

TANZANIA / JUDGMENT

jumanne nkhandi kibela vs zuberi mzee mwinyimvua another 2004 tzhccomd 17 29 july 2004

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT PAR ES SALAAM
COMMERCIAL CASE NO. 314 OF 2002 JUMANNE NKHANDI KIBELA..... PFAINTIFF VERSUS
ZUBERI MZEE MWINYIMVUA...1ST DEFENDANT PRECIOUS COMPANY LTD..... 2nd
DEFENDANTS

JUDGMENT

KIMARO, J. The 1st defendant is the registered owner of a plot of land identified as plot No.895, Mbezi Tangi Bovu, comprised of a Certificate of Title No.29449. It consists of an area of 30,900 square metres. On 24th August 2001, the parties executed an agreement in which the 1st defendant agreed to sell and the plaintiff agreed to buy square metres 10,765 of the 1st defendant's plot. The Agreement forms part of the plaintiffs claim and there is no dispute at all in respect of this fact. One of the most important step which had to take place so as to allow flow of events move on properly, was to have the relevant authorities sub divide the plot and create the square meters intended to be sold to the plaintiff: This is a responsibility which had to be performed by the 1st defendant. 2 A schedule of payment was also made. The purchase price which was agreed upon was T.shs 70,000,000/=. The amount had to be paid in four instalments of T.shs 10,000,000/= upon the execution of the agreement, T.shs 15,000,000/= upon obtaining authority to survey the property so as to have it divided into two parcels, T.shs 15,000,000/= upon issuance of the letter of offer and finally T.shs 30,000,000/= on 30th September, 2001. The parties are before this court for a conflict which revolves around the implementation of the terms and conditions of the Sale Agreement. Although the plaintiff has sued two defendants the 2nd Defendant has never entered appearance. Service was effected by substituted service in the daily papers. The court allowed the case to proceed against the 2nd Defendant exparte. Both parties blame each other for the breach of the sale agreement. Whereas the plaintiff relies on clause 5 of the sale agreement which required the 1st Defendant to grant vacant possession of the plot upon execution of the sale agreement claiming that the 1st Defendant breached it, the 1st Defendant relied on clause 2 of the sale agreement which provided for the schedule of payment claiming that the plaintiff breached it. Both parties enjoy legal services of Learned Counsel. The plaintiff is

represented by Mr. Rutashoborwa from Julius Chambers and the 1st Defendant is represented by Mr. F.S.Mbuya. The issues framed for the determination of the court are- 3 “ i) Whether any of the parties was in breach of the sale agreement. ii) If the answer to issue No.i above is in the affirmative whether the breach can be remedied. iii) To what reliefs are the parties entitled to.”

Mr. Jamal Jackson Musiba testified for the plaintiff as PWI. His testimony was that until when the suit was filed in this court on 30th December, 2003, the plaintiff had been paid a total of T.shs 28,684,254/=. The witness said that all the amount was paid as per the schedule of payment except an instalment of T.shs 7,000,000/= which was paid beyond the agreed schedule. In his final submission, Mr. Rutashoborwa concentrated on clause 2 (a) and 5 of the agreement. He argued that the plaintiff by paying T.shs 10,000,000/= immediately after the execution of the agreement, the plaintiff fulfilled his obligation. The 1st Defendant was required to reciprocate by delivery of the plot in dispute but he persistingly refused to deliver vacant possession. The 1st Defendant on the other hand did not deny receipt of part of the purchase price. His testimony was that he performed his obligation by carrying out actions which were necessary for purposes of having the plot be divided. However, he stopped at the stage of surrendering his Certificate of Title for purposes of the creation of the 4 two plots because the plaintiff defaulted to effect payments as agreed. He feared that if the plot was divided without payment of the purchase price in full, he might have ended up not being fully paid by the plaintiff. According to the 1st Defendant, the consent to have the plot divided was obtained. In his submission Mr. Mbuya urged that because the plot had to be subdivided so as to create a plot measuring 10,765 square meters, it was difficult to give vacant possession of the property to the plaintiff before the subdivision exercise and that is why the framework for payment of the purchase price was fixed. According to the framework of payment, the purchase price had to be paid within a month and 7 days from the date of the execution of the sale agreement. Mr. Mbuya contended that if the plaintiff adhered to the schedule of payment, which had 30th September, 2001 as the deadline, processes necessary to be completed so as to have the delivery of vacant possession of the premises would have been accomplished. Traversing the evidence which was tendered in court, Mr. Mbuya said both PWI and DWI testified that the 1st Defendant did seek and obtain authority to survey the property with a view of having it be divided into two parcels. In terms of Clause 2 (b) of the sale agreement, the 1st Defendant was entitled to the payment of T.shs 15,000,000/=. This however, was not done. Evidence on receipt of payment which include vouchers and receipts indicate that by September 30th, 2001 the deadline for the payment of the purchase price, only T.shs 11,000,000/= had been paid to the 1st Defendant. He said except for the initial payment of T.shs 10,000,000/= which was paid in time the rest of the instalments paid were neither paid in time nor in right quantum. Mr. Mbuya associated the 1st Defendants refusal to surrender his Certificate of Title to the Commissioner for Lands with fear that he would not have been able to prevent the process of survey and division of his plot. This could have made him loose the outstanding balance of T.shs 41,315,750/= which the plaintiff had not yet paid. Mr. Mbuya submitted further that to date, only T.shs 28,684,250/= out of the purchase price of T.shs 70,000,000/= has been paid, while the last instalment had to be paid by 30/09/2001. Mr. Mbuya concluded that it was the plaintiff who breached clause 2 of the sale agreement. This court was referred to the case of Millen Richard V Ayub Bakari Hoza (1992) TLR 385 where the court held that failure to pay the balance of the price

