

TANZANIA / JUDGMENT

KISESA JUDGMENT

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IN THE HIGH COURT OF TANZANIA (MWANZA SUB-REGISTRY) AT MWANZA CIVIL CASE NO. 7
OF 2023 KISESA EXPRESS LIMITED.....PLAINTIFF DIAMOND TRUST
BANK TANZANIA LIMITED.....1ST DEFENDANT MABUNDA AUCTION MART CO.
LTD.....2ND DEFENDANT

JUDGMENT

19th February & 17th March, 2025 KAMANA, J. In this suit, this court is invited to determine the following issues:

1. Whether Plot No. 32 Block Y within Mwanza City was partitioned to create Plot No. 50 Block Y within Mwanza City.
2. Whether the defendants concealed material facts through deception and misrepresentation to induce the plaintiff to purchase Plot No. 32 Block Y within Mwanza City.
3. Depending on the answer to the second issue, whether the plaintiff is entitled to avoid the performance of a contract in respect of Plot No. 32 Block Y within Mwanza City. 1
4. Whether the defendants have subjected the plaintiff to unnecessary inconveniences by denying the former the opportunity to utilize the money held by the former in other business ventures.
5. Reliefs the parties are entitled to. Briefly, the plaintiff is a registered company dealing with the transportation business. The first defendant is a registered company dealing with the banking business. The second defendant is also a registered company operating as an auctioneer and debt collector. Facts gathered from the plaint are that on 22nd and 23rd February, 2022, the second defendant, within Mwanza City, publicly invited the general public to the auction of Plot No. 32 Block Y within Mwanza City which was scheduled to take place on 24th February, 2022. On 23rd March, 2022 the plaintiff's personnel visited the plot to ascertain its demarcations and boundaries. On 24th February, 2022, the plaintiff participated in the auction and was declared a successful bidder for TZS 421,000,000/-. Having purchased the plot, the plaintiff initiated the transfer of ownership process. In the course of that process, the plaintiff came to the knowledge that the plot she purchased had previously been partitioned to create another plot which is Plot No. 50 Block Y. This means that what 2 she

thought to be the size and boundaries of Plot No. 32 Block Y was part of Plot No. 50 Block Y. In her opinion, the plaintiff alleged that there was a misrepresentation and deception as the defendant concealed material facts to induce the bidders, including her, to purchase Plot No. 32 Block Y without disclosing its real boundaries. Given that, the plaintiff prayed for the following:

1. The declaratory order that following the misrepresentation and deception by the defendants, the contract for the purchase of Plot No. 32 Block Y within Mwanza City between the plaintiff and the first defendant is voidable at the option of the plaintiff.
2. The defendants be ordered jointly or severally to reimburse the plaintiff TZS 421,000,000/- being the sum of money paid by her to the first defendant as consideration for the purchase of Plot No. 32 Block Y.
3. The order against the defendants to refund the plaintiff the costs she had incurred before and after the auction to the tune of TZS 5,000,000/-.
4. General damages to be assessed by the court that are naturally arising in the usual course of things, interest 3 on the claimed sum as well as damages to be assessed and the commercial bank rate from the date of accrual of the cause of action until the delivery of the

judgment.

5. Interest on the decretal amount from the date of delivery of the judgment up to the satisfaction of the same.
6. Defendants be condemned to bear the costs of this suit.
7. Any other relief(s) that the court deems just to award. At the hearing, the plaintiff was represented by Mr. Deocles Rutahindurwa, learned Counsel. The defendants were advocated by Mr. Frank Malongo, learned Counsel. Mr. James Joseph, the plaintiff's manager testified as PW1. In his evidence, he testified that on 22nd and 23rd February, 2022 he heard a public announcement that Plot No. 32 Block Y would be auctioned on 24th February, 2022. Following the announcement, he informed his director who told him that he read the advertisement about the auction and instructed him to make a follow-up. PW1 evidenced that on 23rd February, 2022 he went to Plot No. 32 Block Y to inspect the same including the house located in the plot. He testified that he inspected the plot and the house guided by the 4 defendants' representatives. The witness stated that on 24th February, 2022, after being satisfied with their inspection, the plaintiff participated in the auction conducted by the second defendant in which she was declared a successful bidder. Following the declaration, the plaintiff paid the first defendant TZS 421,000,000/- as a purchasing price. The witness testified that contrary to the announcement during the auction that the house was to be sold with its surrounding plot as it is, after the auction, the plot was divided by a wall. He stated that the wall obstructs the plaintiff from accessing the house. Given that, he asked this court to order the defendants to refund TZS 421,000,000/- as the sold plot is in dispute. In cross-

