

TANZANIA / JUDGMENT

CIVIL APPEAL NO

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IN THE COURT OF APPEAL OF TANZANIA AT MWANZA (CORAM: MUGASHA. 3.A.. MLACHA. J.A.. And NGWEMBE. 3JU CIVIL APPEAL NO. 264 OF 2019 NOORMOHAMED ABDULLA OSMAN.....1st APPELLANT MOHAMED SAID SEIF.....2nd APPELLANT VERSUS ABDUL AZIZ HAGEB..... RESPONDENT (Appeal from the decision of the High Court of Tanzania I at Mwanza) (Makaramba. J.) dated the 20th day of May, 2016 in Land Case No. 10 of 2004 JUDGMENT OF THE COURT 16th& 19th August 2024 MUGASHA. JA.= Abdul Aziz Hageb, the respondent, sued NoorMohamed Abdullah Osman and Mohamed Said Seif, the appellants, in the High Court of Tanzania, at Mwanza. The cause of action rested on: One, an alleged legality of 1st appellant's rescission of the sale agreement of a house located on Plot No. 81 Block Q, Uhuru Street in Mwanza City (the suit premises) between him and the 1st appellant after he had paid a substantial sum to purchase the suit property; and two, the legality of ' 1 the consequent re-sale agreement of the suit premises between the appellants, The reliefs sought by the respondent included a declaration that the subsequent sale agreement between the appellants was a nullity; permanent injunction against the appellants from disturbing the respondent from occupying the suit premises, general damages and costs of the suit. According to the respondent, he initially rented the suit premises vide an agreement between him and the 1st appellant. Later, on 12/6/2004, the 1st appellant sold the suit premises to the respondent at a consideration of TZS. 45,000,000/=. It was agreed that, the purchase price be paid in instalments. While the respondent continued to pay the respective purchase price in instalments as agreed, the 1st appellant was of the opinion that the respondent had defaulted to pay the purchase price in accordance with the agreed payment schedule contained in the sale agreement. Consequently, the 1st appellant sold the suit property to the 2nd appellant which triggered a dispute which is a subject of this appeal. In the joint written statement of defence, the appellants denied the respondent's claims. Whereas the 1st appellant admitted to have 2 sold the suit premises to the respondent however, he averred that, he had to rescind the sale agreement after the respondent defaulted to pay the purchase price in accordance with the schedule of instalments in the sale agreement. The appellants also raised a counterclaim against the respondent on ground that, on account of the said breach and failure by the respondent to heed to the notice to terminate the sale agreements so as to remedy the breach, the 1st appellant resold the suit premises to the 2nd appellant at a price of TZS. 35,000,000/= and thus incurred a loss of TZS. 10,000,000/=. Therefore, the appellants sought for one, a declaration that the resale of the suit property was lawful; two,

the respondent to yield vacant possession of the suit property to the second appellant; three, payment of TZS 10,000,000/= to the 1st appellant; four, payment of rent due to the 1st appellant; five, payment of mesne profit to the 2nd respondent; and six, cost of the suit. At the trial, some of the controlling issues were: One, whether there was breach of the sale agreement concluded between the respondent and the 1st appellant for sale of the suit premises; two, whether the 1st appellant's act of rescinding the sale agreement which he had signed with the respondent was unlawful; three, whether the 3 resale agreement of the suit premises between the appellants was unlawful; four, whether the 2nd appellant is entitled to mesne profit in respect of the disputed suit premises; and five to what reliefs are parties entitled to. At the trial, the respondent adduced evidence claiming to be a lawful owner of the suit premises under the sale agreement which was unlawfully rescinded and illegally resold to the 2nd appellant. On the other hand, it was claimed that, the respondent had breached the contract necessitating its rescission by the 1st appellant and subsequent re sale to the 2nd appellant. After scrutinizing the evidence, the trial judge held against the appellants having concluded that, the rescission of the sale agreement by the 1st appellant was unlawful given that, at the time the 1st appellant's unilaterally rescinded the sale agreement, the respondent had not defaulted in paying the purchase price. Consequently, in the event the rescission of the sale agreement was unlawful and the learned trial Judge concluded that, 1st appellant's purported resale of the suit property to the 2nd appellant was a nullity hence, even the claim of mesne profit in the counterclaim could not stand in the absence of proof of rental arrears due to the 1st appellant from the 4 respondent. The respondent was awarded general damages to the tune of TZS 5,000,000/=: costs of the suit to be paid by the 1st appellant, and the respondent was ordered to proceed to perfect the contract by paying the outstanding instalments. The appellants were restrained from disturbing the respondent in his occupation of the suit premises. Aggrieved by that decision, the appellants have appealed to this Court to assail the trial court's decision on the following grounds of complaint: -