within two months stipulated in the agreement constituted breach. The court further held that extension of time through the letters of the appellant to the respondent did not constitute waiver and as such did not alter the terms of the agreement. Another case is that of Haji Hassan Chimbo V Mshimbe Iddi Ramadhani (1996) TLR 292. In this case a delay of two years for payment of T.shs 20,000/= was considered unreasonably 6 frustrating delay in circumstances where even small children talk of business worthy a lot of money. It was further held that the plaintiff was unreasonably late to complete his payment, entitling the defendant to rescind the contract. In his reply to counter the defendant's submission, Mr. Rutashoborwa relied on the provisions of clauses 2 (a) and 5 of the sale agreement and argued that since the 1st Defendant was obliged to deliver vacant possession to the plaintiff after payment of T.shs 10,000,000/= which followed the execution of the sale agreement but failed to do so, the plaintiff could not proceed to effect extra payments through the instalments provided in clause 2 (b)(c) and (d) of the sale agreement. The above exposition gives a picture of the events which took place between the parties and the reasons why the events moved in the direction explained above. It is apparent that each of the parties is pointing an accusing figure at the other for being in breach of the sale agreement. Coming to the first issue, if this court were to agree with the interpretation which Mr. Rutashoborwa suggests, that the 1st Defendant had to deliver vacant possession of the disputed plot after execution of the agreement (after signing) there was something wrong. The sequence of events which had to follow do not support the proposition that the delivery of vacant possession had to take place 7 after the execution of the agreement. I say so because the plot which was to be sold had to be created from a registered land. That is why the parties talked of seeking the consent of the relevant authorities to have the land surveyed and subdivided. The evidence shows that even the plaintiff did not ask for vacant possession immediately after payment of T.shs 10,000,000/= after the execution of the agreement. As correctly pointed out by Mr. Mbuya, the first time the plaintiff asked for vacant possession was on 11th December, 2002 (as per annexure JCE to the plaint). That was after sixteen months. It would have been legally possible for the plot to be handed over after its creation from the survey and sub division of plot No.895. It is impossible to envisage creation of this plot in any other way before contacting and getting the consent of the relevant authority. For this reason I entirely agree with Mr. Mbuya that it was difficult to give vacant possession of the property to the plaintiff before carrying out the sub division exercise. The testimony of PWi & DWi shows that there was a default in adhering to the payment schedule. I find that the plaintiff was in breach of the agreement. He failed to effect payment as per clause 2 of the agreement. I disagree with Mr. Rutashoborwa that the 1st Defendant failed to show reasonable cause for not performing his obligation under the agreement and that the court must compel him to comply with the terms of the agreement. He did his best. According to his own testimony he reached a stage of surrendering his Certificate of Title to the Commissioner for the purpose of the subdivision but hesitated because the plaintiff was not effecting payment as per the agreed schedule. The case of Idrissa 8 Mohamed V Hashimu A. Jaku (1993) TLR 280 cited by Mr. Rutashoborwa is not applicable. As for issue number 2 it is obvious that the breach cannot be remedied because of the lapse of time which has passed and given the fact that there is also a substantial amount which has not been paid. The cases of Mr. Millen Richard V Ayub Bakari Hoza 1992 TLR 385 and Haji Hassan Chimbo V Mshimbe Iddi

Ramadhani 1996 TLR 292 are relevant authorities on this issue. Coming to the reliefs, the plaintiff is praying for - “ (a) A declaration that the Plaintiff is the rightful owner of a plot comprising 10,765 square metre as per the sale agreement dated 24th August, 2001. (b)An order compelling the 1st Defendant to deliver vacant possession of 10,765 square metres pursuant to the sale agreement dated 24th August, 2001. (c)An order compelling the 1st Defendant to surrender to the Plaintiff all documents evidencing title of Plot No.895, Mbezi Tangi Bovu, Dar es Salaam so as to enable him process transfer of 10,765 square metres plot to his name. 9

- (d) A declaration that the 2nd is a trespasser at the said 10,765 square metres area hence should surrender vacant possession thereof.
- (e) Perpetual injunction restraining the Defendants by themselves, agents, assignees, workmen, representatives or any other persons working on that behalf from interfering in any manner whatsoever with the Plaintiffs comfortable enjoyment of 10,765 square metre area.
- (f) Costs be provided for.” It is obvious from what has been discussed hereinbefore, that the plaintiff is not entitled to the prayers he is asking for. What the plaintiff is entitled to, is a refund of the amount of T.shs 28,684,250/= paid to the 1st Defendant because the circumstances as they are allows the 1st Defendant to rescind the contract. The 1st Defendant is entitled to rescind the sale agreement and refund the plaintiff the amount of T.shs 28,684,250/=. Otherwise the plaintiff s suit is dismissed with costs. N.P. KIMARO, JUDGE 23/07/2004 10 Date: 29.07.2004 Coram: Hon. N.P. Kimaro, J. For the Plaintiff - Mr. Ogunde. For the 1st Defendant - Mr. Mbuya. For the 2nd Defendant - Absent. CC: R. Mtey. Court: Judgment delivered today. Order: The plaintiff is entitled to the refund of T.shs 28,684,250/=. Otherwise the suit is dismissed with costs. N.P.KIMARO, JUDGE 29/07/2004 2,583 - words. Jd. ! z<T)-.h!s's a true and correct oriN/d/order Judgement Rulhng ____ "— Re'istrart^mmmercial Court Dsm.
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