

TANZANIA / JUDGMENT

nyasulu enock nkyapi vs debora james ikhalla 2023 tzhclandd 16631 21 june 2023

COURT
TANZLIIDECIDED
21 June 2023

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND CASE NO. 253
OF 2021 NYASULU ENOCK NKYAPI..... PLAINTIFF VERSUS DEBORA JAMES
IKHALLA..... DEFENDANT

JUDGMENT

Date of last Order: 31/5/2023 Date of Judgment: 21/6/2023 k, MSAFIRI, J, The plaintiff one Nyasulu Enock Nkyapi instituted this suit against the defendant Debora James Ikhalla. The brief facts as per the contents of the Plaint is that on 19th February 2016, the plaintiff and defendant concluded a sale contract with a consideration of TZS. 200,000,000/= to be paid in three instalments. The contract was for sale of a land described as Plot No. 37 Block B Tegeta Area within Dar es Salaam City (herein as suit property) the property of the defendant. That the plaintiff had duly paid the defendant by cash and through bank account the total sum of TZS. 150,000,000/= being the 1st and 2nd installments in accordance with the terms of the sale contract. That, the plaintiff awaits to pay TZS 50,000,000/= as third installment upon completion of transfer process but the defendant had failed to perform the agreed obligations under the contract. That, after several oral and written demands by the plaintiff to the defendant, the i defendant has totally ignored and disregarded completely to honour her obligations under the contract. Therefore, the plaintiff has instituted this suit praying for judgment and decree against the defendant as follows;

- a) An order for specific performance and payment of damages at contractual rate of 30% per month on the paid consideration amount (TZS. 150,000,000/=) from February, 2016 to the date of

Judgment.

In alternative from prayer (a) above;

- b) A declaratory Order that the plaintiff is the lawful owner of the property described as Plot No. 37 Block 'B' Tegeta Area within Dar es Salaam City held under certificate of title no. DSMT 1016066.
- c) An order for special damage to the tune of TZS 260,000,000/=

- d) Perpetual injunction order against the defendant to the property described as Plot No. 37 Block B Tegeta Area within Dar es Salaam City held under Certificate of Title No. DSMT.1016066.
- e) General damages to the tune of TZS 600,000,000/=
- f) Punitive damage to the tune of TZS 300,000,000/=
- g) Interest on the decretal amount at the Court's rate of 12% from the date of judgment until full and final payment;
- h) Costs of the suit; and
- i) Any other and further relief(s) this Honourable Court deems fit and just to grant. The defendant filed her written statement of defence and vehemently disputed every claim by the plaintiff. She added that it was the plaintiff who breached the contract as he did not pay 2nd instalment 2 as per agreed terms of contract. She prayed for dismissal of the suit with costs. At the hearing, the plaintiff was represented by Mr. Evance Rwekaza learned advocate with Amani John Richard, learned advocate. The defendant had legal services of Mr. Yudathadei Paul, learned advocate assisted by Mr. Edward Kikuli, learned advocate. Before the commencement of the trial, the following issues were framed by the Court;
 - 1. Whether there is a sale contract of suit property between the parties.
 - 2. Whether there is a breach of that contract by either party.
 - 3. To what reliefs are parties entitled to. During the hearing, the plaintiff had a total of four witnesses including himself while the defendant summoned two witnesses including herself. Also a total of 13 documents were tendered and admitted by the Court on the plaintiff's side while on the defence side, a total of two (2) documents were admitted by the Court. The parties through their advocates also filed the final submissions. I have considered the final submissions by the plaintiff in my determination of the evidence in this matter. However I have disregarded the final submissions by the defendant as they were filed out time scheduled by this Court, without the leave of the Court. I shall analyse the available evidence while determining the framed

issues.