1. That, the trial court erred in law and facts in permitting the respondent to introduce a new cause of action deviating from and inconsistent with the original cause of action.
2. (a) that the trial court erred in law and fact in rejecting to admit annexure NA5 to the WSD of the first appellant.
(b) That had the trial court admitted the said annexure NA5 and considered the contents thereof would have found that the respondent had repudiated the sale agreement.
3. That had the trial court properly appreciated the law and evidence would have found that clause 3 of the sale agreement Exh. P2 made the payment dates of instalment as the essence of the agreement and the respondent was in breach thereof thus the appellant was entitled to terminate the sale agreement.
4. That the trial court erred in law and fact in finding that the respondent had paid to the first appellant by 9th August, 2004 Tsh. 12,700,000/= of the purchase price; all instalments in advance thus performing his part of the contract.

5. That had the trial court properly evaluated the evidence particularly exh. P4 would have found that the termination of the sale agreement by the first appellant was lawful.
6. That the trial court erred in law in awarding general damages as the same are quantifiable for breach of contract.
7. That, the trial court erred in fact and law In not finding that the second appellant was entitled to mesne profit for loss of use of the disputed house from the date of re-sell until rendering of vacant possession by the respondent. One year after the appeal was filed, the 1st appellant died on 11/5/2020. Since two years after the death of the 1st appellant, no legal representative was joined in the place of the 1st appellant, the Court on 28/5/2024 ordered that the appeal had abated in respect of the 1st appellant. At the hearing the appeal was prosecuted by Mr. Chama Matata, learned counsel whereas the respondent had the services of Mr. Elias 6 Hezron, learned counsel holding brief of Mr. Kassim Gilla, the learned counsel for the respondent with instructions to proceed. The learned counsel adopted written submissions earlier filed for and against the appeal. The grounds of appeal and the written submissions basically hinge on mainly four issues namely: One, whether the respondent introduced a new cause of action in the amended pleadings; two, Whether the sale agreement was rescinded; three, whether the resale of the suit premises was lawful; and four, the propriety or otherwise of the order to pay damages to the respondent. Before determining this appeal, from the outset, we wish to point out that since this is a first appeal, the Court has a right and duty to re-consider and re-evaluate the evidence and draw its conclusions. See: OKENO VS REPUBLIC (1972) E.A.32. However, such jurisdiction must be exercised with great caution. The jurisdiction can be exercised if there is no evidence to support a particular conclusion; or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong. See PETERS VS SUNDAY POST LIMITED (1958) E.A 424). Pertaining to the claim that the respondent introduced a new cause of action in the pleadings, it was submitted by Mr. Matata that, the same was irregular and that the offending paragraphs should be struck out. This was opposed by the respondent and it was contended that, besides, clarifying or rather elaborating on the nature of the claim, at no point did the respondent introduce a new cause of action which was in respect of the sale and resale of the suit premises. This need not detain us, it is settled law that the pleadings should not be amended to deviate from the original pleading by introducing a new cause of action. See: MUNTAZIR MOHAMED RAZA DHIRANI VS DEVENDRA B PATEL, Civil Appeal no. 71 of 2021 (unreported). In paragraphs 6 and 10 of the original pleadings, it was averred that the 1st appellant had received money fraudulently with knowledge that he had no legal right to dispose of the suit premises. This is similar to paras 6 and 10 of the amended pleadings which states that, subsequent to signing the sale agreement and after the 1st appellant had received part of the purchase price of the suit premises, the purported rescission of the sale agreement which was without knowledge of the respondent was intended to deprive the respondent his right under the sale agreement. That apart, the reliefs sought in both original and 8 amended pleadings, were centered on the remedies available consequent to the breach of the sale agreement and

