in the hands of the defendant until now. That, the defendant is the one collecting rent, and the suit property is in use and has been rented to the tenants by the defendant who pays him.

During cross examination by the counsel for the defendant, PW1 agreed that after the construction agreement, the parties signed a Memorandum of Understanding. She was led to read the contents of the plaintiff's reply to the amended WSD and she admitted that it was agreed in the memorandum of understanding that the construction duration was to take four years from February 2008 to February 2012.

PW1 admitted further that the building permit was issued on 23/3/2009 and that the defendant could not have started construction without building permit. In cross examination, PW1 also agreed that the injunction which was entered by the Ilala District Tribunal in 2010 also affected the building plans of the defendant. She said that she was unaware that there was a counterclaim in the Application No.286 of 2009 which went on and was decided in June 2015.

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She agreed and state that she was appointed the administratix on 13/01/2023 and before that the administrator was her father, Mikidadi Mohamed Mgeni. She said that there has not been handing over between her father, the former administrator and her the current one. She agreed that her father Mikidadi Mohamed was co-administrator with Salum Mussa Kipande. She said that she never knew that the two administrators signed an addendum agreement (Mkataba wa Nyongeza) with the defendant on 31/10/2022 but she admitted to have acknowledged the said agreement in her reply to the amended WSD, but insisted that she has seen the agreement here in Court.

The defendant had three witnesses to defend his case. DW1 was the defendant himself who testified that in 2007 he entered an agreement with Fuad Kipande Mussa and Salum Mussa Kipande of construction of the suit property. He identified and acknowledge the agreement as exhibit P3. That he was the one to construct the eight floors building and the building permit was issued on 23/3/2009. He acknowledged the building permit exhibit P5. He said further that in 2008, he entered a new agreement with Fuad Kipande Mussa and Salum Mussa Kipande, that the terms were the same save for the duration of construction which changed from two years to four years from 2009 to *Alle*

2013. He produced the said agreement which was admitted in Court as exhibit D1.

DW1 said that after getting a building permit in 2009, he started construction of the ground floor where the shops were constructed and completed. Then he was informed by Salum Mussa Kipande that there was an injunction order to stop construction as there was a suit before Ilala District Tribunal. That he got that information on 17/12/2009. That after that, he stopped the construction until 2015 when again Salum Mussa Kipande informed him that the suit has been finalized at the said Tribunal. That after that he restarted the construction in 2015 and it took him six years to construct the building up to fifth floor i.e. from 2015 to 2021. He said that the reason it took him long to build the house was the building expenses which was very high in 2015 to 2021 compared to 2009.

DW1 said that he has built the house up to fifth floor. That the 1st and 2nd floors were completed by 2022. The 3rd and 4th floors were completed in 2023 and the 5th floor has not been finished completely. That finishing of the outside of the building is not complete but it remains only plaster and painting.

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He said that in 2022, he was sued in the current suit by Mikidadi Mohamed Mgeni. That later, they agreed with Mikidadi Mohamed Mgeni to settle the dispute hence they entered an addendum contract on terms and conditions that the defendant should complete finishing the areas of the share owners which were not complete on the house. Another condition was for Mikidadi Mohamed who was then the plaintiff in this case, to withdraw the current case, and after handing over of the shares to the owners, then the beneficiaries/ owners will have no claim on the defendant. He produced the addendum contract which was admitted as exhibit D2.

That, according to exhibit D2, the distribution of the shares on ownership of the suit property were that; the 1st and 3rd floors were taken by Salum Mussa Kipande, Mikidadi Mgeni took the 2nd floor. That after that, the heirs had their percentages by their ownership and they don't claiming anything from the defendant. DW1 stated that as of now he remained with ownership of the 4th, 5th, 6th, and 7th floors which are all incomplete.

He said that he has incurred big loss in construction of the suit property due to the existence of dispute over the property which led

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him to construct the building for a long, unexpected time and hence the building expenses were very high.

DW1 stated that he have failed to achieve the purpose of building on time and the purpose of leasing the premises and get an income on time as expected. That his part of the share on the building is unfinished compared to the heirs whose areas are finished and are now leasing their parts of the premises. He prayed for the Court to order the plaintiff to pay him the claims as per the counterclaim.