3 Beginning with the first issues as to whether there is a sale contract of suit property between the parties, neither of the rival parties disputed this issue. Testifying as PW1, the plaintiff stated that, the defendant was introduced to her by his father who told him that she was asking for a loan. PW1 said that, he refused telling the defendant that he was not in lending business. That, the defendant kept pursuing him asking for a loan, until on 01/02/2016, the defendant told the plaintiff that she has a house which she can charge as a security, or sell so that she can get the money she needed for school fees of her child who was studying outside the country. PW1 said that accompanied with his lawyer from HOMAC advocates, he went site visiting the defendant's

house which is located at Bahari Beach, Tegeta area (herein as suit property). That he was satisfied by the said house and decided to purchase it whereby he (plaintiff) and the defendant agreed on the purchase price. That, he made enquiries on the neighbours around the suit property and also visited the office of Street Local Government of the area and they all confirmed that the suit property belong to the defendant. That, the plaintiff asked his lawyer at HOMAC advocates to conduct official search of the landed property at the Commissioner for Lands, and the results were that the suit property has no Title but it has a Letter of Offer in the name of Asha Mfaume. Following that, the plaintiff confronted the defendant who assured him that the suit property legally belongs to her. LMO- 4 Upon satisfaction, on 19/02/2016, the plaintiff and defendant met at the offices of HOMAC advocates and signed a Sale Agreement. The said agreement was about sale and purchase of the suit property located at Bahari Beach Tegeta, owned by the defendant. He tendered the said sale agreement which was admitted in Court as Exhibit P1. On her part the defendant testifying as DW1, confirmed that she entered a sale agreement for sale of suit property with the plaintiff. That, she was introduced to the plaintiff by his father whom she knew previously. That she has advertised her intention to sell her property located at Plot No. 37 Block B. Tegeta, Bahari Beach. She agreed to have communicated with the plaintiff and took him to see the suit property. That the plaintiff spoke with neighbours of the area and local street leaders and he was satisfied that the suit property is lawfully owned by the defendant. DW1 stated that on 19/02/2016, she and the plaintiff signed a sale agreement at HOMAC Offices at Mikocheni and the purchase price was TZS. 200 Million which was to be paid in three instalments. From the evidence of both parties, it is clear that there is/was a sale contract of suit property between them, as also supported by exhibit P1. The first issue is answered in the affirmative. The second issue is whether there is a breach of that contract by either party. Gathering from evidence, each party claims that his/her rival has breached the sale contract. In order to know whether there was a breach by any party, I carefully read the sale contract/ sale agreement, Exhibit pi- MU- 5 According to Exhibit. P1, the consideration of contract is TZS. 200 Million. The mode of payment of consideration was to be in three instalments; the first instalment of TZS. 20,000,000/= to be paid to the vendor on the date of signing the contract, the second instalment of TZS. 80,000,000/= to be paid to the vendor within one week after signing the contract, and the third instalment of TZS. 50,000,000/= to be paid on completion of the transfer after signing of the contract. In his evidence, PW1, stated that on 19/2/2016, he paid one (1) million cash to the defendant at HOMAC offices after signing the contract, then later on the same date he went with the plaintiff at the Bank where he deposited TZS. 70 Million in the defendant's account at KCB Bank. He tendered the Bank slip which was admitted at Exhibit P2. Exhibit P2 shows that a total of TZS. 70,000,000/= million was paid by Nyasulu Enock (plaintiff) into the account of Deborah James Ikhalla (defendant). PW1 stated that, according to the terms of the contract, the defendant was to hand over the ownership documents of the suit property. PW1 said that, the defendant did not hand over the ownership documents as agreed. He said that despite that, the second instalment has to be paid within a week after payment of first instalment. This was as per the terms of sale agreement. Hence, PW1 was to make payment on or before 26/2/2016. PW1 stated that he acted accordingly and on 25/2/2016, he made Bank transfer from his company known as Lupi Co. Ltd, the amount of TZS 79 Million. The transfer of the said