resale of the suit premises to the 2nd appellant. We are thus satisfied that, besides, making clarity and elaboration on his claim and reliefs sought, no new cause of action was introduced by the respondent. That apart, the determination of the suit was on the basis of the issues framed drawn from the pleadings of the parties. Thus, the first ground of appeal is not merited. As to whether the sale agreement was rescinded, parties locked horns on the matter. In the written submissions, Mr. Matata fronted three aspects arguing the same necessitate repudiation by the respondent and rescission of the sale agreement by the 1st appellant. Firstly, he contended that, the respondent had on his own volition repudiated the sale agreement vide a correspondence between the two advocates for the parties. However, he faulted the trial court's decision in rejecting to admit in evidence such correspondence on ground that it was a privileged communication under section 25 of the Tanzania Evidence Act [CAP 6 R.E.2019]. He further argued that, the said correspondence which was binding on the respondent could have successfully, proved that it is the respondent who had initially repudiated the sale agreement. In this regard, he implored on the Court to find that the correspondence was wrongly rejected and implored on us to invoke rule 36 (1) of the Tanzania Court of Appeal Rules, 2009 to receive the correspondence as additional evidence. Secondly, it was submitted by Mr. Matata that the rescission by the 1st appellant was justified given that; the respondent had defaulted to pay the scheduled instalments on agreed dates which was contrary to clause 3 of the sale agreement and as such, the 1st appellant was entitled to terminate the agreement. In this regard, it was argued that, the learned trial Judge wrongly interpreted clause 3 of the agreement having concluded the same to be explanatory on the mode of paying agreed instalments. Thirdly, it was contended that on account of default to pay the agreed instalments in accordance with the schedule, the respondent did not heed to the 1st appellant's notice which rendered the sale void ab initio. This he argued, entitled the 1st appellant to cancel the sale agreement in terms of section 55 (1) of the Law of Contract [CAP 345 R.E 2019.] Having fronted the three instances which he viewed to have necessitated rescission of the sale agreement of the disputed suit premises and subsequent resale to the 2nd appellant, Mr. Matata urged us to reverse the impugned decision of the High Court. On the other hand, it was submitted for the respondent that, the decision of the High Court is correct and the appeal is without basis. On the correspondence which was rejected by the trial court, it was stated that, at the trial the respondent denied to have been aware of the document. Moreover, it was contended that the correspondence between the advocates was not binding on the respondent because it was never intended to be utilized as evidence at the trial. In the alternative, it was argued that, the said correspondence authored on 24/8/2004, was after the respondent had already paid TZS. 15,200,000/= which was ahead of the agreed payment schedule by a sum of TZS. 200,000/=. In the premises, it was argued that even if the rejected document was received in evidence, it could not mean that the respondent had no intention to discharge his contractual obligations as suggested by Mr. Matata. According to clauses 2 and 3 of the sale agreement, parties had agreed on the payment of the purchase price of TZS. 45,000,000/= as follows: 11 "Clause 2: That simultaneously with the execution of this agreement the Purchaser shall pay to the Vendor the sum of Tshs. five million (5,000,000/=) receipt of

which the Vendor hereby acknowledges and the balance of Tshs. Forty million shall be paid by way of instalments as follows:

- (i) Tshs. 2,500,000/= shall be paid on 30/6/2004. (ii) Tshs. 2,500,000/= shall be paid on 15/7/2004. (Hi) Tshs. 5,000,000/= shall be paid on 30/7/2004. (iv) Tshs. 4,000,000/= shall be paid on 30/8/2004.
- (v) Tshs. 3,500,000/= shall be paid on 30/9/2004. (vi) Tshs. 3,500,000/= shall be paid on 30/10/2004 (vii) Tshs., 3,500,000/= shall be paid on 30/11/2004 (viii) Tshs., 3,500,000/= shall be paid on 30/12/2004 (ix) Tshs., 4,000,000/= shall be paid on 31/1/2005

