

TANZANIA / JUDGMENT

19881021 TZHC Dar es Salaam

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TZHCDECIDED
21 October 1988

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IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM CIVIL APPEAL NO.19 OF 1987
(Original HM Civ. Case No.7/87 at Kisumu HM's Court - Dar es Salaam) 1st Appellant (Haji Mohamed) vs. Respondent (J UI-IH-f;] ATHUMANI) 1st Respondent

JUDGMENT

This appeal is against the decision of the Resident Magistrate Court, Dar es Salaam. The facts of the case which gave rise to this appeal are that under a written agreement dated 11th October 1984, first appellant Haji Mohamed sold his house (henceforth referred to as the suit premise or house) to the respondent for a sum of shs.200,000/- out of which he was paid / , shs .. 1. So 9 000/:-. According to the said written agreement, respondent was required to pay the balance of shs.~o,000/= by 16th October 198~. Meanwhile respondent was given possession of the house and / occupied it. He is still in occupation of the house up to now. It is in evidence that respondent failed to pay the balance of shs.40 1 000/= as per the agreement. First appellant's reaction to this default WAS to lodge a complaint to the CCM Branch Chairman before whom the said complaint was executed. And according to exhibit D1, on 1st October 1985 the CCM Branch Chairman referred the first appellant to the primary court to sue. After this on 6th December 1985 first appellant accepted from the respondent shs.~23,000/; as payment in full of the remaining debt of the shs. L.tO,OOQ/:-. This payment was reduced in writing which was produced in court as exhibit 02. However, on 14th February, 1986 first appellant swore an affidavit in which, inter alia ">~.,) .~ ..

- ~. ~-:~.1: ,/(~ /2 he deposed that he had sold the suit premise to the second appellant for a sum of shs.~ 80~/-, . This affidavit was followed by execution of a Deed of Transfer of Right of Occupancy from the first appellant to the second appellant. On learning of the alleged second sale respondent reported to police and consequently first appellant was charged of obtaining money by false pretences in that he sold the suit house to the second appellant after the same had already been sold to the respondent. However, for reasons contained in "10 judgment" first appellant was acquitted. But in the court case of the trial it was revealed that the alleged sale to the second appellant was for shs.~J50,000/~ anti net shs.80f600/= as deposed by the first appellant in his affidavit and repeated in the Deed of Transfer of Right of Occupancy signed by both first and second appellants.

originates from. a suit filed by the scc,:c::c.: n;3yelle.nt against the respondent for V\cant possession of the suit premise. l 'l'hrGe grounds have been advanced in support of the cC',ppec:...O_. First it is contended that since respondent did ~o~ counterclaim for vacant possession, the le~rned · tri0.l ,:1::,sistr,"lte Wf\S wrong in mri.king an f\Ward . for Vc,Cc.nt possession of the suit premise in favour of the resp6:::1c1 ,m.t'. The secortd ground of appenl is that the join~er cf the first appellant to the suit as a third party -:ras not done in accordance with the provisions of· the Civil Procedure Code~ And lastly th~ learned Counsel for the appellent is challenging the trial cocrt 's Ze..ilure · to appreciate· the right of the first appellc.nt to terminrtte the first agreement of sale after the respondent hRd de_faul ted prlyment of the balance a£.r.- t~e purc.ase ·n · price. Gt2,rting with the first ground it _is true that in ni3 ~Gfence defendant did not counterclaim for vacant· possession of the suit house. To this extent I agree with °i::I-4e learned counsel that it was wrong for the trial e!)::::~t to :.:]c.l-<.:e an order for Vf\ca.nt possession in favour •• .,/J I ,. I /

