

TANZANIA / JUDGMENT

smsaee limited vs corporate security ltd and others 2021 tzhclandd 224 28 may 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES
SALAAM LAND CASE NO. 381 OF 2017 S. M. SAEED LIMITED..... PLAINTIFF
VERSUS CORPORATE SECURITY LTD..... 1st DEFENDANT MRS. PARVIZ AZAD POONJA
BHANJI.... 2nd DEFENDANT EQUITY BANK TANZANIA LTD..... 3rd DEFENDANT

JUDGMENT

S;M. MAGHIMBI. J: The plaintiff, S.M. SAEED LTD, a limited liability company, sued the three defendants a limited liability company trading in the name of Corporate Security Limited (First Defendant), Mrs. Parviz Azad Poonja Bhanji, the 2nd defendant and Equity Bank Tanzania Limited, the 3rd defendant, claiming for a nullification of the loan agreement entered between the defendants. In the said loan, the 1st defendant deposited as collateral a property, One Nineteenth (1/19th) undivided share in Plot No. 16 Block "55" Kariakoo Area, CT IMo. 47241 Dar es salaam ("the suit property"), a property (EXD2) which the plaintiff claims to have purchased from the 1st defendant vide i EXP1. In her plaint, the plaintiff prayed for Judgment and Decree against the Defendants as follows:-

- a) That the mortgage deed between Defendants is unlawful or in the alternative;
- b) Refund payment of USD, 60,000.00 being purchase price.
- c) The costs of the suit be borne by the Defendants.
- d) Any other relief (s) this Honourable Court deem just to grant. Before me, Mr. Samwel Shadrack, learned advocate, represented the plaintiffs; Mr. Thomas Mwananyongo, learned advocate, represented the 1st and 2nd defendants while the 3rd respondent was represented by Mr. Henry Kimario, learned advocate. Upon conclusion of pleadings and failure of mediation, the following issues were framed for determination:
 1. Whether the sale of the disputed property between the plaintiff and the 2nd defendant is absolute.
 2. If the first issue is answered in the affirmative, whether the mortgage of the suit property (inclusive) to the 3rd defendant by the 2nd defendant was lawful.

3. To what reliefs are the parties entitled to. In order to prove her case, the plaintiff had two witnesses and tendered three exhibits EXP1; sale agreement entered between the plaintiff and the 2nd defendant with her husband for sale of the suit property, EXP2; Copies of cheques of I&M Bank and EXP3; Land Forms No. 29,30 and 35 under Section 36 of the Land Act, Cap. 113 R.E 2002 (as of then) for the intended transfer of the suit property. On their part, the 1st and 2nd defendants had two witnesses and they did not tender any exhibits. While the 3rd defendant had one witness who tendered four exhibits (EXD1; One Offer of Banking Facility letter dated 20/12/2013 between one Shaizad Azad Bhanji and the 3rd defendant, EXD2; Certificate of Right of Occupancy with C.T No. 47241 for the suit property, EXD3; a Mortgage of Right of Occupancy in the suit property between the 2nd defendant & one Azad Poonja Bhanji and the 3rd defendant and EXD4; a notice of default under Land Form No. 54A for CT No. 47241 dated 22/08/2016, from the 3rd defendant to the 2nd defendant & one Azad Poonja Bhanji. At the conclusions of the trial, the parties further prayed to file their losing submission in written form, much appreciation for the submissions which were timely filed. Starting with the first issue, whether the sale of the disputed property between the plaintiff and the 2nd defendant is absolute. From the pleadings, the 2nd defendant did not deny the fact there was a sale agreement, EXP1, and that on the day of the sale of the suit property, they received a sum of USD 30,000/- as part of the consideration of the sale. Furthermore, during their testimonies, both the DW1 and DW2 did not deny the fact that the said amount was paid and they did not deny signing of the collective EXP3. The only fact that had remained in issue is whether the plaintiff paid the 2nd defendant the full amount of the purchase price or not. This is what is before me for determination. A sale becomes absolute when the property passes to a buyer upon completion of an agreement, without conditions. At this point, the title is transferred by the seller to the buyer without any restrictions other than payment of an agreed-upon amount of money. The issue is whether such is what happened in this case. Looking at EXP1, the sale agreement dated 02/01/2012, the sale had the following conditions, and the first one was that the purchaser pays a sum of Tshs. 30,000 /- USD, a condition which is undisputed that it was fulfilled. The second condition was on the delivery of the vacant position, according to clause 3 of the contract, the purchaser was to pay the remaining balance of USD 30,000/- after being handed over vacant possession of the premises by the vendor by 01/03/2013 (clause 3) failure of which, the vendor shall be liable to payment of Tshs. 1,000,000/- to the purchaser as rent. Now the payment of the remaining USD 30,000/- is in battle. While the plaintiff wants the court to rule that the payment was finalized, the 2nd defendant strongly dispute the existence of that fact. PW1 testified that the amount was paid through collective EXP2, cheques of I&M Bank with No. 67-21-01 for USD 15,000/- dated 08/03/2012 issued to Naheed Merali, USD 15,000/- dated 06/01/2012 issued to Azad Poonja Bhanji, USD 10,000/- dated 09/03/2012 issued to Parvez Azad Bhanji and USD 5,000 dated 11/03/2012 issued to Parvez Azad Bhanji. According to the DW1, she disowned the cheque No. 545760 dated 08/03/2012 addressed to Naheed Merali by a simple argument that the said Naheed is not part of the agreement because it is not her house. She however admitted to know the said Naeed Merali who was an employee of her son Shehzad (DW2) and that they are friends and