- (x) Tshs. 4,000,000/= shall be paid on 28/2/2005 (xi) Tshs. 4,000,000/= shall be paid on 20/3/2005." Under clause 3, it was stipulated that: "That, the dates of payment of the instalments shall not be the essence of the contract as long as the purchaser pays due instalments before the next following instalment" According to clause 3 parties undertook not to be strictly bound by the scheduled dates of payment provided that, the due instalment 12 was paid before the next due instalment. Accordingly, it is on record that, by 30/7/2004, the respondent had already paid a sum of TZS. 15,200,000/=. Having scrutinized the evidence, we are satisfied that, the respondent had not breached the payment schedule as suggested by Mr. Matata. We are fortified in that regard given that, according to exhibit P2 the respondent was supposed to pay Tsh.5,000,000/= on 30/7/2004 and Tsh.4,000,000/= on 30/8/2004. As per clause 3, the respondent had up to 29/7/2004 (that was just before the next instalment) to have paid that Tsh.5 million. From the record it can be discerned that, the respondent paid on 9/7/2004 TZS. 500,000/=. On 13/7/2004 he paid Tsh.2,000,000/=. and on 23/7/2004 he paid Tsh.2,500,000/= by cheque though it was not encashed by the 1st appellant for reasons best known to him. Thus, before the next payment was due on 30/7/2004, the respondent had already TZS. 200,000/= as part of the next instalment. In this regard, the correspondence alleged to have been authored on 24/8/2004 had no bearing to justify that the respondent had repudiated the sale agreement, and had no intent to perform contractual obligations under the sale agreement. 13 It was suggested by Mr. Matata that in the sale agreement, parties had agreed that time was of essence in paying the instalments and as such, the delay to pay the instalment placed the respondent on the breach. In the case of MRAMBO MABULA VS YOHANA SENGASU AND ANOTHER, Civil Appeal No. 71 of 2020 (unreported), the Court held that, in an agreement for sale of landed property, time may not be of essence only on certain situations and the Court cited with approval the comment in Halsbury's Laws of England, 5th Edition Reissue Vol. 9 (1) at page 685 where it is stated that: "The modern law, in the case of contracts of all types, may be summarized as follows: Time will not be considered to be of essence, except in one of the following cases: 1) where the parties expressly stipulate conditions as to time must be strictly complied with; or 2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered of essence; or 3) a party who has subjected to unreasonable delay gives notice to the party in default making time of essence." [Emphasis supplied] 14 Apparently, it can be gleaned in the bolded expression that the parties had agreed on the mode of payment that it should not

surpass the next due instalment. There is no clause expressly stating that conditions as to time must be strictly complied with, in the circumstances. Thus, in the absence of any tangible evidence that the respondent had defaulted the payment schedule, the 1st appellant's cry on the essence of time and its strict compliance thereto on the payment of the purchase price in terms of instalments was indeed, an afterthought which cannot be condoned by the Court. Secondly, nowhere it is expressly stated in the sale agreement that, termination of the sale agreement would be communicated through a lawyer who authored the questionable correspondence purporting the respondent's termination of the sale agreement of the suit premises. In this regard, and rightly so in our view, at the trial PW1 was entitled to dispute existence of such correspondence. Therefore, in addition to reasons stated by the learned trial Judge we think the rejection of the correspondence was justified and we see no cogent reason to invoke Rule 36 (1) of the Rules to admit the respective correspondence as additional evidence. 15 Given that, the respondent neither repudiated nor defaulted to pay the instalments as agreed in the sale agreement, the 1st appellant's notice dated 9/8/2004 to terminate the sale agreement is inconsequential. We are fortified in that regard; because the notice at page 199 of the record of appeal reads as follows: "N.A OSMAN, P.O.BOX670, MWANZA 9/8/2004 Bwana Abdulaziz Hageb S.L.P 321, MWANZA, KUH: KUVUNJIKA KWA MKATABA Kichwa cha habari hapojuu chahusika. Kutokana na wewe kushindwa kutimiza sharti la tatu katika mkataba wa kuuza nyumba baina yangu na wewe wa tarehe 12 Juni2004, mkataba huo umevunjika. Naomba tuonane kwa mazungumzo zaidi. N.A Osman Nakala: Magongo na Wenzake, Mwakili, Mwanza." 16 The question to be answered is if the reproduced notice was a proper course for the 1st appellant in the wake of the existing sale agreement. Our answer is in the negative and we shall explain. It is a requirement of the law under section 37 of the Contract Act that, parties to the contract have to perform their respective promises. The provision stipulates: "Parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or any other law." In the premises, there was a meeting of the minds of the parties who undertook to be bound by the sale agreement. The respondent had performed his obligation or promise and paid the purchase price by instalments as agreed by the parties. Therefore, the respondent had not defaulted to warrant being issued the 1st appellant's notice to terminate the sale agreement. This was uncalled for and probably, it was an expression of intent on the 1st appellant who was looking to rescind the contract with intent to resale the suit premises. Therefore, the purported rescission of the sale agreement by the 1st appellant is unlawful and as such, the learned trial Judge was justified to hold 17 that, the respondent who had paid instalments in advance performed his part of obligation in the respective sale agreement. This takes us to the legality of the resale of the suit premises. Given that, the 1st appellant had sold the suit premises to the respondent upon terms agreed in the sale agreement, a famous latin maxim says: "Nemo dat quod non habet" which means, no one gives what he does not have. In the case of FARAH MOHAMED VS FATUMA ABDALLAH [1992] H R 205 the Court said: " He who does not have legal title to the land cannot pass a good title over, the same land to another" Thus, given that the 1st appellant had sold the suit premises to the respondent, he had no

