

TANZANIA / JUDGMENT

annie ally kwayu vs francis van elwwijick 2017 tzhc 2031 10 february 2017

COURT
TZHCDECIDED
10 February 2017

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IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM DISTRICT REGISTRY) AT DAR ES SALAAM
CIVIL CASE No. 11 OF 2010 ANNIE ALLY KWAYU..... PLAINTIFF VERSUS LYDIA
EZRA MOSHI..... DEFENDANT FRANCIS VAN
ELWWIJCK..... THIRD PARTY 05/12/2016& 10/02/2017

JUDGMENT

MWANDAMBO, 1 The Plaintiff instituted the instant suit in a bid to enforce her contractual right in an agreement for the sale of a house to her by the Defendant. The Plaintiff thus prays for judgment and decree for the refund of the purchase price amounting to USD 100.000, general and special damages in the sum of USD 20,000 and Tshs 8.000.000/= respectively. The Defendant has resisted the suit in her written statement of defence contending that she repudiated the sale agreement upon the Plaintiff failing to pay the balance of the purchase price as agreed. The Defendant contends that she paid the advance payment of the purchase price to the Plaintiff's husband who is joined as a third party to this suit. Before commencement of the hearing, the Court framed the following issues for determination namely; 1

- 1) Whether the Defendant breached the terms of the sale agreement with the Plaintiff in relation to a house on plot No. 732 Block F Msasani Village,
- 2) Alternatively, did the Defendant lawfully repudiate the agreement for sale of a house on plot No. 732, Block F. Msasani Village?,
- 3) Whether the Plaintiff suffered damages by reason of the breach (if any),
- 4) Whether the Defendant is entitled to an indemnity from the third party,
- 5) What reliefs are the parties entitled to. As the record will show, hearing of the case got delayed for a number of reasons including change of judges and unexplained absence of the Defendant. By reason of the Defendant's unexplained absence, Mrs. Rita Chihoma learned Advocate hitherto representing her sought and obtained leave to withdraw from the conduct of the defence for lack of instructions. Subsequently, Mr. Alex Balomi learned Advocate representing the Plaintiff prayed to serve the Defendant by substituted service by publication in Nipashe Newspaper despite which, the Defendant defaulted appearance on

the date scheduled for hearing. That resulted into an ex parte hearing pursuant to Order 6(1) (a) (i) of the Civil Procedure Code, Cap 33 R.E 2002. The Plaintiff prosecuted the case by her own evidence led by Alex Balomi learned Advocate. Briefly, the Plaintiff stated that at one time she was a tenant in a house on plot No. 732 Block F, Msasani village owned by the Defendant and before expiry of the period of one year contracted for the lease, the Defendant offered to sell that house to her. PW1 is on record that the Defendant made the offer to the Plaintiff's sister at the time she was outside the country. Upon her return in the country some time in 2009, the Plaintiff met the Defendant and the two entered into an agreement for sale of the said house for USD 185,000. According to the Plaintiff, the purchase price was payable in two installments. The first installment of USD 100,000 is said to have been paid to the Defendant on an unspecified date by cash through Barclays Bank in the presence of the 3rd party. It was her testimony that according to the sale agreement (annexure A to the plaint), the balance was due for payment upon completion of title deed processing with the Ministry of Lands. To her surprise, the Defendant reneged from the agreement and told the Plaintiff that she had already sold the house to another person. The Plaintiff told the Court that she made some renovation on the house against which she incurred a sum of Tshs 8,000,000/= and tendered some receipts admitted in evidence as exhibit PI collectively. However, PW1 did not go further to explain the basis of the said renovations let alone linking the expenses with the house on which the renovations are said to have been carried out. Apart from exh. PI the Plaintiff tendered no other documentary exhibit inclusive of the sale agreement. At the end of her testimony she prayed for judgment for the refund of USD 100,000 part of the purchase price, USD 20,000 as general damages on account of disturbance and Tshs 8,000,000/= renovation costs. Mr. Alex Balomi learned Advocate filed closing written submissions urging the Court to find and hold that his client had discharged her burden of proof in support of the case against the Defendant and therefore entitled to judgment. In doing so, the learned Advocate addressed the Court on three issues said to have been framed during the final pretrial conference. Apart from the reliefs, the issues featuring in the learned Advocate's submission do not mirror the issues on the Court's record. I will thus consider the substance of the submissions to the extent they address the issues framed by the Court. Before doing so, I find it necessary to state that since the Defendant did not pursue her third party claim against the third party, the said third party claim stand dismissed. Having dismissed the third party claims issue No. 4 which relates to the Defendant's entitlement to indemnity against the third party has been rendered superfluous and it thus falls away. The first and admittedly the central issue in this suit relates to the alleged breach of the sale agreement for the sale of a house on plot No. 732, Block F Msasani Area. The rest of the issues depend on the answer to that issue. According to the pleadings and PW1's evidence the sale of the house was made in writing by way of annexure A' to the plaint. PW1 testified to the effect that the agreement was signed in the presence of a lawyer. However, not only the said agreement was not tendered in Court as an exhibit, the lawyer before whom the said agreement was signed was not called to testify. Mr. Balomi learned Advocate would have me find that in so far as the existence of the agreement is not disputed by the Defendant I should ipso facto find that the Defendant