he has worked with him. I have taken a thorough look at collective EXP2, the undisputed cheque No. 545755 was issued to the 2nd defendant's husband, the 2nd defendant acknowledged that fact and the fact that the cheque was honored. But at the back of the same cheque, the drawee had directed that the amount is paid to the said Naheed Merali, implying that unlike what the 2nd defendant (DW2) want the court to believe, that they have no any 4 financial relations with Naheed, this cheque is a proof that in the transaction in question Naheed Meral was involved as the receiver of the some amount of money. In what capacity? That is for the 1st and defendant to know, but having undisputed evidence on records that the said Naheed was ever instructed to receive some amount of proceeds of this instructions, I will make a conclusion that the cheque No. 545760 dated 08/03/2012 was received by the 2nd defendant and her husband through Naheed. As for the cheque dated 09/03/2012 I recognize this cheque written refer to drawer. This cheque was not honored. I know the cheque but it was not honoured. As for the cheque dated 11/03/2012 addressed to me, I recognize it but the cheque was never honored till today. They bounced. It is unfortunate that the 2nd defendant's husband could not come and testify on whether he received a cheque of 11/03/2012 and 09/03/2102 which according to DW1, they all bounced. On his part Mr. Shadrack advanced an argument that according to clause 10 of the Sale agreement gives clearly that transfer forms, the Title would have been handed over to the Plaintiff upon final payment being effected. The 2nd Defendant upon handing over to the plaintiff the Transfer forms it is enough proof that the whole purchase price has already been fully settled by the plaintiff, otherwise Transfer Forms could have been withheld to date. Let me first reproduce the clause of the contract that Mr. Shadrack was making a reference to: "The Purchaser and the Vender have agreed to sign the transfer documents o f the land in favour o f the purchaser and such transfer documents together with original Title Deed and other relevant documents will hand over to the purchaser on payment o f final installment to the vendor o f USD. 30,000.00 on or before 1/3/2012 by cheques" Coming back to the evidence adduced, in his own testimony, the PW1 tendered Collective EXP2 which showed that even post the 01/03/2012, the plaintiff was still paying the money to the defendant. Therefore the mere fact of the existence of clause of the agreement could not be used to conclude that because the transfer documents were handed to the plaintiff and the clause says the deadline for payment is on the 01/03/2012 then the presumption should be that the payments were actually made. Furthermore, the documents (EXP3) were executed on 06/01/2012 while the payments were to be made by 01/03/2012. On another development, when PW1 was cross examined by Ms. Kavishe on Collective EXP2, he admitted that the cheque dated 11/03 and 09/03 has the words "refer to drawer" on it. That the words mean that the cheque bounced and they could not get the money from that cheque. He was however quick to testify that the defendants returned the cheque and they paid him cash insisting that they have proof that they paid them in cash. Unfortunately, this proof was not brought to court. Up to this point therefore, I am satisfied with the evidence adduced that the plaintiffs did not pay the 1st and 2nd defendant the full purchase price. It was a shot of USD 15,000/- making it a total of USD 45,000/-. On that note the first issue is partly answered in favor of both sides, the purchase price was paid but not in full. As for the mortgage between

the 1st & 2nd with the 3rd defendant, it is obvious that at the time the two defendants were mortgaging the property, the sale had not been completed hence the property was still in the name of the 2nd defendant's husband. I cannot therefore challenge the validity of the mortgage on mere ground of the incomplete transaction between the 2nd defendant and the plaintiff because the bank was not privy to that agreement and furthermore, the property was still registered in the name of the 2nd defendant's husband. Therefore the mortgage transaction stays intact. Having made the above findings, I find that in the light of the existence of a valid mortgage of the suit property between the defendants, I cannot proceed to declare the plaintiff as the lawful owner of the suit premises. In the upshot, I partly allow the suit in favor of the plaintiff by making the following orders as per the alternative prayer in their plain:

- a) The 2nd defendant is hereby ordered to refund the plaintiff a sum of USD 45,000.00 being partly paid purchase price of the suit property.
- b) The 1st and 2nd defendants to pay the plaintiff the costs of the suit. Dated at Dar es Salaam this 28th day of May, 2021. i i i a ■ i i r«. S.MMAGHIMBI JUDGE 7

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