

TANZANIA / JUDGMENT

20110429 TZHC Dar es Salaam

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TZHCDECIDED
29 April 2011

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IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM DISTRICT REGISTRY) AT DAR ES SALAAM
CIVIL CASE NO. 40 OF 2010 ST. MARY'S INTERNATINAL ACADEMY
PLAINTIFF VERSUS

1. LAWRENCE MATESO 1 ST DEFENDANT
2. CHRISTINA VUMILIA THOMAS 2ND DEFENDANT
3. KESIA DOROTHEA INNOCENT 3RD DEFENDANT Date of last order:
05/04/2011 Date of Ruling: 29/04/2011 JUDGMENT (EX-PARTE) Dr. F. Twaib, J: In this suit, the Plaintiff is praying for the following principal reliefs:
 - a) Declaratory order that the sale agreement between the 1st Defendant on the one part and the 2nd Defendant together with the . 3rd Defendant on the other part, for the sale of property at Plot No. 132 Mbezi Beach, Dar es Salaam, under Certificate if Title No. 47895 (hereinafter called the suit property) is null and void; "ORIGINAL"
 - b) Declaratory order that the purported termination of the sale agreement between the Plaintiff and the 1st Defendant over the suit property is illegal, as such, the sale is of no legal affect;
 - c) An order for specific performance against the 1st defendant to collect the balance of the purchase price, Tanzania Shillings 30,000,000/= from the Plaintiff.
 - d) The Plaintiff be declared the lawful purchaser of the suit property. Two other prayers are the usual reliefs of costs and "any other order the Court may deem fit and proper to issue." Upon being assigned the case, I ordered that the usual notice be issued to the Defendants. On the day of first mention, Mr. Edward Chuwa, learned Advocate, held brief for Mr. Nassoro, learned Advocate for the Plaintiff. Mr. Chuwa's instructions were to pray for substituted service by publication, because the whereabouts of the Defendants were unknown to the Plaintiff. Hence, the usual service by hand could not be carried out. Following that prayer, I ordered that the summons be effected through publication in Nipasheand Mwananchinewspapers by 31 st December 2010. On 8th March 2011, when the matter again came up for mention, I ordered re-publication, as I noticed that the publication of the summons was too small and could hardly attract the attention of the reader. I ordered that

the publication for each summons should be at least 25 square centimeters in size, and that publication should be made by 11 th March 2011. Pursuant to that order, publication was effected, but that was done out of time, in Mwananchi on 15th March 2011 and Nipashe of 16th March 2011. When the matter was called up on 18th March, 2011, I did not order proof 2 i, "ORIGINAL" ex parte, as my earlier order was for publication to be done not less than one week before the scheduled appearance of parties or their Counsel. Since the time between the publication and the date set for mention was too short, I adjourned the matter to 18th March 2011 to give the Defendants time to follow up with the Court registry, if they were so minded. On 5th March 2011 (almost three weeks after the last publication in Nipashe), the matter was called up before me, and once again, none of the Defendants was present. Upon being satisfied that due service of the summons by publication had been effected and the Defendants had ample time to follow up make appearance or do any act consistent with the circumstances, I ordered the matter to proceed by the Plaintiff bringing ex parte proof by affidavit. The Plaintiff duly and timely filed its affidavit in proof of claim on 11 th April