title to pass by reselling the suit premises to the 2nd appellant. As correctly found by the learned trial Judge, the subsequent sale of the suit premises to the 2nd appellant was unlawful as it was encumbered by the sale agreement between the 1st appellant and the respondent who had a superior title. See: COLONEL KASHIMIRI VS NAGINDER SINGH MATHARU [1998] TLR 162 and OMBENI KIMARO VS JOSEPH MISHILI T/A CATHOLIC CHARISMATIC RENEWAL, Civil Appeal No 33 of 2017 18 and ENOCK KALIBWANI VS AYOUB RAMADHANI AND THREE OTHERS, Civil Appeal No. 85 of 2020 and MELCHIANDES JOHN MWENDA VS GIZELLE MBAGA AND OTHERS, Civil Appeal No. 57 of 2018 (all unreported). In the premises, given the illegal sale of the suit premises to the 2nd appellant, he is thus not at any stretch of imagination entitled to mesne profit payable as rent because he had not acquired any title on the suit premises. We wish to add that, the respondent did prove his case on the balance of probabilities that he had not breached the sale agreement and that it is the 1st appellant who breached the sale agreement having wrongly rescinded the sale agreement and unlawfully sold it to the 2nd appellant. Thus, grounds 2, 3, 4, 5 and 7 are not merited. Lastly, is on the damages whereby parties locked horns having submitted for and against the award of damages. This need not detain us because the law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence on record able to justify the award. The judge has discretion in awarding general damages although the judge has to assign reasons in awarding the same. See: ALFERD FUNDI VS GELED MANGO & OTHERS, Civil Appeal No.49 of 2017 (unreported). Thus, having found that, it is the 1st appellant who had breached the sale agreement, before awarding the respondent general damages to the tune of Tsh.5,000,000/= "The court having considered the circumstances of this suit and the time and resources the plaintiff has employed in defending his rights and the pain and suffering he has endured in hands of the defendants and the disturbance he had to put up with in failing to have peaceful occupation of the suit house, shall be entitled to the award of general damages to the tune of Tsh.5, 000,000/=" Since the award of general damages is the discretionary domain of the trial court and given that no complaint came from the appellants on the amount being excessive, there is no basis on which to fault the learned trial Judge. Thus, the sixth ground of complaint is equally not merited. In view of what we have endeavoured to discuss, having re- evaluated the evidence before the trial court we found no cogent reason to fault the decision of the High Court. Thus, the respondent is entitled to pay the outstanding instalments to the 1st appellant. Consequently, we find the appeal not merited and it is hereby dismissed with costs. DATED at MWANZA this 18th day of August, 2024. S. E. A. MUGASHA JUSTICE OF APPEAL L. M. MLACHA JUSTICE OF APPEAL P. J. NGWEMBE . JUSTICE OF APPEAL The Judgment delivered this 19th day of August, 2024 in the presence of Mr. Kassim Gilla for the Respondent also holding brief for Mr. Chama Matata, learned counsel for the Appellant, is hereby certified as a true copy of the original. R. W. CHAUNGU Z DEPUTY REGISTRAR >7/ COURT OF APPEAL 21

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