

TANZANIA / JUDGMENT

ruckya sanatu basserporte vs treasury registrar and 2 others 2021 tzhc 7389 29 november 2021

COURT
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANNIA IN THE DISTRICT REGISTRY
OF ARUSHA AT ARUSHA LAND CASE NO. 15 OF 2019 RUCKYA SANATU
BASSERPORTE..... PLAINTIFF/DEFENDANT VERSUS TREASURY
REGISTRAR..... 1st DEFENDANT/PLAINTIFF CENTER FOR AGRICULTURE
MECHANIZATION AND RURAL TECHNOLOGY (CARMATEC)..... 2nd DEFENDANT/2nd
DEFENDANT THE ATTORNEY GENERAL..... 3rd DEFENDANT/3rd DEFENDANT

JUDGMENT

21/09/2021 & 29/11/2021 GWAE, J The plaintiff, Ruckya Sanatu Basserporte has filed this suit in the court against the three defendants to wit; Treasury Registrar (1st defendant), Center for Agriculture Mechanization and Rural Technology (CARMATEC, 2nd defendant) and Attorney General (3rd defendant) jointly and severally claiming ownership over the landed property in Plot No. 108 located at Vijana Road, Arusha City, under Certificate of Title 11496 (055036/14). She further claims for the court's orders of specific performance by the defendants, i general damages and other ancillary reliefs that may be deemed fit and just to grant by the court. In the plaint, the plaintiff alleged that, on the 6th November 2002, the then Presidential Parastatal Sector Reform Commission (PSRC) publicly advertised a tender for the purchase of the residential houses owned by the defunct Tanzania Natural Development Company ("TANADE"), the suit property was among the houses intended for the public sale. The plaintiff subsequently made the highest bid price at the tune of Tshs. 60,000,000/= and then on the 18th November 2002 he made the initial payment at the rate of ten percent (10 %) equivalent to Tshs. 6,000,000/= which was 10% of the bid price. Thereafter the plaintiff unsuccessfully made several efforts to effect payment of the outstanding balance of Tshs. 50,000,000/= so that the suit premise could be transferred in her name. However, on the 10th February 2003 the plaintiff was advised by PSRC to be patient as there was a court order over the suit land. Despite the fact that the plaintiff who was required by the defendants to be patient however on 25th November 2008, the 2nd defendant demanded the plaintiff to hand over the suit property before 10th December 2008 and that, from there onwards the plaintiff has been served with several demand 2 notices requiring her to vacate

the suit premise. It was on 16th April 2009 when the plaintiff became aware that, the Government through the then Consolidated Holding Corporation had subsequently changed its mind and that, the tendering process and the intended sale of the TANADE's properties including the suit premise was suspended due to Government Policy. On the 3rd February 2017 again, the plaintiff became aware that on 23rd May 2008 the 1st defendant through GN No. 65 of 2008 made an instrument of transfer of the suit property to the 2nd defendant. The plaintiff maintained that the 2nd defendant is not the lawful owner of the suit land as the official search with the Registrar of Titles which was conducted by the plaintiff on the 28th January 2009 revealed that, the suit land was still registered under TANADE and not the 2nd defendant. The plaintiff thus prayed for the following reliefs;

- i. That, this court holds and declare that, the plaintiff is the lawful owner of immovable property being Plot No. 108 Vijana Road, Arusha City under Certificate of Title 11496 (055036/14) Land Registry-Moshi. ii. That, this court order and compel the 1st defendant to issue the plaintiff a title deed of the suit land being Certificate of 3 Title 11496 (055036/14) Land Registry-Moshi in the name of the plaintiff. iii. That, an order for a permanent injunction restraining the defendants, jointly and severally, whether by themselves, agents, employee, any person or group of persons claiming interest under the defendants or any of them from interfering with the plaintiffs continued possession and use of Plot No. 108 Vijana Road, Arusha City under Certificate of Title 11496 (055036/14), Land Registry Moshi. iv. That, an order against the defendants, jointly and severally, for payment of General damages to be assessed by this honorable court.
- v. Costs of the suit. vi. Any other relief as this court may deem just and fit to grant. On the other hand, the defendants via their joint written statement of defence contendingly stated that, the plaintiff is illegally occupying the suit property as she had never made any payment in relation to the disputed property nor does she have any colour of right as there was no sale of the suit house that was conducted by the plaintiff save invitation for bid. The defendants also admitted some of the plaintiffs claims such as the transfer of ownership from the TANADE to the 2nd defendant, the issuance of notices 4 for vacant possession and advertisement of the outright purchase of the houses previously owned by the TANADE and other plaintiff's averments. The defendants' WSD was also accompanied by their counter claim against the plaintiff praying for payment of USD 153,600 being rentals allegedly collected by the plaintiff. Consequently, the defendants pray for the judgment and decree on the counter claim against the plaintiff as follows;
- i. Declaration that the plaintiff is wrongly occupying the suit property ii. Declaration that the 2nd defendant is the lawful owner of the suit property iii. Eviction of the plaintiff from the suit land and vacant possession to the 2nd defendant iv. Payment of rentals wrongly collected by the plaintiff or which was due for collection by the 2nd defendant from the plaintiff in the sum of USD153,600

