

TANZANIA / JUDGMENT

golden palm ltd vs cosmos properties ltd 2023 tzhc 17959 31 may 2023

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA DAR ES SALAAM DISTRICT REGISTRY AT DAR ES SALAAM CIVIL CASE NO. 157 OF 2014 BETWEEN
GOLDEN PALM LTD..... PLAINTIFF VERSUS COSMOS PROPERTIES LTD..... DEFENDANT

JUDGMENT

Date of Last Order: 26/05/2023 Date of Judgment: 31/05/2023 Mambi, J. This Judgment emanates from the counterclaim filed by the defendant COSMOS PROPERTIES LTD (who in this case shall now be referred as the plaintiff) against the plaintiff, GOLDEN PALM LTD (who in this case shall now be referred as the defendant). Earlier the defendant, GOLDEN PALM LTD who was the plaintiff sued the plaintiff COSMOS PROPERTIES LTD who was the defendant in civil case No. 157 of 2014 in this court. In its plaint, the defendant (former plaintiff) claimed for declaration that the plaintiff (former defendant) breached their contract, permanent injunction and damages for breach of contract. The records reveal that the dispute arose from a multi-storey modern building complex that is Plot No. 63/27, UWT Street, Upanga, Dar Es Salaam where the plaintiff (who was the defendant) sold to the defendant (who was the plaintiff) an office space covering 191 square metres on the third floor along with five car parking lots on the 4th floor. The consideration for the sale was US\$355,600.00 VAT Exclusive as indicated under the sale agreement dated 15th March, 2013. The pleadings and the summary of the court of appeal ruling dated 13th September 2022 show that the parties had no dispute on the ownership of the property but the dispute was on the payment of the outstanding portion of the purchase price and the interpretation of the contractual clauses on the timing of the payment. Consequently, the defendant who is now the plaintiff counterclaimed for breach of contract and payment of outstanding purchase price and damages. The records reveal that on the 6th June 2017 the suit was before this court for hearing but the plaintiff (who is now the defendant) and its advocate did not turn up. The suit was dismissed for non-appearance under Order IX Rule 8 of the Civil Procedure Code, Cap 33 [R.E.2019]. Thereafter the plaintiff (the defendant in this counter-claim) filed an application (Misc. Civil Application No. 318 of 2017) before this Court for setting aside the dismissal order but its application was dismissed. Having been aggrieved by the decision of this Court the plaintiff (who is now the defendant in this counterclaim) lodged another application

before this Court vide Misc. Civil Application No. 516 of 2018 seeking for extension of time within which to 2 apply for review of the said dismissal order of 6th June, 2017 this Court once again dismissed the application. The plaintiff (now the defendant in this counter-claim) approached the Court of Appeal by filing an application for extension of time in Civil Application No. 208/01 of 2019 to file an application for revision of the order of this Court dated 6th June 2017. The application was granted by the Court of Appeal on 19th November, 2019. An application for extension of time having been granted accordingly the plaintiff (now the defendant in the counter-claim) applied vide Civil Application No. 561/01 of 2019 before the Court of Appeal an application to revise the dismissal order of this Court dated 6th June, 2017. The Court of Appeal on 13th September, 2022 struck the application out on the grounds that it could not revise the order of this Court for it was an appealable order. Holding that a revision was not a substitute for an appeal. It is also on the records that on the 11th of October 2022, this court ordered this matter to proceed for hearing ex-parte. Furthermore, on 04/05/2023 the matter was re-scheduled for hearing ex-parte. The plaintiff in its counter-claim, claims as follows:

