

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

LAND CASE NO. 252 OF 2021

DOMINIC ADOLF LOUIS (As the Legal Representative Administrator
of the estate of the **ADOLF JOHN LOUS**)**PLAINTIFF**

VERSUS

TEXAS ENTERPRISES LIMITED**DEFENDANT**

J U D G M E N T

Date of last Order: 30/3/2023

Date of Judgment: 27/4/2023

T. N. MWENEGOHA, J.

The above named being a legal representative of the of the estate of the Adolf John Lous has instituted a case against the defendants in relation to Plot No. 151 situated at Haile Selassie Road, Oysterbay with Certificate of Title No. 137331 (Suit Land). Upon agreement of both parties two issues were framed being:-

- 1. Whether the plaintiff and other beneficiaries of the estate of the late Adolf John Louis have the rights to take possession of the suit premises due to breach of the lease agreement and property development agreement relating to the land at issue.**
- 2. To what reliefs are parties entitled to.**

In giving his testimony the plaintiff, who was PW1 informed the Court that he had entered a long Lease Agreement on 15/04/2015 with the defendants with regard to the suit property. Evidence of the same was admitted as Exhibit P2.

That they also entered into Property Development Agreement with the defendants admitted as Exhibit P4.

That, in the said Agreements, parties had agreed to enter Joint Venture where the plaintiff gave the suit land and the defendant the funds for the venture. That, in their Agreement, the defendant was supposed to build 9 apartments for the beneficiaries of late Adolph John Louis, together with the outside development including garden and swimming pool. That upon completion of the project, the defendant was to be given half of the suit land for his benefit.

It was a testimony of PW1 further that all these were to be finalized in a period of 24 months from the date of signing long term Lease Agreement. That, the project was to be concluded by 15/04/2018, with extension not exceeding 12 months upon request.

It was contention of the PW1 that the defendant had failed to meet their obligations. That, upon passing the deadline, the plaintiff contacted the defendant however, the directors were hostile with no intention of honoring the Agreement. That, he made follow up even way after passing the deadline, but in vain.

He testified that all this time, the directors of the defendant were occupying the premises. That, they had divided the suit land in half and whereas at one

side they were constructing the apartments, on the other they were conducting a bar business for their own benefits.

He testified that he finally decided to serve them with a Notice for vacant possession through Majembe Auction Mart which required them to either vacate the property or finish the project in 30 days. That, he had the power to do so as per paragraph 2. 5 of their Property Development Agreement (Exhibit. P4). That, upon receiving the Notice, the defendants instituted a case No. 397 of 2019 at the District Land and Housing Tribunal at Kinondoni, Mwananyamala wanting the Court to grant extension of time for the Agreement. But later on, they withdrew the case at hearing stage. That, soon thereafter the plaintiff repossessed the property.

It was testified further that after such vacant possession the defendants wrote to the plaintiff (Exhibit P6 and P7) asking for extension of time to complete the constructions as failure to do the same was due to financial hardship, that they were willing to give compensation for delay (Exhibit. P8). He testified that the plaintiff's family were not in agreement with compensation offered and that the defendants then decided to lodge another case, this time at the High Court, Land Division being case No. 3 of 2020 asking for extension of time. That, their case was dismissed.

PW1, who was the only witness for the plaintiff, prayed for the Court to grant their prayers contained in the plaint before closing their case. Similarly, the defendant brought in one witness for the case. In giving their defense, defendant's director Ayubu Amani Tesha testified as DW1. He informed the Court that their company is working on real estate and they develop

properties for sale or rentals. He agreed that it is true that they had entered into agreement with the plaintiff.

DW1, further confirmed that in the said agreements, the defendant were to build 9 apartments for the beneficiaries of Adolf Louis on half part of the land and they were to withhold half of the remaining land for their own use, which was around 2500 square meters.

He further claimed that they had kept their part of agreement where they had made all initial payments as per agreements and had constructed nine apartments as agreed.

It was the contention of DW1 that the said apartments have been constructed up to 80%. That it is only 20% of finishing that was yet to be finalized. He told the Court that, they were not able to finalize the project due to financial difficulties caused by the COVID 19 pandemic. He submitted that they had already paid US Dollar 120,000/= as compensation to beneficiaries of Adolf Louis and US Dollar 70,000 had gone to middlemen being 3% - 5% of total contract price, as per contractual agreement. Further to that, he claimed that they had relied on mortgaging the property to secure finances but the same was not possible as the property had terms and conditions prohibiting sale and mortgage for 25 years. Hence, they had to use a personal financing.

DWI's testimony was similar to that of the plaintiff's. However, he was of the view that the contract should have started to run when they were issued with building permit on 20/07/2016 as per paragraph 2.5 of the Development Agreement (Exhibit D3). DW1 further alleged that they were only two weeks

delayed when they had received the notice to vacate. It was the prayer of the DW1 that the Court issue them more time to finish the construction of the buildings. During Cross examination, DW1 admitted that it was true that they were out of the agreed time frame. He also agreed that the middlemen expenses were not part of the agreement and neither had they agreed that they will use the property to secure loans and other finances.