money was made to the defendant's account. He tendered a Bank slip which was admitted as Exhibit P3. It shows that a total of TZS. 79,000,000/= was paid by Swift 6 Transfer by Lupi Co. Ltd on 25/02/2016, to the beneficiary Deborah J. Ikhalla in her account at KCB Bank. PW1 stated further that the terms of agreement instructed him to deposit TZS 80 million, but he deposited TZS 79 million only because he has already gave the defendant, one million in cash. He said that by 25/2/2016, he has already paid TZS. 150 million as per the terms of agreement. PW1 stated that after the deposit, PW1 communicated with the defendant and asked her to hand over to him the ownership documents. That the defendant told her that the documents were in the custody of her lawyer who has travelled. That, PW1 went on pursuing the defendant asking her to hand over the document to no avail. That later, the defendant told him that she was cancelling the sale agreement and wants to refund the amount of money paid by PW1. PW1 averred that, as per the terms of sale agreement, if the vendor breached the terms of the said agreement and was to refund the money already paid by purchaser, then the vendor was to refund the said money plus an interest of 30%. This is shown at clause 8 of the agreement. PW1 stated that it was the defendant, who has breached the terms of contract because she has failed to hand over to him the ownership documents, she has expressed her intention to cancel the agreement but failed to refund PW1 the sum he has paid her with 30% interest as per the terms of contract. That, despite efforts to ask the defendant to pay back the purchase price with interest, the defendant did not comply, and hence he decided to file this case so as to get justice. He prayed to the Court to grant his prayers as per the Plaint. In cross examination by the counsel for the defendant, PW1 stated that on the first day of agreement, he made cash deposit of TZS.70 million in defendant's account, and also on the same date, in HOMAC advocates offices, he gave the defendant cash one million shilling, totaling TZS. 71 million. When asked about proof of payment of TZS. One million, PW1 replied that there was witnesses who saw him paying the defendant the said amount in cash. The witness was shown a Bank statement which shows that the payment of TZS. 79,000,000 was paid on 21/3/2016 and not 25/2/2016. However, he maintained that he made payments by swift transfer on 25/2/2016 and communicated to the defendant by phone call and informed her about the deposit. PW1 said that the defendant communicated with his lawyers by phone call informing them that she is cancelling the agreement. He insisted that it was the defendant who breached the agreement. PW2 was Rose Valenci Njau who introduced herself as an advocate at HOMAC advocates. She said that in February 2016 she witnessed the signing of sale agreements between the plaintiff and the defendant. That her office conducted office search of the suit property before the sale agreement. That the search at the office of Commissioner for Lands showed that no record of the owner the property was revealed. However the plaintiff and defendants insisted to continue with sale transaction as they said they trust each other. I |q. 8 PW2 said that they drafted sale agreement on which the parties to the dispute signed. That on the date of signing the agreement, the parties came at their office where they signed the agreement. That on that date, the plaintiff gave TZS One Million cash to the defendant after the same requested so, insisting that she is in urgent need of cash, that the rest of money TZS. 70 Million was deposited in the defendant's Bank account. That she witnessed the plaintiff giving cash one million to the defendant. That after the first instalment, they communicated with the defendant asking her to hand over the documents but she replied that she will hand over later when her