In cross examination by the counsel for the plaintiff, DW1 stated that the addendum contract was entered after the institution of the present case. That the heirs of the late Fuad are claiming for their share which have not been completed but now the construction of their area have already been completed and the shares distributed.

He said that on the date of signing of addendum contract, the late Salum Kipande was with his daughter Mwajuma Salum Kipande. That Salum Kipande was sick at that time so his daughter was with him. That in the addendum contract, the late Fuad was represented by Mikidadi Mgeni who was not accompanied by any person. He claimed that Mikidadi told him that he has contacted the heirs of Fuad and asked the heirs to attend but they refused to come. He said that he didn't know

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that the heirs of the late Fuad has instituted a case against the wish of their father Mikidadi, using his name.

DW1 admitted that he has reached an agreement to settle this suit amicably and they even drafted a Deed of Settlement with Mikidadi Mohamed who was the administrator. However before recording the settlement, the administratorship of Mikidadi was revoked and a new administrator was appointed. He said that he has never contacted the new administrator to let her know about the existing addendum contract.

On the counterclaim, DW1 said that he has claims against the heirs of the late Fuad as they have instituted a case against him. He admitted that he have not sued Salum Kipande Mussa for the delay of the construction due to the case at Ilala District Tribunal.

DW2 was Mikidadi Mohamed Mgeni. He said that he knows the defendant as the joint owner of the suit property who has entered an agreement in 2007 with Fuad Mussa Kipande and Salum Kipande Mussa who are now both deceased. He identified in Court the first agreement exhibit P3. He also identified the second agreement exhibit D1 between the parties which was entered in 2008.



He said that he was appointed the administrator of the estate of the late Fuad Kipande Mussa in 2009. That while he was administrator, he was responsible for managing the estate of the late Fuad which is her shares and ownership in the suit property. That as an administrator, he collected shop frames and one floor in the building on suit property. That he was also handed the two construction agreements.

He said further that when he was appointed an administrator, the construction of foundation of the building was already completed and the construction of the 1st floor was ongoing. That, the construction was stopped for ten years from 2009 to 2015 due to the dispute over the suit property. He said that when the construction was stopped all the shops were already completed and they were handed over to them.

DW1 said that in 2022, his son Abuu Mikidadi told him that they want to file a suit to claim their house. He asked them to meet to discuss the matter first before going to Court. That later he met the advocate James Bwana at his office where he signed the plaint after he was made to believe that the matter was not going to be filed in Court but it was just a threat to the defendant Said Hamiar to make him agree to meet for discussion. However, later he was surprised when he heard that his

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children Salili and Abuu have filed this case in Court using the document he DW2 have signed.

He said that after that he came to Dar es Salaam where he met with Said Hamiar, Sheikh Mahmoud, and Salum Mussa Kipande for discussion on how to settle the dispute amicably. That he called his children to come to the meeting but they refused. That at the meeting, they entered an agreement which he identified as exhibit D2, the addendum contract. That in the said contract the distribution was that; the three floors in the building which were complete were given to the partner owners. The 1st and 3rd floors were given to Salum Mussa Kipande, the 2nd floor was given to the late Fuad Kipande, and DW2 received it on behalf as an administrator. He said that the 2nd floor of the building is owned by the heirs of the late Fuad. That as of now what they claim from the defendant is for him to finish the outside wall plaster and painting on the building.

In cross examination, he said that he has been an administrator for fourteen (14 years) from 2009 to 2023. He admitted that he don't know the period of administratorship as he was not told. He said that he has never filed an inventory. He said that he received the three frames which he has handed them over to his children who are the heirs of the estate. *Atte.*

He said that he also gave the heirs a copy of the addendum contract. He admitted that, the construction was for the 8th floor but the building of the said floors has not been completed and that when he visited for the last time, the construction was on 5th floor.

He said that he is ready to take the new administrator to the building and hand over to her the 2nd floor which is the rightful property of the heirs of the late Fuad. He insisted that the building has already been handed over to the said heirs but will take them to show them the said property.