- v. Alternatively, payment of mesne profit in the sum of USD153,600 vi. Payment of USD 1,200 per month from the date of filing this suit to the date of judgment vii. Compound interest on items (iv) and (v) above at the rate of 4 % per annum from November 2008 to the date of

judgment

5 viii. Interest of 12 % per annum from the date of judgment to the date of final payment ix. Costs of the proceedings be provided for, and

- x. Any other relief (s) that the court may deem proper At the hearing of both main case and the counter claim the plaintiff was represented by Mr. Meinrad D'Souza, the learned counsel while the defendants were represented by Mr. Peter Musseti, the learned Senior State Attorney. The following issues were framed and they are subject for determination by this court: -
1. Whether the plaintiff purchased the property on Plot No. 108 Vijana Road with CT 11496 Arusha City.
 2. Whether the plaintiff was /is under statutory obligation to pay house rents in favour of the defendants.
 3. To what reliefs are the parties entitled to. The plaintiff's case was supported by two witnesses namely; Ruckya Sanatu Basseporte who appeared and testified as PW1 and Mr. Marc Basseporte (PW2). The testimonies given by the plaintiff's witnesses are reiteration of what is contained in the plaint however the plaintiff seriously sought to be allowed to pay the remaining bid price at the rate of 6 Tshs.54,000,000/=and or alternatively she be paid compensation for the renovation that she had effected to suit house and be declared the lawful owner of the suit premises. Exceptionally, the PW2 testified that he paid Tshs.6,000,000/= to the PSRC upon request by the PW1 to assist her purchasing the suit land which was initially let to him as the tenant since 1990 by virtue of being TANADE's employee. He paid through his personal account by means of bankers' cheque which, according to him, is good as money. He further adduced that his salaries' arrears with TANADE amounting to USD 75, 000 was to be set off in the purchase of the suit property. He added that the bid price was not fully paid due to the filing of caveat by one Mrema on the 22nd November
2002. When cross examined by the defence counsel, the plaintiff admitted to have not personally paid part (10 %) of the bid price except her husband (PW2). Plaintiff's side correspondingly tendered seven documents these are; Majira Newspaper dated 6/11/2002 (PE1), Bank Draft Request form dated 18th November 2002 worth Tshs. 6,000,000/= drawer being PW2 and the same was addressed to PSRC (PE2), (PE3), letter dated 25th November 2008 addressed to the plaintiff in relation to handing over of a house on Plot No. 7 103 Vijana Road -Arusha (PE4), a reply letter written by the PW2 and plaintiff dated 3rd December 2008 to the 2nd defendant (PE5), reminder demand notice to vacate dated 29th January 2009 from the 2nd defendant (PE6) and Official Search dated 3rd December 2015 (PE7). On the other hand, the defendants summoned two witnesses namely; Robinson Kidede and Pastory Mrosso who