lawyer who was in possession of the same came back. That, after payment of second instalment they kept waiting and insisting the defendant to hand over the documents but the defendant failed to do so. PW2 stated further that later, the plaintiff informed them (at HOMAC) that the defendant has cancelled the sale agreement and is ready to refund the money already paid. That, the lawyers advised the defendant about the consequences of cancelling the contract and that she will have to pay 30% interest of the whole paid amount. She said further that on 21/3/2016, the defendant came at their offices and informed them that she has no intention of continuing with sale process. That PW2 drafted a letter showing the intention of termination of sale agreement and served the copy to the defendant. The letter was admitted as Exhibit P11. The letter shows that, subject to the defendant's intention of rescinding/cancelling the contract, then she will have to pay a total of TZS. 222,370,000/=. -Afl 1 n. 9 PW2 stated further that the defendant wanted to sell the suit property to another buyer so, acting for the plaintiff, they filed a caveat at the Office of Commissioner for Lands to stop the sale or transfer of ownership of suit property. The caveat was admitted as Exhibit P.12. PW3 was Clement Mwanzalima, who said that he is a Branch Manager currently at KCB Bank, Morogoro Branch, but before that, he was a Manager at Oysterbay Branch, Dar es Salaam. He stated that on 25/02/2016, he was at his bank, KCB Bank Oysterbay Branch, when the Bank received money deposited in the form of TISS (Tanzania Interbank Settlement System). That the money was paid to the account of Deborah James Ikhala, the defendant. That they called the said defendant by phone and inform her about the transaction and she confirmed that she was aware of the deposit. That the amount received was TZS. 79 million. PW3 stated that according to the procedures on TISS transactions, the Bank needed verification of the money so they waited for the defendant to bring proof of the money so that the Bank can deposit the same into her account. That the defendant did not bring proof of the money as required so they were unable to deposit the money into her account. He said that since the time was passing and they had received the money on 25/2/2016, on 14/3/2016, the Bank decided to return back the money to Equity Bank. That, after that, the defendant finally brought the requested proof to the Bank which is Sale Agreement. She brought the said agreement on 21/3/2016 and asked the Bank to take the money back io from Equity Bank, which KCB did on the same date. The money then were deposited into the defendant's account. PW3 said that, however on 04/5/2016, the defendant came at the Bank (KCB) where she filled a deposit form to return TZS. 79 Million to Equity Bank. That, the money sent back could not be received by Equity Bank because there was an error on the account name of the receiver so, the money were returned back to KCB Bank. He said the error was that, instead of filling the name of Lupi Company which is the account which sent the money to defendant's account at KCB from Equity Bank, the defendant filled the name of receiver as Nyasulu instead of Lupi Company that was why the transaction was unsuccessful. PW3 produced the SWIFT documents which were received by the Court for identification purpose as ID1. PW3 stated that initially, the defendant's account received up to 80 Million shillings but the money were used until it was finished. In cross examination, PW3 stated that the defendant was notified about the deposit into her account by phone call and she also come physically at the Bank and was informed about the deposit. He added that all SWIFT transactions are investigated for verification particularly those involving individual accounts. PW4 testified as Howard Macfarlane Msechu, who was a Managing Partner of HOMAC

Advocates. He testified as an advocate who was involved in drafting the sale agreement and witnessed the signing of the said sale agreement between the plaintiff and the defendant. His evidence was similar to that of PW2, the fellow advocate at HOMAC advocates. The defendant then opened her case and testified as DW1. She stated that she know the plaintiff and admitted that she entered a sale ii agreement with him. That, before selling the suit property to the plaintiff, she told him that she bought the property from Asha Mfaume and that the property has a Letter of Offer in the name of Asha Mfaume. That upon satisfaction, the plaintiff agreed to purchase the suit property and they entered the sale agreement and signed it on 19/2/2016 at HOMAC advocates offices, Mikocheni. That, the purchase price was TZS. 200 Million and the payment was to be done in three instalments. The first instalment was TZS 70 million which was paid on 19/2/2016 and it was done by the plaintiff depositing cash TZS. 70 Million in her account at KCB Bank, Oysterbay Branch. DW1 denied to have been paid one million shilling cash by the plaintiff as claimed. She stated that if she had wanted cash, she could have taken the same from her account when the plaintiff and she went together at her Bank and the plaintiff deposited 70 million shillings. She produced a Bank statement which shows that 70 million shillings were deposited into her account. The two Bank statements was admitted as Exhibit DI collectively. The Bank statement dated 24/3/2023 shows that on 19/2/2016, Nyasulu (plaintiff) deposited TZS. 70 Million in the defendant's account at Oysterbay Branch. DW1 stated that the second instalment was not effected on 25/2/2016 as per the sale agreement. That after some time has passed, she contacted the plaintiff who replied that the payment was still on process maybe it was on SWIFT. But she said she did not get any payments or any SWIFT documents from the plaintiff. She said that on 21/3/2016, one Howard Msechu (PW4) came at her office and informed her that the money has been deposited into her 12 account since 25/2/2016 and also told her that she has failed to produce documents as per the agreement. That, then Howard Msechu made a conference call between him, the plaintiff and a Bank officer. He put a call on loud speaker so the defendant was hearing the conversation. That the Bank officer denied to receive money at the Bank and that no money has been deposited into her account. DW1 stated that the money on second instalment, i.e. TZS 79 million was received and deposited into her account on 21/3/2016 as per Bank statements which was admitted collectively as Exhibit. DI. Indeed, Exhibit.DI, particularly on the second Bank statement shows that on 21/3/2016, TZS. 79,000,000/= was paid to the defendant's account via inward SWIFT, payment made by Lupi. Co. Limited. DW1 stated further that on the same date 21/3/2016, she was called by HOMAC secretary and told to pass by the office to take her letter. That she went on the same date and received the said letter which stated that she has cancelled the contract. She identified the said letter which was admitted in Court as Exhibit P.II. She denied to have ever written a letter to cancel the sale agreement and that she has never communicated by a phone call with anyone about cancelling the agreement. She stated further that after getting a letter exhibit P.II, she consulted her lawyer, who wrote back to the HOMAC Advocates and told them it was the plaintiff who cancelled the contract by breaching the terms of agreement. That, instead of paying the second instalment on 25/2/2016 as per the sale agreement, the plaintiff paid the same on 21/3/2016 and deposited 79 million only. In-13 She produced a photocopy of the said letter replying the letter of 21/3/2016, which was admitted as Exhibit D2. DW1 stated further that, on 04/5/2016, she and her lawyer went at her