2011. The affidavit was sworn by one Humphrey Kenneth Rwakatare, a principal officer of the Claimant. Briefly, the evidence in support of the claim is as follows: By Agreement dated 28th February 2001, the Plaintiff -brought the suit property from the 1st Defendant at a consideration of Tanzania Shillings 70,000,000/=. Under clause 2 of the Agreement, the purchase price was to be paid by installments, as follows:
- a) Shs. 30,000,000 on 20 th February 2001.
 - b) Shs. 20,000,000 on 21 st May 2001.
 - c) Shs. 20,000,000 on 20 th September 2001. The Agreement further provided that upon completion, the date stated to be "the signature date when the Vendor should hand over (sic) to the purchaser the Certificate of Title No. 47895 and upon satisfaction of clause 2.2.1 herein." Hence, completion was to take place upon the purchaser 3 l, "ORIGINAL" making the last and final payment of the purchase price, whereupon the Vendor (1 st Defendant) was to deliver to the purchaser (Plaintiff) the Certificate of Title and duly executed Deeds of transfer in the Plaintiff's favour and all receipts for land rent and taxes. According to the affidavit of Mr. Rwakatare, the Plaintiff was up until the dispute arose paid part of the purchase price as stated above. The reason why this payment was adequate is irrelevant. It was further averred by Mr. Rwakatare that by then, the Plaintiff had already paid the 1st Defendant the sum of TZS 30,000,000. However, the 1st Defendant never showed up to receive the balance and that Plaintiff's efforts to trace him have been in vain. On 3rd August 2001, while the sale agreement between the Plaintiff and the 1st Defendant was still subsisting, the Plaintiff entered into another agreement with the 1st and 2nd Defendants for the sale of the suit property at a consideration of TZS 15,000,000. This sale agreement is evidenced by Annexure "C" to the Plaintiff. Mr. Rwakatare further asserts that after the sale, on 9th November 2001, the Plaintiff received a letter from Rwabutaza & Co., Advocates, the 1st Defendant's lawyers, informing the Plaintiff that the 1st Defendant had decided to terminate its arrangement with Plaintiff on grounds of breach of clause 2.2 of the Sale Agreement

(namely, failure to comply with the payment schedule). The Plaintiff responded through its lawyers, Ndanzi & Co., Advocates, contesting the rescission of the Agreement. The letters evidencing the relevant correspondence were attached to the Plaint and collectively marked "B". On the basis of the above facts, a dispute arose between the Plaintiff and the 1st Defendant leading to the institution of this case. The 2nd Defendant and 3rd defendant are joined herein as necessary parties, since the orders 4 :., "ORIGINAL" being sought against the 1st Defendant will have direct effect on their interests, if any, in the suit property. I have carefully considered the facts as narrated in the affidavit for ex parte proof. They generally support the averments contained in the Plaint. Both sets of facts stand undisputed. There being no averments or evidence to counter the same, I take them as so narrated to be true and correct. In the first place, they prove the existence of the agreement between the Plaintiff and the 1st Defendant. Secondly, they prove payment of the sum of TZS 40,000,000/= to the 1st Defendant being part payment of the purchase price by the Plaintiff. Thirdly, they prove that before the expiry of the time for payment of the last installment (the completion date), the 1st Defendant decided to sell the suit property to the 2nd and 3rd Defendants. It is surprising as to why the 1st Defendant decided to sell at a price much below the price earlier agreed between him and the Plaintiff. But that is beside the point. The point is that when the second sale agreement between the Defendants was entered into, the first sale agreement was still intact and binding upon the 1st Defendant and the Plaintiff was still prepared to pay the balance of the purchase price. The only problem was that the 1st Defendant himself failed to appear to receive the money as agreed. In the absence of any evidence to the contrary, I am satisfied that the Plaintiff has proved its case against the Defendants on a balance of probabilities and is entitled to the reliefs sought. In fine, judgment is entered in favour of the Plaintiff. Consequently, it is ordered as follows:

- a) The sale agreement between the 1st Defendant (on the one hand) and the 2nd and 3rd Defendants on the other hand) in respect of the 5 , . \ .. "ORIGINAL" sale of the suit property at Plot No. 132 Mbezi Beach, Dar es Salaam, under Certificate of Title No. 47895 ("the suit property") is hereby declared null and void;
- b) The 1st Defendant's termination of the sale agreement between him and the Plaintiff in respect of the suit property is declared unlawful and of no legal effect;
- c) The Plaintiff is hereby declared the lawful purchaser of the suit property;
- d) The 1st Defendant is hereby ordered to specifically perform the terms and conditions of his sale Agreement with the Plaintiff by delivering the Certificate of Title and duly executed Deeds of Transfer and in favour of the Plaintiff, immediately upon receipt of TZS 30,000,000 being the balance of the purchase price from the Plaintiff.
- e) The Plaintiff is to have its costs. Dated at Dar es Salaam this 29 th day of April 2011. Judge
- f) I j. I -. . /

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