appeared and testified in court as DW1 and DW2 respectively. In essence, the defendants/ plaintiff to the counter claim testified that the tender substantiated by PEI was renounced as the TANADE's properties were handed over to the TBA who subsequently handed the same to the 2nd defendant. It is also the evidence by the defendants/plaintiffs that, according to PEI the defunct PSRC would not be bound to accept the bids on the basis of one factor. According to the PSRC was not final decision maker to the bid and that the current lawful owner of the suit property as per DEI is the 2nd defendant and that the plaintiff had not been refunded her money. DW2's evidence in its style is to the effect that upon refusal by the plaintiff to vacate the suit land, the incurred unnecessary expenses for accommodation for the 2nd defendant's senior staff. 8 Equally, the defendants tendered three exhibits, these are, a letter dated 15th June 2014 written by the 1st defendant to the 2nd defendant on transfer of ownership of the TANADE's properties, the suit land inclusive formerly owned by TBA to the 2nd defendant accompanied with G.N 65 of 2008 (DEI), Handing over deed dated 17th October 2008 by CHC to the 2nd defendant and minutes (DE2) and three notices of 2008, 2015 and of 2019 for vacant possession issued by the 2nd defendant to the plaintiff (DE3). When cross examined by the plaintiff's counsel, DW1 admitted that the tender process for the purchase of the TANADE's residential houses including the suit house was formally advertised but the change of the intention to sell was not publicized. Similarly, when the DW2 was cross examined by the counsel for the plaintiff on the veracity of their evidence as to the counter claim on collection of rentals or if there is evidence as to the alleged payment of rents for the 2nd defendant's senior staff occasioned by the plaintiff's possession of the suit house, the answer was to the negative as they had not produced any documents to substantiate their claims 9 At the end of hearing, the parties' counsel sought and obtained leave to file their final written submissions. I have appreciated their submissions which I shall accordingly consider them while determining the issues framed as herein above; 1st issue, whether the plaintiff purchased the property on plot No. 108 Vijana Road CT 11496 Arusha City. Basing on the parties' evidence, the following facts are undisputedly clear, that on the 6th November 2002 the Government of United Republic of Tanzania via Presidential Parastatal Sector Reform Commission (PSRC) made a public invitation (PEI) for investors to purchase residential houses owned by TANADE by then including the suit house and that the plaintiff through her husband submitted her bid to PSRC accompanied with a banker's cheque worth Tshs. 6,000,000/ which is equivalent to 10 % of the plaintiff's bid price in relation to the suit property. It is also clearly established by both sides that the bid price quoted in Tanzania shillings was indisputably accompanied by 10 % of the bid price. Following the above proven facts, it is now for the court to ascertain if the plaintiff/ defendant legally purchased the suit property. 10 The defendants maintained that, the said intended public sale was subsequently revoked by the defendants. Equally, the plaintiff admittedly testified that, she was told to hold on payments of bid price in full until the dispute between the caveator, La Fleur Afrique Limited and PSRC was finalized. In the final submission the counsel for the plaintiff submitted that since the issue before this court attracts the law that governs contractual relationships on sealed bids, and that the contract between the plaintiff and PSRC arose at

the time the plaintiff was announced as the highest bidder for the purchase of the suit land to the tune of Tshs. 60,000,000/=after she had met the tender preconditions as advertised. According to the counsel for the plaintiff, it did not matter who paid the consideration for the banker's cheque. The counsel went further that the conduct of the PSRC in accepting the payment of 10% out of the bid price made by the plaintiff in fulfilment of condition (f) in exhibit PEI, therefore amounted to an acceptance on the part of the defendants. He further submitted that, an adverse inference against the defendants should also be drawn as PSRC did not accept any payment of any lower bids. 11 In addition, the plaintiff's advocate was of the view that, as much as the Government has an interest in every agency it is not simply open to command transfer of assets between one Government agency and another agency. There must be a specific law that authorizes such transfer and that handover notes do not suffice as a legitimate transfer. Mr. D'Souza was of the further view that the CHC could not have lawfully transferred any right or interest over the suit land that was previously committed for sale to the plaintiff by PSRC. The evidence adduced by the defence and the submission by their counsel which are to the effect that, there is no contract or document tendered by the plaintiff substantiating the alleged sale of the disputed property. The defendants/plaintiffs urged this court to make a reference to section 64 (1) of the Land Act Cap 113 R.E 2019. It is fundamental principle that, the burden of proving existence of certain fact rests on the party who substantially alleges an existence of such fact in issue and not the party who denies existence of such fact (Section 110 of the Law of Evidence Act, Cap 6, Revised Edition, 2019). 12 In the matter at hand as reflected in the pleadings filed by both parties, plaintiffs evidence adduced by PW1 and PW2 together with documentary evidence especially PEI, PE2 and PE3, it is evidently clear that the house in question was initially intended to be sold by the defendants and the plaintiff did bid and her bid was accompanied with a banker's cheque. However, the defendants have seriously contended that, it is not the plaintiff who paid this amount, indeed, I wholly agree with defence as plainly depicted in the PE2 that the amount paid was remitted from PW2's account. The Plaintiff does not dispute that, she did not directly pay the said amount except that, the same was remitted from the account of PW2 who is her husband for more than a period of thirty (30) years and their marriage is blessed with two

issues.