examination, PW1 testified that the plaintiff purchased Plot No. 32 Block Y as auctioneered by the second defendant and not Plot No. 50 Block Y. He evidenced that when he went to inspect the said plot, he did not know its size. He added that he did not remember the size of the plot that was stated during the auction. He evidenced that he did not conduct an official search to satisfy himself as to the particulars of the plot. In re-examination, the witness stated that they had no reason to suspect foul play as they inspected the house guided by the defendants' representatives. He stated further that at the time of the auction, there was no mark indicating that the area was comprised of more than one plot. Mr. Fidel Shilatu (PW2) testified that on 23rd February, 2022 he participated in the inspection of Plot No. 32 Block Y and the house located in the said plot guided by the defendants' representatives. He stated that the defendants' representatives showed them the boundaries of the plot. Having satisfied with the inspection, the witness testified that he, on behalf of the plaintiff, bid and emerged the winner for TZS 421,000,000/- which was paid to the first defendant by the plaintiff. When cross-examined, PW2 testified that the plaintiff purchased the house located in Plot No. 32 Block Y. The witness stated that he does not know the size of the plot in terms of measurements. Mr. Richard Zuberi, the plaintiff's director testified as PW3. In his evidence, he stated that the plaintiff purchased Plot No. 32 Block Y from the first defendant after the auction conducted by the second defendant. He testified that the purchasing price was TZS 421,000,000/-. The witness evidenced that when he was in the process of changing the ownership of the said plot, it came to his knowledge that the area bought by the plaintiff was comprised of two plots. According to PW3, he informed the first defendant about his findings and asked her to find a solution. The witness stated that his efforts to find a solution proved futile and the owner of the other plot has notified him of his intention to demolish part of the house that transcends to his plot. When cross-examined, the witness stated that before the purchase he did not consult a surveyor or conduct an official search. He evidenced that at the time when the auction was conducted, the value of Plot No. 32 Block Y was TZS 421,000,000/-. In defence, the first defendant fielded Mr. Ferdinand Lupande, the former Branch Manager of the first defendant, as DW1. He testified that Plot No. 32 Block Y was placed as collateral to the first defendant by Exotic Expeditions Ltd. He stated that after Exotic Expeditions Ltd failed to service the loan, the first defendant decided to sell the collateral through the second defendant. He evidenced that the plaintiff purchased the plot after paying the first defendant TZS 421,000,000/-. The witness testified that on 23rd February, 2022, he, Mr. Dooyakwa Phillip, a first defendant's officer and Mr. Massawe, a representative of the second defendant, went to Plot No. 32 Block Y. He stated that they went there to accomplish preparations for the auction to be conducted on 24th February, 2022. As per his recollection, on that day he and his colleagues did not show any person the boundaries of the plot as it was the duty of the purchasers to inspect the boundaries. Mr. Dooyakwa Phillip, the first defendant's officer, testified as DW2. In his evidence, he stated the certificate of occupancy in respect of Plot No. 32 Block Y shows that the said plot has 8010 square feet. The witness tendered the certificate which was admitted as Exh.DE1. DW3 testified that the auction was advertised through Raia Mwema Newspaper dated 18th February, 2022. The newspaper was admitted as Exh. DE2. According to the witness, the

advertisement required the prospective buyers to inspect the house. He stated that the prospective buyers were informed that the house would be sold as it is. In cross-examination, DW2 testified that the advertisement did not state the boundaries of the plot. He evidenced that when they said that the house would be sold as it is, they meant that they were selling Plot No. 32 Block Y. Mr. Joseph Massawe, the marketing manager of the second defendant, testified that the second defendant was instructed by the first defendant to auction Plot No. 32 Block Y. He evidenced that the auction was advertised through Raia Mwema and the public announcements. The witness testified that it was a condition for buyers to inspect the house before the auction. He further stated that the advertisement in the newspaper stated vividly that the house would be sold as it is. 8 The witness testified that on 23rd February, 2022 he and the first defendants' representative went to the plot to finalize the preparations for the auction. DW3 testified that, while there, he saw prospective buyers inspecting the house and the plot. He evidenced that neither he nor the first defendants' representatives showed the prospective buyers the boundaries of the plot. After hearing the evidence, I thought it prudent to direct the City Director to appoint a competent officer to prepare a report and testify before this court on the following:

1. Whether Plot No. 32 Block Y Bugando, Mwanza was partitioned to create Plot No. 50 Block Y, Bugando, Mwanza;
2. Whether Plot No. 32 Block Y Bugando, Mwanza shares the boundaries with Plot No. 50 Block Y, Bugando, Mwanza;
3. Whether the house allegedly to be in Plot No. 32 Block Y Bugando, Mwanza encroaches onto Plot No. 50 Block Y Bugando, Mwanza. I will discuss the report and the evidence adduced in respect of the report when determining the issues. 9 It is trite that he who alleges must prove. This principle has been established in numerous decisions including the case of *Barelia Karangirangi v. Asteria Nyalwamba*, Civil Appeal No. 237 2017- CAT (Unreported) where it was held: 'At this juncture, we think it is pertinent to state the principle governing proof of case in civil suits. The general rule is that he who alleges must prove.' In highlighting the source of the said rule, the Court went on to state that: '...the rule finds a backing from sections 110 and 111 of the law of Evidence Act, [Cap 6 RE. 2002] which among other things state: '110. Whoever desires any court to give judgment as to any legal right or liability depends on existence of facts which he asserts must prove that those facts exist.
111. The burden of proof in suits lies on that person who would fail if no evidence at all were given on either side.' It was further held in the same decision that: 'It is similarly, that in civil proceedings, the party with legal burden bears the evidential burden, and the standard in each case is on the balance of probabilities.' 10 This position was also stated in the case of *Anthony M. Masanga vs Penina (Mama Mgesi) and Another*, Civil Appeal No. 118 of 2014, CAT (Unreported) thus: 'In civil cases, the burden of proof lies on the party who alleges anything in his favor.' Guided by these principles, the burden of proof in this suit lies squarely on the shoulders of the plaintiff. Now the question that follows is whether the plaintiff has been able to discharge his duty on the required standard As to whether Plot No.

32 Block Y within Mwanza City was partitioned to create Plot No. 50 Block Y within Mwanza City, it is my considered view that none of the plaintiff's witnesses testified that Plot No. 32 Block Y was divided to create Plot No. 52 Block Y. Further, according to Mr. Hamis Hassan (CW), the land surveyor in Mwanza City Council, Plot No. 32 Block Y had never been divided to create Plot No. 52 Block Y. According to the report he submitted which was admitted as Exh.CE 1, Plot No. 32 Block Y was surveyed and registered in 1958 while Plot No. 50 Block Y was surveyed and registered in 1986. With such evidence, I am satisfied that the plaintiff failed to prove that Plot No. 32 Block Y was divided to create Plot No. 50 Block Y. This is because, since 1986, the two plots have been owned by two different 11 persons. Further, the plaintiff did not tender any cogent proof that proves her allegations in that respect. As to whether the defendants concealed material facts through deception and misrepresentation to induce the plaintiff to purchase Plot No. 32 Block Y within Mwanza City, PW1, PW2 and PW3 testified that the plaintiff purchased Plot No. 32 Block Y. However, the witnesses testified that there was a misrepresentation so far as the boundaries of the said plot are concerned as the boundaries shown by the defendants' representatives to PW1 and PW2 differ from actual boundaries. Amplifying on this, PW3 testified that the house that was purported to be in Plot No. 32 Block Y transcends to Plot No. 50 Block Y. PW3 evidenced that he had been notified by the owner of Plot No. 50 Block Y of his intention to demolish part of the house that is on Plot. No. 50 Block Y. The defendants' evidence was at par with the plaintiff's evidence so far as the selling of Plot. No. 32 Block Y. However, the defendants' witnesses testified that they did not show PW1 and PW2 the boundaries and that it was the plaintiff's duty to ascertain the boundaries. In determining this matter, I wish to restate the contents of the advertisement that was published in Raia Mwema Newspaper (Exh.DE2). According to the advertisement, the second respondent advertised the 12 auction of the house on Plot No. 32 Block Y with Title Number 033032/28 located at Mjini Centre Bugando, Mwanza Municipality as it is. The house, according to the advertisement was placed as collateral by Exotic Expeditions Ltd. That being the case, whoever attempted to purchase or purchased the house in question, in the case of the plaintiff, had in mind that he attempted to purchase or purchased a house located on Plot No. 32 Block Y. Now the question I would like to answer is whether there was a misrepresentation so far as the house was concerned. In so doing, it is pertinent to understand the meaning of misrepresentation. According to Oxford Dictionary of Law, Fifth Edition, the term "misrepresentation" means: 'An untrue statement of fact, made by one party to the other in the course of negotiating a contract, that induces the other party to enter into the contract.' As stated earlier, the second defendant advertised that she would sell by auction a house that is located on Plot No. 32 Block Y. Was that statement untrue? According to PW3, the house that was purchased by the plaintiff which was advertised by the second defendant to be on Plot No. 32 Block Y transcends on Plot No. 50 Block Y. This evidence was supported 13 by CW who testified that the house in question is located on the two different plots and it crosses the road. Further, according to Exh.CE1 tendered by CW, the City Director reported that on the two plots there is a permanent building that crosses the road that separates the two plots. From this evidence, I am satisfied that the house is not within Plot No. 32 Block Y as advertised by the second