Bank, KCB Bank Oysterbay where they met with the Bank officers one of them was Clement Mwanzalima (PW3). That her lawyer requested the Bank to return back the money TZS. 79 million to the sender as the same has been deposited contrary to the terms of sale agreement. That there was confusion on the names of the sender whereby the sender/depositor was Lupi and Co. Ltd while the names on Sale Agreement are Nyasulu Nkyapi and Deborah Ikhala. That she was asked to fill the transfer form, and after that, she was informed that the money has been returned back to the sender/depositor, Equity Bank. That she gave the HOMAC advocates the SWIFT form to show that the money has been returned. DW1 insisted that, between her and the plaintiff, it was the plaintiff who breached the agreement and this is for a reason that the money for second instalment was received on 21/3/2016 instead of 25/2/2016. Also, as per the agreement, the money to be paid for second instalment was TZS. 80,000,000 but instead the plaintiff only paid TZS. 79 million. She said that she proceeded to process the transfer of ownership of suit property from Asha Mfaume to her own name, and the Commissioner for Lands cancelled/deregistered the caveat which was filed/entered by the plaintiff on suit property. That, while the process of transferring the ownership into her name was under way, the plaintiff took occupation of suit property and started developing it. That he extended the wall fence 14 and erected some huts, and changed the use of suit property from residence to business and residence. She prayed for the dismissal of the suit and order that the plaintiff vacate the suit property, she said also that she is ready to return back the money TZS. 70 million. On cross examination by the counsel for the plaintiff, DW1 admitted that she received TZS. 70 million but did not hand over the documents of ownership because the agreement stated that she was to hand over after second instalment. She referred Item No. 5. and Item No. 8 of sale agreement. DW2 Asha Mfaume Abdallah also testified and admitted to have sold the suit property to the defendant in 2005 and moved to Bagamoyo. Having gone through the evidence both oral and documentary from both side, I will now determine the second issue which is whether there is a breach of contract. Who breached a sale contract? Each party to the dispute blames the rival party for the breach. The plaintiff said that it was the defendant who breached the contract by refusing or failing to hand over to him or the common lawyer, the ownership documents as per the terms of agreement. On her part, the defendant also contend that it was the plaintiff who breached the agreement by his failure to pay on time the second instalment and not paying the whole amount as per the terms of agreement. Having gone through the evidence, I feel I should point that it is a cardinal principle of law that he who alleges must prove. The principle is 15 enshrined under the provisions of sections 110 and 111 of the Evidence Act, Cap 6 R.E 2019. This principle has been reiterated in numerous cases of the Court of Appeal and to name few, in the case of Godfrey Sayi vs. Anna Siame (as legal representative of the late Mary Mndolwa), Civil Appeal No. 114 of 2012 CAT (unreported) the Court of Appeal stated that; "It is similarly common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on balance of probabilities." Also in the case of Joseph Kahungwa vs. Agricultural Inputs Trust fund & 2 others, Civil Appeal No. 373 of 2019 (unreported), the Court of Appeal among other things held that; "It is a cardinal principle of law that the burden of proof in civil cases lies on the party who alleges anything in his favour." Basing on that cardinal principle, in the matter at hand, it is the duty of the plaintiff to prove his claim on balance of probabilities. The plaintiff claim that the