The question that follows is, does the fact that, the money was not paid by the plaintiff alone exonerate her from claiming against the defendants? Absolutely the answer is not in affirmative! as correctly submitted by the plaintiffs counsel in his final submission that, the significant issue to be taken into consideration should not be that, the amount paid did not come directly from the PW1's personal account. In essence, the oral testimony has established that, PW1 and PW2 are wife and husband 13 respectively. Sensibly, in my view, one would not be amazed for a husband to assist his wife in purchasing the suit house in which they had been dwelling since 1990. What, should however be taken into consideration is, to whom was the

money addressed (PSRC) to and for what purpose was the money sent for. It was lucidly addressed to PSRC and purpose being a bid for the purchase of residential house in question. Basing on the evidence adduced by the parties and considering the fact that, the plaintiff had undoubtedly proven to have paid 10 % of the bid price to the PSRC in relation of the suit land and that, the same had not been refunded to her to date and supported by DW1 a Treasury Employee who on cross examination admitted that, the plaintiff has not been refunded her 10% of the bid price. Having found as herein above, the question that follows is that; does the payment of 10% of the bid price constitute a sufficient proof that, the plaintiff has purchased the suit property? According to 12 conditions set forth in PEI for the sale of the TANADE's residential houses (a-i), especially payment submission of the bids, mode of payments of bid price by highest bidders, transfer of ownership after 14 payment of the purchase price in full (j) and binding nature of the bids to the defendants In the condition (i) of PEI, in my firm view, there is an indication of an ouster clause to the binding nature of the bids with effect that, PSRC would not be bound to accept the bids on the basis of compliance of single factor and its decision (the decision of the PSRC) will not be final. Since it is plainly clear that, the plaintiff had performed part of his duty notwithstanding that, she had not fully completed the payment of the bid price on the reason that, initially there was case between PSRC and La Fleur Afrique Ltd followed by an order of the court restraining any further business especially sale of the TANADE's properties including the suit house (PE3) followed by revocation of the intention to sell and eventually transfer of the TANADE's properties to 2nd defendant which would be so due to change of policy or any other reason by the Government of the United Republic of Tanzania. I am alive of the principle that "he who has no legal title to the land cannot pass good title over the same to another as was rightly stressed in the case of Farah Mohamed vs. Fatuma Abdallah (1992) TLR 205. 15 However, in our case, the Government of the United Republic of Tanzania had never ceased to be the owner of the suit land since a sale deed was yet to be executed, therefore, no transfer of ownership of the suit premise from the Government or her agency to the plaintiff that was effected to the date of her filing of this matter except initial bid processes especially undisputed defendants' advertisement of the tender for the interested investors to purchase the TANADE's Properties and the plaintiff's banker's cheque, price envelope. In law, all agreements are contracts if they are made by free consent of the parties who are competent to contract, for a lawful consideration and with a lawful object and are not on the verge of being declared void. That is the essence of section 10 of the Law of Contract Act, Chapter 345 Revised Edition, 2019, 2019 (the Law Contract Act). The Court of Appeal of Tanzania in the case of Zanzibar Telecom Ltd vs. Petrofuel Tanzania Ltd, Civil Appeal No. 69 of 2014 (Unreported) construing the Law of Contract Act had these to say; "It is crucial to point out however, that contracts begin by an expression of a proposal/offer, and that in terms of section 7 of the Contract Act; for such a 16 proposal by the offeror to become a binding promise it must be absolutely accepted by the offeree. Under section 8 of the said Act, performance is amongst the modes of acceptance." It is apparently clear that, in this instant case, the parties' performance of the contract, sale of the suit land was yet to be an absolute as it was frustrated by the Government Policy where the plaintiff was restrained from performing/executing the terms of the contract namely; paying the remaining bid price. Hence, in no way, the contract for sale between the parties cannot be said to have been concluded. Moreover, as alluded above, the