- , -- of the respondent. How-ev~r~ at worst the allege<l order is ,:rron 0 :for being superfluous. It is in evidenee thei:t respm:-:dent had been in posses::lion of the ~uit house risht ~ro~--... the day when·first appellant received the sh.s.,160.o'oo/c: being instalment of the pw:-c_pt"se price •. It is f~rther in evidence that· to date respondent is still . in ccuocation . of the house. . Hence there was no rec.son :for the respondent to raise a counterclaim for vl;.can:t;;possession in his defence. -As quite rightly pl.ei,cled in his defence, what the respondent required frm:1 th.0 court was a deelarntion that he i.s the lawful ol'mer of the suit house. hs for the alleged irregularity in issuing third pc,rty summons to the first nppellnnt, the learned counn-3l Is 0.rr:ument is ·legc"\lly sound. The relevant provioio:r:s of the Civil Procedure Code were not co~plied with before first appellRnt was joined to ths suit as a third party. But the.nature of the caso is 5UCH that I cnnnot imegine how justice could be c.:cn-2: without joining him either on the application cf' ·':;l-ie pl.,;intiff or defendant.. The prime goal of any lititeton is to reach a final solution on the matter in (isputeo For this reason the court is given power to :-:Ct:::"I:e order which will enhance the interest of: just.ice in a particular case. Now admitted that there had been irrc3ularity in joining the first appellant as R third party:, the question should be whether this irregularity has occaticned failure of justice. I don't think so. hs I seic, for the interest of justice, the first ap~,;,ell"n.t he,d to be a party to this case anyway·. This eJ:_plains why neither the first appell~nt nor second appell~nt objecte~ against respondent's application for the seid third party summons •. There is then the ~rgument th~t the le~rned trial resident m~gistrate ha~ overlooked the right of the first e~pGllnnt to terminate the first sale agreement after responcGnt had defnulted payment of the remaining purchc:ise price.. It is true th.at accor·aing to law first ap90llent had the option to rescind the sale agreement with 1~e:spondent after respondent had det"aul ted payment of -:~1.e be.le.nee cf the purchase price.. What hAppened is ttnt aftor the defaul~, the said agreement became voic:e.ble e:nc.1 not voi<l. In other words first appellant coulc outri 0 htly ignore the contract or take steps to enforce ito Tlie agreement could only come to an end i:f first o.pr:ellnnt had dccicld to ignore it. However, whc:t T.:c.j_,:pened is thc\t first appellant opted to enforc~ tha nurecent by seeking the

assistance of the Party Branch office where the agreement was executed to press the respondent pay the purchase price. And when the Party Branch office failed, the matter was referred to the primary court for the Seline purpose. Consequently respondent paid the first appellant shs.231 000/= thereby leaving a balance of shs.17,000/. • First appellant's acceptance of the shs.2J,000/= clearly negates any suggestion that he decided to terminate the contract after respondent had defaulted payment of the remaining purchase price. At this juncture let me say something about first appellant's timid denial that he received the shs.~3,000/= from the respondent. In support of this 'p,~y:...12::"It TGspon]ent produced a chit in which it is shown that the alleged payment was witnessed by two relatives of the first appellant; viz. H~mza llaji and Kassiu1 Heji.. If at all it is true as alleged by the first appellant, that respondent did not pay him this money, he would not have mentioned these relatives of the first appellant as witnesses of the transaction. It is quite strangely, first appellant did not cross-examine the respondent after he had deposed during the trial that he paid him shs.2),000/= on 6/12/85.- It is therefore true that despite the respondent's failure to pay the balance of the purchase price, first appellant had not decided to terminate the agreement, but instead he took steps to enforce the agreement and thereby resulting to the payment of the shs.2) 1 000/= for the second appellant, the position is that his claim is based on the alleged second agreement of •• /5

- 5 - sale between himself and the first appellant. But in my respectful opinion the alleged agreement of sale is not legally enforceable for two main reasons. First at the time when appellants purported to execute the alleged contract of sale, the suit premise had already been sold to the respondent, under a contract which, as pointed out earlier, was still valid. There had been no express or implied attempt by the first appellant to terminate the first agreement notwithstanding the fact that he was legally entitled to do so. To the contrary, there are clear indications one of which being his subsequent acceptance of shs.2J,000/= as part payment of the remaining purchase price, that first appellant intended to uphold the agreement. At the time when the alleged second agreement was purportedly entered, first appellant had already received the shs.2J 1 000/= from the respondent thereby manifesting his option to uphold the agreement. First appellant had a right to choose one of the two options; either to terminate the agreement or enforce the fulfilment of the payment of the balance of the purchase price. He could not have both for that would mean that he were, blowing hot and cold at the same time. But even if the first agreement was effectively terminated, still the alleged second agreement would not be enforceable as it was tainted with illegality aimed at perpetuating the commission of a crime. Appellants conspired to evade payment of correct income tax by declaring lesser purchase price than the real, one... The Deed for Transfer of Right of Occupancy together with the first appellant's affidavit in support of the purported contract of sale stated that the purchase price is shs.80 1 000/= when in actual fact it is shs. 150 9 000/=-. To crown up this criminal conspiracy, with apparent fraudulent intention, appellants caused to appear that the Deed of Transfer was signed by One Shabani Juma, who is supposed to be the second appellant,

when in actual fact the same was signed by one Ramadhani Bakari who actually filed this suit against the respondent.. It has been revealed that the respondent is the alleged vendee one Shaban Juma who is a minor. In the absence of clear disclosure by Ramadhani Bakari that he was signing on behalf of Shaban Juma who is a minor the purported Deed of Transfer is of no legal validity. All in all in the respectful view that this appeal is devoid of merits. It is accordingly dismissed with costs. H.A. Ms. JUDGE For the Appellants: Mr. Rahim. For the Respondent: Mr. Ismail .. Ji --

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Prepared on 14 October 2026 · Esheria