DW3 was Mwajuma Salum Kipande. She said that she is the daughter of the late Salum Kipande who was the joint owner of the suit property. That on 31/10/2022, she participated in the conciliation agreement between Mikidadi Mohamed Mgeni, Said Hamiar and Salum Kipande. That she was in the agreement with her father who was sick by then. That the agreement came after Mikidadi Mohamed has filed a suit in Court over the suit property hence the said parties met for conciliation.

DW3 stated that in the agreement she was a witness of her father Salum Kipande. That in the meeting, Said Hamiar admitted to have delayed the construction and the main reason was that there was a case

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filed in 2009 by Sadikiel Meta against Kipande Mussa. That in the meeting, Said Hamiar agreed to release the finished floors to the heirs and the agreement was signed. The witness identified the agreement as exhibit D2. That after signing the agreement, the parties went at the suit property where Said Hamiar officially handed over the 1st and 2nd floors to Salum Kipande and the 1st floor was handed over to Mikidadi Mgeni. That from that day, the children of Salum Kipande who is now deceased are the owners of the 1st and 3rd floors of the building and they started to collect rent from the said floors. She said that on the share of the late Fuad Kipande, the shares were handed over to Mikidadi Mgeni and she expected the same to have already been handed over to the heirs of the late Fuad.

In cross examination, DW3 said that her father the late Salum Kipande had claims on the suit property but he preferred to sit and negotiate the matter amicably rather than filing a case in court. That the defendant has already talked to them and promised to hand them their property on January 2023. She said further that it was right for the heirs of the late Fuad to institute the current case in court as it was filed before the conciliation/ addendum agreement and after the agreement, Mikidadi Mgeni was supposed to give the heirs their rights.

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Having analysed, as briefly as I can, the evidence which was adduced by both parties to the suit, I have also read the final submissions which was filed by parties through their advocates. I appreciate the analysis and research done by the learned counsels in the said submissions which have been of great assistance and I have well consider them in the determination of this suit.

Having said so, now my duty is to determine the issues which are in dispute. Before I start the determination of the said issues I feel obliged to point the requirement of the law that the one who alleges must prove. This requirement is laid under the provisions of Section 110 of the Evidence Act, Cap 6 R.E 2022.

This principle is further embedded in litany of cases both of this Court and the Court of Appeal. Among the cases is one of **Godfrey Sayi vs. Anna Siame as legal representative of the late of Mary Mndolwa**, Civil Appeal No. 114 of 2014 (unreported) where the Court of Appeal held that;

It is a principle of law that generally in civil cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of Law of Evidence which among other things states that whoever

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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. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person”.

The similar observation was made by the same Court of Appeal in the case of **Ernest Sebastian Mbele vs. Sebastian Mbele and others**, Civil Appeal No. 66 of 2019, CAT at Iringa (Unreported), the case which was referred to me by the counsel for the plaintiff in the final submission. Basing on that requirement of the law, it is the duty of the plaintiff who have to prove his case on the balance of probability.

It is my view that the first, second and third issues are interrelated hence I will determine them jointly.

The first issue is whether the defendant breached the construction agreement entered between him and Salum Mussa Kipande and Fuad Kipande Mussa on the suit property. The plaintiff claims in the amended plaint that the defendant has breached his fundamental contractual obligations to construct eight storeyed building on the suit property and that the defendant has breached the agreed division of the said building. On his defence and counterclaim the defendant claims that in the course

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of erecting the building, there was an injunction from Ilala District Land and Housing Tribunal in Land Application No.286 of 2009 between Sadikiel Meta vs Kipande Musa, the father of Fuad Kipande Mussa and Salum Kipande Musa, hence all that which were agreed in the construction agreement of 25/02/2008 could not be effected due to that interference.

There is no dispute that there was a construction agreement which was entered by the said parties as per exhibit P3. According to exhibit P3 the constructor, who is the defendant was to start immediately the construction which was to be completed within two years. Clause 9 of the agreement Exhibit P3 provides thus; "*ujenzi utanza haraka iwezekanavyo na kumalizika chini ya miaka miwili*". Meaning that the construction will commence immediately and been completed under the time of two years. The agreement is not clear when the time "immediately" starts or when does the time "under two years" starts to be counted. However according to the evidence adduced in Court by parties, it was assumed that the construction was to commence immediately upon signing the agreement and since the agreement was signed on 13/9/2007, then it was assumed again that the two years were to end on 2009.