defendant has breached the sale agreement. He produced the sale agreement Exhibit P1 which was entered on 19/02/2016. Exhibit P1 states that the mode of payment of consideration of TZS. 200 million was to be in three instalments. The first instalment of TZS. 70 Million was paid on the same date of signing the contract which is on 19/02/2016, hence there is no dispute on payment of first instalment. /Wn- 16 The dispute is on payment of the second instalment which was to be TZS. 80 million. The same was to be paid within one week after signing the contract which was to be paid on 26/02/2016. It is in the evidence that the plaintiff paid only TZS. 79 Million. This was explained by the plaintiff that he paid cash one Million to the defendant on 19/02/2016 that is why he paid only TZS. 79 Million on second instalment. There was evidence from PW2 and PW3 that they witnessed the plaintiff paying cash one million shillings to the defendant. Furthermore, there is evidence from PW3 a Bank Officer which is corroborated by the evidence of the defendant herself that the money TZS 79 Million was paid by SWIFT on 25/02/2016 but could not be directly deposited to the defendant's account for the reason of verification processes which the said process was delayed by the defendant herself who took time to give details needed for verification. As results, the sent money were not deposited in the defendant's account until 21/3/2016. This fact that the plaintiff deposited TZS 79 Million on 25/02/2016 is also supported by exhibit P3 a fund transfer form. In her evidence, the defendant admit to receive TZS 79 Million in her account. There is no evidence that the said sum were refunded to the plaintiff. The evidence available shows that the defendant asked her bank, KCB to return the sum but the return transfer did not succeed. The Bank statements admitted as exhibit DI collectively shows that the money TZS 79 Million was returned back to the defendant's account so the money are still in possession of the defendant. It was the evidence of the plaintiff side that the defendant breached the terms of sale agreement. Looking at the whole evidence, I am inclined 17 to agree with the plaintiff's claims. According to the evidence, the first instalment of TZS. 70 Million was paid by plaintiff and received by the defendant on the date of signing the contract i.e. on 19/02/2016. Clause 4 of the contract of sale (also herein as sale agreement), states that the date of execution of the deed of disposition shall be promptly upon signing and delivery of the down payment (first instalment). By this clause, it is clear that upon signing and delivery of first instalment the execution of the deed of disposition was to be effected. This term bound the defendant to hand over the necessary documents for effecting the said deed of disposition. This is simply because the disposition would not be effected without ownership documents which were in possession of the defendant. Clause 6 of the said contract further insisted that the vendor shall immediately hand over the genuine copies of letter of offer, land receipt and any other documents to the common lawyer who shall keep the same for transfer of ownership process. Throughout her evidence, the defendant kept pointing on how the plaintiff breached the contract by his failure to pay the second instalment on time but FAILED to say anything on her failure to hand over the necessary documents for purpose of execution of the deed of disposition as per clause 4 of the contract. She did not say anything about the terms of clause 6 and 8 of the contract. When she was cross examined by the counsel for plaintiff about her failure to fulfil her part of obligation, she stated that she was to hand over the documents upon payment of second instalment. JVIU' 18 However, clause 5 of the contract provides that upon payment of the second instalment, the vendor shall promptly hand over to the purchaser vacant possession of the property. Therefore, according to the contract, the