Dw1 marked the end of the defendant's case and parties were given to file closing submission thereafter. Only the plaintiff filed the same. I have taken into consideration what was written in the submissions and will also be reflected in the Judgment.

In addressing the issues agreed by the parties, I will start with the first issue as to whether the plaintiff and other beneficiaries of the estate of the late Adolf Louis had the rights to take possession of the suit premises due to the breach of the Lease Agreement and Property Development Agreement at issue.

It is evident this issue cannot be discussed without consideration of what parties had agreed to do. Therefore, highlighting terms and conditions they entered for the suit land project is essential. For this I will make reference to a term which both parties seems to be centred upon, from the Property Development Agreement, whereupon, Article 2.4 of the same state:-

"2.4 the Developer undertake to complete the construction of the project within the period of Twenty Four months from 1st April, 2016, and soon after obtaining the building permit from the relevant authority unless

parties agree to extent the same because of delay arising due to a good cause in any case such extension shall not be for more than the total of Twelve (12) Months."

Further, article 2.5. of the Property Development Agreement state

"2.5 That upon failure to complete the construction project even after such extension, then the parties will be at liberty to end the agreement repossess the property and establish procedure for reasonable compensation be agreed between parties."

Clearly, both parties do not contest the Agreement nor its terms. DW1, on his defense contested the submission of the plaintiff and claimed that the project was nearly finished save for 20 percent which includes finishing and the last touches. Despite the contest, he later on admitted that the project was not finished in time, but the delay was only for two weeks where by then they were saved with notice to vacate. I will not, therefore, dwell in the arguments given by DW1 as they have been surpassed by such admission.

Regarding the time length of the delay, even if it was proven that it was only a two weeks' delay, in any legal agreement time is of the essence. Any delay will amount to a breach of Agreement even where the delay is very short. Moreover, it is noted that DW1 did not dispute the plaintiff's testimony that they were contacted several times by the plaintiff to conclude the matter but in vain. Neither did DW1 objected to the fact that they did not ask for the extension of time for the project until later on after they were served with a notice. In additional, DW1 while concluding his defense, he informed this Court that they do not have any claim against the plaintiff. It is therefore

evident that the defendant did not honour the terms of the Agreement with the plaintiff. DW1 prayed before this Court that the defendant be given time to finish the project. However, the plaintiff disagreed with such prayer. In his final submissions, he pleaded this Court to grant his prayers and be allowed to reposes the suit land as their agreement with the defendant has been breached.

Indeed, through the facts narrated above, it is established that there is a breach of an Agreement between the plaintiff and the defendant as any Agreement has to be complete and in accordance with the terms of the contract, which is not the case. Parties are bound by their promises in a contract. This position is cemented under **Section 37(1) of the Law of Contract Act** which states:

"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 of any other law"

In situation such as the one in this case, where one party has failed to perform the terms of a contract as agreed, a right arises for the offended party and against the defaulting party. It can be a right to damages, specific performance, injunction and so forth, as per their agreement and the law.

Furthermore, the case of **Joseph F. Mbwiliza vs. Kobwa Mohamed Lyeselo Msukuma (Legal Representative of the Estate of the Late Rashid Mohamed Lyeselo) and Others, Civil Appeal No.227/2019 Court of Appeal of Tanzania at Tabora**, unreported, at page 13 quoted with approval the case of **Abuaiy Alibhai Azizi v. Bhatia Brothers Ltd**

[2000] T.L.R 288 whereby in highlighting a principle of sanctity of a contract, the Court had this to say:

"The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and not principle of public policy prohibiting enforcement"

I note the prayer of DW1 for this Court to interfere and order for the project to be finished as it is 80% done. Even if it was established that was the case, the Courts do not have a power to freely interfere and remodel the terms to what one party think is reasonable measure or fair where subsequent events have rendered one side's situation more favourable or unfavourable. In consideration of particulars of facts of this case, the defendant was able to do so had he wished to conclude the project.

I, therefore, refer to the Agreement reached by parties, in particular, Article 2.5 of the Property Agreement quoted above and by virtue of the evidence given and analyzed and by the content of the provision quoted above, the first issue is answered in affirmative.

In addressing the second issue as to the relief parties are entitled to, this Court has considered proof admitted in Court proving the current status of the suit land and what has been done. Consequently, the Judgment is herewith entered in favour of the plaintiff and I hereby order that;

- a. The defendant has breached the fundamental terms and conditions of the Lease Agreement entered between them and the plaintiff**
- b. The defendant has breached the fundamental terms and conditions of the Property Development Agreement;**
- c. The term leased registered in Land registry regarding the parties and property at issue be expunged from Land Registry record and for being the consideration in full as agreed, be expunged as prayed;**
- d. The Lease Agreement and Property Development Agreement are hereby terminated;**
- e. The defendant is ordered to pay costs of the suit.**

Right of appeal explained.


T. N. MWENEGOHA
JUDGE