defendant. This means that the second defendant misrepresented the location of the house. That being the position, this court asked itself whether the plaintiff was induced by the misrepresentation to purchase the disputed property. In this, I am of the considered view that the plaintiff was induced by the misrepresentation to purchase the said property. This is because after reading the advertisement and being informed by the plaintiff's manager (PW1), PW3 instructed PW1 to make a follow-up with regard to the auction and authorized the purchase of the disputed plot. If the defendants had correctly represented that the house is located on two plots and crosses the road, the plaintiff would have been informed of what she was about to purchase. I have found no merits in the defendants' evidence that the property was advertised to be sold as it is. The "as is" clause is not meant to save the seller from the misrepresentation he made about the property. The clause is meaningful when there is no misrepresentation. 14 In other words, the clause is not a thicket that unscrupulous sellers can use to hide themselves from their misrepresentation. Contextually, what was represented by the second defendant was that the house to be auctioned was in Plot No. 32 Block Y. Based on that representation the plaintiff purchased the plot in question only to find that the house is on two plots and cuts across the road. In that case, the clause "as is" cannot save the defendants' skin from liability. This is because by stating that the house was in Plot No. 32 Block Y, the defendants represented that the house was located on that plot only and not otherwise. Mr. Malongo, in his submission, contended that under section 34 of the Land Registration Act, Cap. 364 [RE.2002], the plaintiff was bound by the principle of caveat emptor which entails that a buyer must do due diligence to satisfy himself as to the condition of the property about to be purchased before purchasing the same. He amplified that when the buyer purchases the property is precluded from complaining that the property has defects. He supported his argument by citing the case of *Martin Fredrick Rajab v. Ilemela Municipal Council and Synergy Tanzania Company Limited*, Civil Appeal No. 197 of 2019-CAT (Unreported). 15 At this point, it is apposite to reproduce the contents of section 34 of the Land Registration Act as follows: 'Every person acquiring any estate or interest in any registered land shall be deemed to have actual notice of every subsisting memorial relating to such land in the land register at the moment when he acquires such estate or interest and, in the case of subsisting memorials inscribed in those parts of the land register which contain the description of the land and the particulars of incumbrance, of any filed documents to which those memorials refer.' The cited provisions were interpreted by the Court of Appeal in the cited case as follows: 'Thus in terms of the cited provision and since the buyer is required to be aware before purchasing a landed interest, it was incumbent on the appellant...to approach the 1st respondent to ascertain on the proper and actual status of the land before the purchase.' While I agree with the stated principle as augmented by the Court of Appeal and explained by Mr. Malongo in his submission, I am of the considered opinion that the principle of caveat emptor does not apply when there is a misrepresentation of the property by the seller. In this, I 16 am guided by the Court of Appeal in the case of *Crescent Impex (T) Ltd v. Mtibwa Sugar Estates Ltd*, Civil Appeal No. 455 of 2020-CAT (Unreported). In the said case, The Court had time to discuss the principle of caveat emptor as follows: 'We are well aware of a Latin phrase