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Hence in my observation, the first construction agreement was itself ambiguous as it did not lay down clearly the timeline of the construction. However, since it is not the duty of this Court to interpret the terms of the agreement, I will go on looking into the dispute surrounding the suit property.

It seems the parties had overlooked about the legal and mandatory requirement of acquiring a building permit before construction especially in the registered land. It was until 23/3/2009 when Salum Mussa Kipande, Fuad Kipande Mussa and Said Hamiar Mohamed managed to get the building permit from Ilala Municipal Council. Hence the former agreement of completing the construction within two years from 2007 could not be effected.

The parties entered a Memorandum of Mutual Understanding on 25/02/2008. In the Memorandum, it was agreed that the construction of ground floor and seven storeyed building shall be done within four years from the date of execution of the agreement which was 25/02/2008. It was agreed further that on completion of the said building, Salum Mussa Kipande will get one shop at the forefront on ground floor with the 4th and 5th floors, Fuad Kipande Mussa will also get one shop at the forefront of the premises with the 3rd floor and Said

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Hamiar will get two shops at the forefront together with the 1st, 2nd, 6th and 7th floors.

However, since the building permit was released on 23/3/2009, the construction could not have started on 25/02/2008 as it was agreed. After receiving the building permit, according to the evidence of the defendant, the construction started in 2009 but it was frustrated in 2010 when there was an injunctive order by the Ilala District Tribunal following the institution of a case by one Sadikiel Meta against the original owner of the suit property Kipande Mussa. According to the judgment on that case which was Application No. 286 of 2009 which was received in this Court for judicial notice, the construction commenced in June 2009 but it was stopped on 18/01/2010 for reason of injunction orders. However, as per the said judgment, the main case which was filed by Sadikiel Meta was withdrawn by him on 20/12/2010. Therefore, the construction of the suit premises was obstructed from 18/01/2010 to 20/12/2010 when the main case was withdrawn.

The defendant in his evidence as DW1 claimed that he could not continue with the construction until 26/6/2015 when the Application No. 286 of 2009 was finalized by the judgment which was delivered in 2015.



I have read the said judgment. It shows that when Sadikiel Meta instituted Application No. 286 of 2009, the respondent Kipande Mussa in response also filed a counterclaim. Hence when Sadikiel Meta withdrew the main case on 20/12/2010, the counterclaim remained pending in the Tribunal where it was heard and judgment was delivered in 2015. The purported injunction which stopped the defendant from construction was issued in the main case hence it ended when the main case was withdrawn. This is clearly shown at pages 3, 4, and 5 of the judgment on counterclaim where it was held that the injunction orders only affected the period from 18/01/2010 to 20/12/2010 and that there was no injunctive orders sought by the respondent in the counterclaim.

The defendant has stated that since he was not a party to the suit in the District Tribunal he had no way of knowing that that the main case was withdrawn and that there was no longer an injunctive order on the suit property. Also he said that the notice of injunction was affixed on the walls of the building on the suit property. He claimed that his only source of information was Salum Kipande who told him in 2015 that the case has come to finality hence he could now continue with the construction. However since Salum Kipande Mussa is now deceased, there remains the words of the defendant that he did not know of the

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progress of the case which has caused an injunctive orders to be entered on the suit property.

It is my finding that since there was an injunction order which came out of the Application No. 286 of 2009 between Sadikiel Meta and Kipande Mussa, and which the defendant was not a party, then there is a probability that the defendant could not have known that the injunctive order has expired since 20/12/2010 and there was no any other order to obstruct him from going on with the construction. I have seen the judgment which held that the injunction order existed for about twelve months only i.e. from 18/01/2010 to 20/12/2010 but this judgment was delivered in 24/6/2015. Hence if the parties to the suit got the judgment in 2015, then the defendant got the information that there was no longer an injunction on the suit premises in 2015.