defendant was to handover the documents for ownership of suit property upon payment of first instalment. The defendant did not do so hence she breached the terms of contract. I find that the defendant breached the terms of contract by her failure to hand over the documents of ownership of suit property upon payment of the down payment (first instalment) by the plaintiff. The second issue is answered that there is a breach of the contract of sale by the defendant. The last issue is the relief to parties. I understand that the defendant has neither filed a counterclaim nor pray for any relief in her written statement of defence other than dismissal of the suit. The plaintiff however, has prayed for a range of reliefs. The major and first one being an order of specific performance and payment of damages at contractual rate of 30% per month on the paid consideration amount of TZS 150,000,000 from February 2016 to the date of judgment. In the alternative, the plaintiff have prayed for other prayers including declaratory order that he is a lawful owner of suit property. This Court has found and held that the defendant is in breach of contract. In such circumstances I order for specific performance of contract for sale by parties. L 19 Despite the fact that the plaintiff have prayed for both specific performance and payment of damages, I cannot grant for both. My duty is to order specific performance of the sale contract as per the terms of the said contract which binds the parties. In this I am guided by the provisions of section 37(1) of the Law of Contract Act which provides that an agreement entered by parties is binding upon the said parties. This principle of law has been elaborated further in numerous cases by the Court of Appeal and even this Court. To name few, this principle of law was observed in the case of Unilever Tanzania Ltd vs. Benedict Mkasa t/a Bema Enterprises, Civil Appeal No. 41 of 2009, CAT at DSM (unreported) where it was stated that; ... "Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the Courts to change those clause which parties have agreed between themselves..." Also in the case of Mariam E. Maro vs. Bank of Tanzania, Civil Appeal No. 22 of 2017 [2020] TZCA 1789, the Court of Appeal held thus; "It is the law that parties are bound by the terms of the agreement they freely enter into...." Hence, guided by that cardinal principle, this Court can only order for specific performance of the contract by parties. In the Black's Law Dictionary, 8th Edition at page 1435 the term "specific performance" is defined as; 20 "an equitable remedy in the law of contract whereby a court issues an order requiring a party to perform specific act, such as to complete performance of the contract." That it is; "The rendering as nearly as practicable, of a promised performance through a judgment or decree; a Court ordered remedy that requires precise fulfilment of a legal or contractual obligation when monetary damages are in appropriate or inadequate". It is explained further that; "In essence, the remedy of a specific performance enforces the execution of a contract according to its terms and it may therefore be contrasted with the remedy of damages which is a compensation for non- execution. It is not strictly accurate to say that the court enforces execution of the contract according to its terms, for the Court will not usually intervene until default upon the contract has occurred so that the enforcement by the Court is later in time..." (emphasis mine). See also the case of Unilever Tanzania Ltd vs. Benedict Mkasa t/a Bema Enterprises (supra) where it was held further that it is not the role of the Courts to redraft clauses in agreements but to enforce those clauses where parties are in dispute. IV h - 21 With that analysis, I hereby orders;

1. Parties specific performance of the terms of contract which was entered between Deborah James Ikhalla (the defendant) and Nyasulu Enock Nkyapi (the plaintiff) on 19/02/2016 as follows;
 - a) Immediate hand over of the ownership documents of the suit property by the defendant to the plaintiff as per the terms of the contract. The hand over should be done immediately within one week from date of the delivery of this judgment.
 - b) Upon the receipt of the ownership documents, plaintiff to process the transfer of ownership of property as per the terms of the contract.
 - c) The plaintiff to pay off the remaining instalments of the consideration sum as per the terms of the contract. The outstanding payments should be effected within one week after the receipt of the ownership documents.
 - d) The defendant to give vacant possession of the suit property to the plaintiff as per the terms of the contract.
 2. Costs of the suit shall be borne by the defendant. It is so ordered. 22
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://media.tanzlii.org/media/judgment/190315/source_file/nyasulu-enock-nkyapi-vs-debora-james-ikhalla-2023-tzhclandd-16631-21-june-2023.pdf

CASE PAGE <https://chat.esheria.ai/case-law/tanzania/nyasulu-enock-nkyapi-v-debora-james-ikhalla-specificperformance-tanzlii-2023>

Prepared on 14 October 2026 · Esheria