conditions set in the PEI which fall within the parameter of the bid criteria, were clearly not fully complied with by the plaintiff together with the clear bid condition that the PSRC's decision was not final denoting that, the Government of Tanzania was not bound by the decision made by PSRC. Had the execution of the parties' agreement (sale deed) been carried out, the decision of this court in respect of the 1st issue, in my view, would be different since once an execution of the deed of sale was carried out, the sale would be considered to have been concluded notwithstanding whether the bid price was fully paid or not (See the decision of the Supreme Court of 17 India when interpreting provisions of the Transfer of Property Act in the case of *Vidyadhar v. Manikrao & Another* (1999) 3 SCC 573). It therefore follows that; this court cannot justifiably interfere with the terms and conditions therein save to give effect to clear words of the parties' agreement (See a decision of the Court of Appeal of Kenya in *Michara v. Gesima Power Mills Ltd* (2004) eKLR. That being said the first issue is answered not in affirmative. Coming to the second issue, whether the plaintiff was/is under statutory obligation to pay house rents in favour of the defendants. This issue does not need to impede me much for an obvious reason that, there is no evidence whatsoever to prove that, the plaintiff herein was a lessee to the suit property and was thus under statutory obligation to pay house rent to the defendants. This allegation having been raised by the defendants; it was therefore their duty to prove their claims claim on the balance of the probability the effect that, the plaintiff was under such obligation of paying house rents to them instead of mere assertions which do not form basis to be relied by this court to grant the reliefs sought in the counter claim. The plaintiffs to the counter claims bore corresponding duty 18 to prove their claim instead of relying on their pleadings and mere assertions that, they incurred accommodation expenses for their senior staff (See judicial jurisprudence in *Lwanga vs. Centerary Rural Development Bank* (1999) 1 EA 175 (CAU) adopted by the Court of Appeal of Tanzania in the case of *Runway (T) Limited v. WIA Company Limited and another*, Civil Appeal No. 59 of 2015 (unreported) whose decision was delivered on the 1st day of February 2019. In the event this issue is bound to fail and consequently the counter claims for payment of rentals at the tune of USD 153,600 raised by the defendants are dismissed for want of proof. Lastly, to what reliefs are the parties entitled to. Before determining the 3rd issue above, it is apposite if I am subscribed by the provisions of section 56 of the Law of Contract Act, which is herein under reproduced; "(1) An agreement to do an act impossible in itself is void.

- (2) A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. 19
- (3) Where one person has promised to do something which he knew or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise". In the light of the above provision of the law, it is my increasing view that, since the whole process of the sale of the TANADE's residential properties was frustrated by the Government who is also the one who initially invited the investors including the plaintiff to purchase its residential houses previously owned by its agency, TANADE and since it was the Government's agency which

kept on insisting patience on the part of the plaintiff, the plaintiff should therefore be entitled to compensation in terms of expectation of ownership of the disputed premises as it is sufficiently established that, the plaintiff was guaranteed to be the owner of the suit house by the defendants by receipt of her banker's cheque worth Tshs. 6,000,000/= which has never been returned to her since 2002 to date. The amount paid to the defendants/plaintiff must be returned to the plaintiff by the defendants jointly and severally. 20 More so, the plaintiff must, though the receipts for maintenance were technically not received by the court during trial, but costs of maintenance of the house naturally follows from the grounds of the plaintiff's claim as the house is suitable for living due to the plaintiff's care and maintenance (See Mogha's Law of pleading in India, 10th Edition at Page 25). I have also considered the evidence and circumstances surrounding the case that, the plaintiff and her husband had even abstained from making follow ups of their salaries' arrears amounting to USD 75, 000 relying on the defendants' promises to set off the debt with the plaintiff's purchase of the suit property (See 2nd defendants' letter (PE3) and circumstances of the case. He is thus entitled to general damages. In the case of Anthony Ngoo, the Court of Appeal of Tanzania observed that; "The law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence on record able to justify the award. The judge has discretion in the ward of general damages. However, the judge must assign a reason..." As to costs of this case, I think the costs of the suit should be borne by the plaintiff on the thoughtful ground that, the defendants are the ones who caused unnecessary institution of this suit as they failed to promptly 21 exhibit their reversal of their intention to sale the suit property and the undisputed fact that they have not returned Tshs. 6,000,000/=to the plaintiff to date. In the final results, the plaintiff's suit partly succeeds, equally, the defendants' /plaintiffs' counter claim is partly dismissed for want of proof. Consequently, I hereunder make the following orders;

- i. That, the plaintiff/defendant is entitled to the payment of her initial amount of 10% of the bid price that is Tshs. 6,000,000/= ii. Payment of compensation for the non-performance of the contract to the tune of Tshs. 50,000,000/=by the defendants/plaintiff in favour of the plaintiff/defendant iii. That, the defendants/plaintiffs are jointly and severally liable to payment of general damages to the plaintiff in the tune of Tshs. 60,000,000/= iv. That, the 2nddefendant/2nd plaintiff is declared the lawful owner of the suit property 22
- v. That, the plaintiff/defendant shall give vacant possession in favour the 2nd defendant within six (6) months' period from the date of this judgment vi. Costs of the suit shall be borne by the defendants / plaintiffs. iWAE JUDGE 29/11/2021 Court: Right of Appeal fully explained and it is open for either party x M. R.GWAE A JUDGE £ 129/11/2021 23

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