"Caveat Emptor" means buyer beware. It basically conveys the message that the buyer must protect his or her interest when making a purchase or transaction. The buyer ought to have obtained all available information before she finalizes the purchase. Under this doctrine, it is the buyer's responsibility to examine the risks of the contract. However, there are a number of exceptions to the doctrine of Caveat Emptor. The same includes but not limited to the following: If there is no explicit warranty regarding the product's quality, then it is the buyer's responsibility to gather all the information about the purchased product. At the same time, the seller must not misrepresent the product or provide the buyer with false information about the product.' (Emphasis Added). 17 My understanding of the above excerpts is that when there is a misrepresentation of the property or when the seller deceives the purchaser about the property to be sold, the doctrine of caveat emptor is of no help to the seller. In this case, the defendants misrepresented the property, hence the doctrine of caveat emptor cannot rescue them from a hot soup. The defendants advanced the defence that the plaintiff through her representatives inspected the plot and the house in question and it was not their duty to show them the boundaries. In my view, issues relating to boundaries are latent and there is no way by inspecting the plot and the house, the plaintiff could ascertain the boundaries. It was incumbent on the part of the defendants to show the plaintiff the boundaries. Since the defendants failed and provided that they misrepresented the property to the plaintiff, the defence is devoid of merits. In their defence, the defendants hinted that the plaintiff was under the duty to consult the Registrar of Titles to ascertain the status of Plot No. 32 Block Y before the same was purchased. Again, I find no merits in this defence. As I stated hereinabove, the doctrine of caveat emptor is applicable in favour of the seller who did not induce the buyer by misrepresentation of the property. Since there was a misrepresentation, 18 the defendants cannot rely on the defence that the applicant was under the duty to consult land authorities. The one who advances the defence of caveat emptor must raise the same with clean hands. Given that, it is my holding that the defendants misrepresented the property that was bought by the plaintiff. As to whether the plaintiff is entitled to avoid the performance of a contract in respect of Plot No. 32 Block Y within Mwanza City, the law is clear under section 19 of the Law of Contract Act, Cap. 345 [RE.2019] that when the agreement is premised on the misrepresentation of the subject matter, the same is voidable at the instance of the representee, unless it is proved that the claimant had the means to discover the truth with ordinary means. As I stated hereinabove, issues relating to boundaries are latent and there is no way that a buyer by merely visiting and inspecting the property can ascertain with assurance its boundaries. Since the plaintiff relied on the representation of the description of the property by the defendants which turned out to be false, the plaintiff is entitled to avoid the contract. On whether the defendants have subjected the plaintiff to unnecessary inconveniences by denying the former the opportunity to utilize the money held by the former in other business ventures, none of 19 the plaintiff's witnesses evidenced that aspect. PW3 stated clearly that he does not know if the plaintiff would invest the said TZS 421,000,000/- she would get a profit. That being the case, the claim was not proved. In the same vein, I dismiss the claim of TZS 5,000,000/- as the same was not proved by the plaintiff. Amongst the prayed

reliefs were general damages. After evaluating the evidence, I am of the considered opinion that the plaintiff is entitled to general damages. This is because the plaintiff parted with her TZS 421,000,000/- after being induced to purchase the property which was misrepresented by the defendants. Ordinarily, if it was not for misrepresentation, the said amount could be used in other issues regardless of whether the same could generate profit or otherwise. In the final analysis, I order the following:

1. Following the misrepresentation by the defendants, the contract for the purchase of Plot No. 32 Block Y within Mwanza City between the plaintiff and the first defendant is voidable at the option of the plaintiff.
2. The defendants jointly or severally should reimburse the plaintiff TZS 421,000,000/- being the sum of money paid by her to the first defendant as consideration for the purchase of Plot No. 32 Block Y. 20
3. The defendants jointly or severally should pay the plaintiff TZS 42,000,000/- as general damages.
4. Interest of seven percent on the decretal amount from the date of delivery of the judgment up to the satisfaction of the same.
5. The plaintiff should recover the costs of this suit from the defendants. Order accordingly. Right To Appeal Explained. DATED at MWANZA this 17th of March, 2025. KS KAMANA JUDGE The Judgment was delivered this 17th day of March, 2025 in the presence of Ms. Kadashi, learned Counsel for the plaintiff and Mr. Mfuru, learned Counsel for the respondent. KS KAMANA 21 JUDGE 22

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