I have read the final submission of the plaintiff by her counsel Mr. Bwana. In the submission, the counsel has referred this Court to the case of **Hon. Andrew John Chenge vs. The Public leaders' Ethics Secretariat and two others**, Misc. Civil Cause No. 18 of 2015, HC at DSM where a bench of three Hon Judges of this Court quoted the decision of the Court of Appeal in the case of **The National Bank of Commerce vs. Dar es Salaam Education and office Stationery**



(1995)TLR where in the said case, the High Court had issued a temporary injunction against a stranger to the suit. The Court of Appeal agreed that such an order cannot be issued against a stranger to the suit.

The High Court in the case of **Hon. Andrew John Chenge(supra)**, agreeing with the observation of the Court of Appeal, elaborated further thus;

"Conversely, much as a stranger to a suit cannot be bound by a temporary injunction, it being an equitable principle that does not attach to the rem but rather personum, so can't a stranger claim to benefit from such an order."

I wholly agree with the above principle which to sum it up it set that a stranger to a suit is not bound by a temporary injunction ordered in that particular suit. With this, the counsel for the plaintiff has contended that this principle on temporary injunction goes against the defendant's allegations of being frustrated by an injunction order which was issued in Application No 286 of 2009 which he was not a party.

However, I am of the view that the circumstances in the cited case might have been different from the circumstances in Application No. 286 of 2009. In the latter case, the injunction order was issued against the *Atle*.

Applicant in the case who was Kipande Mussa from carrying on any construction activities in the suit premises. It is to be noted that by that time the heirs of Kipande Mussa has already entered an agreement with the defendant to construct the building on the suit premises hence the Tribunal injunction order directly affected the construction. The defendant could not have carried on with the construction on the reason that he was not a party to the suit. This is because since the injunction was issued against the owner of the suit premises who was a partner of the defendant, the injunction order also affected the defendant. For this reason, much as I agree with the principle of temporary injunction set in the above cited cases which was referred to me, I find that the circumstances of the instant case are different and cannot be subjected under the said principle.

It was in the evidence that, the defendant restarted the construction in 2015 and faced the challenge of building materials expenses which went against his previous budget plan of 2009/2010. The defendant claimed that due to the construction expenses which have shoot up since 2010, he has managed to build until now only five storeys. He claimed that until now the heirs of the late Fuad Mussa Kipande and the late Salum Kipande Mussa have been given their

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rightful shares of ownership in the suit property. These claims are denied by the plaintiff who refused to have received anything from the defendant.

This get me to the issue as to whether the plaintiff's complaint is still valid after the addendum contract which was entered on 31st October 2022. It is the plaintiff's evidence that she was never a party to the addendum contract, and had no knowledge of the existence of the said contract until she saw it here in Court. In the final submission, the counsel for the plaintiff has said that the addendum contract was void ab initio for the reasons that first; the new administrator of the estate was not informed about the contract, second; that it was agreed in the contract that the instant case will be withdrawn and that has not been done as the former administrator was cancelled before the implementation but it is not shown as to why it should not be implemented by the successor administrator. The plaintiff argued that the addendum contract has no any effect in the instant case.

I have read the addendum contract which was admitted as exhibit D2. It was between Salum Mussa Kipande and Mikidadi Mohamed Mgeni as the administrator of the estate of the late Fuad Kipande Mussa on one part and Said Hamiar Mohamed on the other part. The contract

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acknowledge the existence of the former agreement which was entered between the parties in 2007, and the memorandum of understanding which was entered in 2008.

As shown in clause 3 of the addendum contract, the parties agreed on the distribution that the ownership of the ground floor shall remain as per the agreement of 2008. That in addition, Salum Mussa Kipande will own and take the 1st and 3rd floors, the heirs of the late Fuad will own and take the 2nd floor while the defendant Said Hamiar will own and take the 4th, 5th, 6th and 7th floors which are not yet finished. The agreement was signed by parties on 31st October 2022.

Having read the addendum contract, I find it to be valid having been entered by competent parties. The parties to the contract were all joint owners of the suit property. When Mikidadi Mohamed Mgeni was entering the said addendum contract, he was the administrator of the estate of the late Fuad Kipande Mussa. His administratorship was cancelled on 13/01/2023 when a new administratrix Salili Mikidadi Mohamed was appointed.