- i. A declaration that the defendant is in breach of the terms of the Sale Agreement in relation to the office and parking space for non - payment of the part of the consideration. ii. A declaration that the remaining balance of the consideration for the purchase of the Property is long overdue and payable to the plaintiff; Hi. Payment of USD 118,765.60 being unpaid part of the consideration for the purchase of the office and parking space by the Defendant; 3 iv. Interest on the (Hi) above at the rate of 15% per annum from July 2013
- v. General damages to be assessed by the Court but not less than USD300,000; vi. Interest on the decretal sum at Court rate from the date of the Judgment to the date of the satisfaction of the decree vii. Costs of the counterclaim and viii. Any other order or reliefs as the Honourable Court deems just to grant During the hearing the plaintiff (COSMOS PROPERTIES LTD) was represented by the learned Counsel Mr Daniel Weiwei. The learned Counsel prayed this court to adopt the written statement filed by one witness. Having heard this matter ex-parte, let me now at this juncture analyse the evidence and determine the key issues. From what I have observed, in my considered view one of the key issues that need to be determined in this suit is, was there any breach of contract and if yes who breached the contract between the parties and lastly what are the remedies? I have dearly gone through the evidence and records and found that there is no dispute that the parties entered into the contract for sale and purchase of office space on the 3rd floor covering an area of 191 square metres and a five car parking lots on the 4th floor at a consideration of US\$ 355,600.00 VAT exclusive. Generally, matters of contract in our country are governed by the law of Contract Act, Cap 345 [R.E 2019]. It is clear from the records that parties entered into the binding contract on the 15th day of March 2013. 4 It is on the records and evidence that despite a number of reminders from the plaintiff (Cosmas Properties Ltd) who was the defendant by then insisting the defendant (who was then the plaintiff) to honour its promise to pay the amount due, the defendant did not fulfil its promise. The question to be determined here; is whether the acts by defendant (who was the plaintiff) amount to breach of contract warranting the plaintiff (who was the defendant) to claim the amount due and damages. To

answer this issue, I will refer at the evidence by the plaintiff witness (PW1). In his testimony (PW1) testified that on 15 March, 2013 the plaintiff executed the agreement with the defendant for the purpose of selling an office space and car parking space at Uhuru heights as per exhibit P1. PW1 further testified that the agreed purchase price was USD 355,000.00 where the defendant made advance payment of USD 210,000.00. PW1 also testified that upon signing the defendant agreed to pay the outstanding balance but he didn't honour his promise albeit various reminder letters from the plaintiff. This show that there was a contract between the parties. Now, since there was a contract between the parties was there any breach of contract if yes who breached such contract? There is no doubt that the parties in their contract agreed the plaintiff to sell office space and car parking to the defendant. I have gone through the trial records and satisfy myself that the evidence adduced by the plaintiff is sufficient to prove on the balance of probability that the defendant breached the contract Looking at the evidence and records it is clear that the act of the defendant not to pay the outstanding balance, albeit letters of reminders 5 from the plaintiff, shows that the defendant breached the contract and the plaintiff was right in invoking the terms and conditions of the contract. This shows that the defendant failed to fulfil his contractual obligations in their contract and the law of the Contract. The law under Section 37(1) of the law of Contract Act, CAP 345 is very clear on the contractual obligations of both parties. This section provides that: "The parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provision of this Act or of any other law" In our case since the parties entered into the binding contract, all of them were bound by the terms and conditions of the contract. In our case the defendant was duty bound to perform its respective promises. There is no evidence to show that the defendant promises or contractual obligation was dispensed with or excused. It is clear from the evidence by PW1 that by agreeing to make advance payment, the defendant agreed to be bound by the terms of contract. Failure to make payment of the outstanding (USD 118,765.60) agreed amount (as per exhibit P2) means that the defendant breached the contract. It is also on the evidence by PW1 that the defendant through Taher Muccadam issued twelve cheques to the plaintiff as per exhibit P3. However, when the plaintiff submitted them to the defendant's bankers that Diamond Trust Bank (T) Ltd and Bank M (T) Ltd for encashment all cheques were dishonoured by the banks as the defendant didn't have enough balance. The evidence of PW1 further show that the defendant had never paid that balance. Thus, clearly shows that the defendant breached the sale agreement and the plaintiff was right in filing counter 6 claim. The evidence by the plaintiff show that it proved its case on balance of probabilities. It is well established principle of the law that in civil matters the burden of proof lies on the one who alleges. The Court in NATIONAL BANK OF COMMERCE LTD Vs DESIREE & YVONNE TANZANIA & 4 OTHERS, Comm. CASE NO 59 OF 2003 HC DSM, had once observed that:- "The burden of proof in a suit proceeding lies on the person who would fail if no evidence at all were given on either side." Reference can also be made to section 111 of the Evidence Act Cap 6, [R.E. 2002] which provides that: "The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on their side." In my considered view, the fact that the defendant failed to pay the

whole agreed amount as per the sale agreement and the fact that it paid advance payment, its failure to pay the outstanding balance due as agreed amounted to the fundamental breach of contract. In this regard the plaintiff was right in filing a counter claim. It is trite law that when one party to the contract breaches the contract, the other party need not perform his part of the obligations and the aggrieved party may rescind or terminate the contract. The court in JOSEPH MNINGA V. ABASS FADHILI & ANOTHER