breached the terms of that agreement. Whilst one may be tempted to find purchase in the former argument, it is not with respect, the same with the latter. The reason for that is not far to fetch. To determine whether a written agreement has been breached, such an agreement must be part of the evidence on record. As the learned Advocate may undoubtedly be aware, annexures are not part of the record unless admitted as exhibits in terms of Order XIII Rule 7 (1) of Cap. 33. Accordingly, in the absence of the actual agreement the subject of the suit, it is hard to determine the terms agreed upon between the parties, the extent to which the Plaintiff performed part of her obligations and the terms the Defendant is alleged to have breached. The fact that the Defendant defaulted appearance does not mean that the Plaintiff's duty to discharge her burden of proof is thereby dispensed with and I think it will be assuming too much to rely solely on the Plaintiff's testimony to establish breach of the terms of 'the said agreement when she could have produced it in evidence during the trial but did not do so. Needless to say, having that caveat in mind, a closer examination of the contents of paras 4,5 and 6 of the amended written statement of defence read together leaves no doubt that the Defendant has admitted to have received a sum of USD 100,000 as advance payment for the purchase of the house. She admits too that she refunded that sum to the Third Party following the Plaintiff's failure to pay the balance but she has not gone further saying that the Third Party was a party to the said agreement and whether the said third Party received the refund as a lawfully appointed agent of the Plaintiff. But even if that was so, she has not come forward to give evidence to prove anything in that direction. Accordingly, in the absence of any evidence from the Defendant proving the fact which she alleges, I am prepared to accept that the refund to the Plaintiff of an amount she admitted to have received from the Plaintiff has not been made to her and she is thus entitled to it as prayed. Save to the extent of the failure to refund the sum as stated shortly I will not belabor the point further on the alleged breach of an agreement which is not part of the court's record. Since the answer to the first issue is sufficient to dispose of the suit, it will be superfluous to discuss the issue whether the Plaintiff suffered damage as a result of the breach. With regard to the claim for renovation costs, I have said earlier in this judgment that the basis for them has not been sufficiently explained let alone the nexus between the receipts in exhibit PI and the house on which the said renovations are alleged to have been done. That claim is accordingly rejected. In consequence, judgment is hereby entered for the Plaintiff for the refund of USD 100,000. That sum shall attract interest at the rate of 11% per annum from the date of institution of the suit to the date of judgment and a further interest on the decretal amount at the rate of 7% per annum from the date of judgment till payment in full. The Plaintiff is awarded the costs of the suit. Order accordingly. LJ.S Mwandambo JUDGE 10/ 02/2017 Delivered in court in the presence of Mrs.* C Rwechungura learned Advocate for the third party this 10th day of February 2017. LJ.S Mwandambo JUDGE 5

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