While he was in the capacity as administrator, Mikidadi Mgeni was legally capable of entering an agreement in that capacity. The addendum contract carried on the agreement of 2008 but varied some

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of the terms particularly on the ownership of the floors in suit premises. The shares on the ownership was not changed but rather the parties decided to distribute the completed floors.

It is my view that the fact which was claimed by the plaintiff PW1 that the heirs of Fuad Kipande Mussa were unaware of the addendum contract does not invalidate the same as it was entered by competent parties. I find that the addendum contract was valid and not illicit because as said earlier the parties were competent as they are the original parties who entered the first, original agreement except for the late Fuad who was represented by the administrator who was legally appointed and had capacity to act for the estate of the late Fuad Kipande Mussa.

The plaintiff in the final submissions has contended that the addendum contract is void as the parties did not adhere to the agreed term that the administrator of the estate of the late Fuad Kipande shall withdraw the present case. It is in the evidence that the former administrator one Mikidadi Mgeni was ready to withdraw the case. He and the defendant even drafted the Deed of Settlement which was filed in this Court on 07/03/2023. However before they have presented the Deed before the Court for recording, Mikidadi Mgeni was cancelled from

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administration of the estate of the late Fuad and his daughter, Salili Mikidadi was appointed as the new administrator.

According to the court proceedings, on 22/11/2022, the counsel for the defendant who was by then Mr Richard Kihara, informed the Court that he had been informed that the parties to the suit have met and agreed on settling the matter amicably. Mr. Bwana had no objection and prayed for the time so that the parties can prepare and file their deed of settlement. On 08/12/2022 Mr. Bwana informed the Court that there is still ongoing talks between the parties with view of settling the matter out of Court. He prayed for more time which the Court granted and set the matter to come for mention on 13/03/2023. However on that date, instead of recording deed of settlement, Mr. Bwana informed the Court that there is a change of the plaintiff's status whereby the former plaintiff is no longer an administrator as his administratorship has been cancelled by Kariakoo Primary Court and there is a new appointed administrator by the name Salili Mikidadi Mohamed.

On the Deed of Settlement which has already been filed in Court, Mr. Bwana stated that he is unaware of it as the former administrator has no longer a capacity to act on behalf of the estate of the late Fuad.

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Following those changes, the Court expunged the Deed of Settlement between the parties which was already filed in Court.

I have narrated all this to show that the addendum contract is valid and parties have attempted to adhere to the terms particularly the one of withdrawing this suit in Court, but they were frustrated by the changes of the status whereby the new administrator who is also the new plaintiff did not acknowledge the efforts of settling the matter amicably.

I agree with what the defendant has submitted in the final submission and in his evidence before the Court that no matter what has happened regarding the time frame for the construction of suit premises, all have been remedied by the addendum contract exhibit D2. In the contract, the disputed shares of the heirs of the late Fuad have been handed over to them through the administrator. This is supported by the evidence of exhibit D2 which shows how the shares have been distributed, and the testimony of DW1, DW2 and DW3 who told the Court that following the addendum contract, the defendant has distributed the shares to heirs as per the agreement.

DW2 has admitted that as a former administrator, he has not contacted the new administratix of the estate of the late Fuad, the *Atte.*

plaintiff, so as to hand over the duties of administrator and the shares of ownership in the suit property. But I find this not to invalidate the addendum contract but rather it is a miscommunication between the two administrators, the former and the new one which does not involve the defendant. It is the obligations of the two administrators, the former and new one who happens to be father and daughter to meet and do necessary hand overs for the estate of the late Fuad.

Having reasoned that, the first, second and third issues are answered in negative.

On the first issue, I find that the defendant did not breach the construction agreement between him and Salum Mussa Kipande and Fuad Kipande Mussa. I say so because the defendant was unable to construct the suit premises on time as he was frustrated first by the mandatory requirement of obtaining the building permit before starting construction. Obtaining building permit is mandatory requirement under Regulation 124(1) of the Local Government (Urban Authorities) Development Control Regulations, 2008 which provides that no person shall erect or begin to erect any building until he has obtained a building permit. 