(2001) TLR at page 222, as cited by the plaintiff stated that, "The term fundamental breach is that breach which touches the purpose of the contract. The question to be determined here; is whether the act by the defendant amount to breach of the contract (sale agreement). My answer to this 7 issue is clear as I have already observed that since the defendant had breached the contract, the plaintiff was right in using counter claim to recover its due amount of money from the defendant. The other issue is whether the plaintiff is entitled to any damages and to what extent. There is no doubt that the law on the issue of damages arising out of the breach of contract is now well settled. See BAMPRASS STAR SERVICE STATION LTD. v. MRS. FATUMA MWALE. This means that unlike general damages, the special damage must be specifically pleaded and strictly proved. While special damages may consist of "out-of-pocket expenses and loss of earnings incurred down to the date of trial, general damage is implied by law and may include "compensation for pain and suffering and the like" See The CMC Ltd v. Moshi/Arusha Occupational Health Serviced. It is on the records that the plaintiff has claimed USD 300,000.00 as general damages. In my view the plaintiff is entitled to USD 150,000.00 as general damages and not USD 300,000.00 as claimed. It should be noted that the award of general damages is on the discretion of the court. It is true that the plaintiff rightly claimed that it suffered damages out of the breach of contract but in my view the amount it claimed that is USD 300,000 is excessive. It is also clear from the case laws that general damages can be asked for by "a mere statement or prayer of a claim" and this is what has been done in our case. See Perestrello Companhia Limitada v United Paint Co. Ltd., [1969]! W.L.R. 570. The Court in observed that: 8 "If damage be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question". Having gone through the records and considered the loss suffered by the plaintiff as a result of the defendant failure to honour the contract, I find that the plaintiff suffered damages as a result of the defendant failure to honour the contract terms and thus this court orders the defendant to pay the plaintiff USD 150,000/= as general damages. The Court in LIVINGSTONE VRAW YARDS CAAL CO (1850) 5 Case 25c\eaty explained "damages", to mean: - "The sum of money which will put the party who has suffered in the same position as he would have been if he has not sustained the wrong for which he is now getting compensation or reparation". The court in Prehn V. Royal Bank of Liverpool, observed that: "General damages are such as the jury may give when the judge cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man..." It is a trite law that general damages need not be specifically pleaded, they may be asked for a mere statement or prayer of claim. As I observed earlier that a general damage is implied by law and may

include "compensation for pain and suffering and the like". The court in THE COOPER MOTOR CORPORATION LTD V. MOSHI ARUSHA OCCUPATIONAL HEALTH SERVICES [1990] TLR .9# held that: "General damages need not be specifically pleaded; they may be asked for by a mere statement or prayer of claim " In the present circumstance the plaintiff was highly affected by the conducts of the defendant and the position of the plaintiff could mostly be retrieved by way of reasonable and justifiable general damages. This is due to the fact that the loss sustained by the defendant is hugely unmeasured. It is well settled legal principle under our law of contract that where a contract is breached or broken, any party to that contract who suffers as a result of such breach has a right or is entitled to receive from the party who has breached the contract, compensation for any loss or damage caused to him thereby. Reference is made on section 73 of the Law of Contract which provides that; "When a contract has been broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which the parties knew, when they made the contract, to be the likely result from the breach of it". It is my well-considered opinion that the amount of general damages claimed is higher as compared to the loss suffered by the plaintiff as the result of the defendant's breach of contract. I therefore think that an award of USD 150,000.00 will be more justice as compared to as USD 300,000.00 that was claimed by the plaintiff. As pointed above that the plaintiff suffered damages out of the breach of contract made by the defendant, I find it proper to order the defendant to pay the plaintiff the outstanding balance and other compensation that I will specify in this judgment. I thus hold that the plaintiff is entitled to the following reliefs from the defendant.

- (1) Payment of the outstanding balance that is USD 118,765.60 being unpaid part of the consideration of the purchase of the office and five parking space by the defendant. Interest at the rate of 11% per annum from July 2013.
- (2) General damages USD 150,000.00. No orders as to costs. Order accordingly. ___ . Mambi Judge 31/05/2023 Judgment delivered this day of 31st May 2023 before both parties. Judge 31/05/2023 Right of Appeal explained. Judge 31/05/2023 li

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