The provisions of Section 37(1) of the Law of Contract Act, Cap 345 R.E 2019 provides that;

*"The parties to a contract must perform their respective promises, **unless such performance is dispensed with or excused under the provisions of this Act or any other law**" (emphasis mine).*

It is my view that the defendant was frustrated from performing his obligations on time by the requirement of the law which was overlooked by both parties.

After getting the building permit, the defendant started the construction, but he was again frustrated by injunctive order from the dispute which involved one of the owners in partnership of the suit premises. The dispute which went on until 2015 when the defendant was able to resume the construction.

The second issue on whether the injunction by the District Tribunal of Ilala was a frustrating event in the construction agreement has already been answered in the first issue.

The third issue has also already been answered in negative that after the parties to the former contract has entered an addendum contract and effected the terms, then the plaintiff's complaint are not

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valid anymore. This is for the reason that in the addendum contract, the defendant have managed to accomplish what the plaintiff has been complaining about, the defendant's failure to hand over the shares of the heirs on the suit property as agreed in the agreement. It was in the evidence that the defendant has handed over the shares to the heirs. What remains is the handing over of the said shares from the former administrator Mikidadi Mohamed Mgeni to the current administratrix, the plaintiff and I believe this is not a land matter to be dealt with this Court.

Now I will address the fourth issue on whether the plaintiff in counterclaim (who is the defendant) have experienced loss of rent which he could have collected from the date the construction of the building was stopped, to date.

In the defendant's counterclaim, the defendant is claiming for total payment of TZS 3,337,600/= . He claims that TZS 2,800,000,000/= is for the cost of erecting building in Plot No.2 Block 34 Nyamwezi Street, Kariakoo, Dar es Salaam and TZS 537,600,000/= being the rent he could have collected from the date he was he was stopped from the construction of the building up to date.

In his evidence in Court as DW1, the defendant stated that when he entered the agreement, his expectation was to finish construction of *Alles*.

the building on time and lease his part and start collecting rent. That, however, due to the disputes surrounding the property, he was unable to achieve that. He said that he has incurred big loss as a result of constructing the building for a long time and the building expenses have become very high comparing to 2009 when he was supposed to start the construction and finish it within the agreed time. He prayed for the Court to order the plaintiff to pay the claims as per the counterclaim.

In this, it is my view that the defendant who is the plaintiff in the counterclaim has either sued the wrong party or has no cause of action against the plaintiff who is the defendant in the counterclaim. I say so for the reason that the defendant claimed to have incurred loss after he was delayed to start the construction on time due to the existence of Land Application No. 286 of 2009 between Sadikiel Meta and Kipande Musa. That it was due to this case which was instituted in 2009 and went on to 2015 that he could not achieve his expectations and as a result, he has incurred loss.

However the defendant did not show how the said case which was between Sadikiel Meta and Kipande Musa is connected to the plaintiff. The defendant did not show how the estate of the late Fuad Kipande Mussa has contributed to the delay of construction which have caused

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big loss to the defendant. In addition, besides testifying generally that he has incurred loss, the defendant failed to show how he has arrived to the amount of loss which he claimed he have incurred as shown in the counter claim.

It is trite law that special damages are to be strictly proved. It was the duty of the defendant to prove his claims in the counterclaim but he has failed to do so. Section 110(2) of the Evidence Act, provides that when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. The fourth issue is answered in affirmative as the plaintiff in the counterclaim has failed to prove his counterclaim on the standard of probability.

The fifth issue is on the reliefs entitled to the parties. This Court has found that there is no breach of the construction agreement as there were events which frustrated the performance and that all that has now been remedied by the addendum contract which bind the parties. From this, I find that the plaintiff is not entitled to the reliefs she has prayed in the plaint.

In the counterclaim, this Court has found that the plaintiff in the counterclaim have failed to establish and prove his claims. From this, I *Alle.*

also find that he is not entitled to the reliefs he prays in the counter claim.

I hereby dismiss both the main case and the counterclaim in entirety. Each party to bear their own costs.

Right of appeal explained.



A handwritten signature in black ink, appearing to read "A. Msafiri". The signature is written over a horizontal dotted line.

A. MSAFIRI

JUDGE

06/11/2023