IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO.88 OF 2011

OYSTERBAY VILLAS LIMITED ..... PLAINTIFF

VERSUS

THE KINONDONI MUNICIPAL COUNCIL ..... DEFENDANT

THE HONOURABLE ATTORNEY GENERAL ..... INTERESTED PARTY

Date of Last Order: 07/06/2021

Date of Judgement: 16/07/2021

JUDGEMENT

MAGOIGA, J.

The plaintiff, OYSTERBAY VILLAS LIMITED by way of plaint instituted the instant suit against the above named defendant praying that, this court be pleased to enter judgement and decree in the following orders, namely:

(i) A declaration that the defendant is in breach of the contracts entered into by and between the plaintiff and defendant;

(ii) A declaration that the plaintiff has suffered, and is entitled to claim, losses and damages as a result of the defendant's breach of the contracts;

(iii) The defendant be ordered to fully comply with/perform the contracts and fulfill the terms, conditions, obligations and requirements of the contracts by undertaking the process of issuance of new certificate of titles in the joint names of the parties in accordance with the agreed ratio of 75% plaintiff's and 25% defendant's as per Article II, IV and IX (Clause 9.3) of the contracts;

(iv) Order for payment of the total sum of United States Dollars Three Hundred Thousand only (USD.300,000.00) being compensation for losses, damages, costs and expenses incurred by the plaintiff due to the plaintiff's failure to utilize and/or commercially deal with the developed properties;

(v) Order for payment of general damages and punitive damages suffered by the plaintiff due to the defendant's failure and

neglect to fully comply with and fulfill the terms and conditions of the contracts as will be assessed by the honourable court;

(vi) Order payment of interest on the decretal sum at the commercial rate of 21% per annum in respect of items (iv) and (v) computed from the date of judgement, and interest at court's rate from the date of judgement to the date of payment in full satisfaction of the decree;

(vii) Costs of this suit;

(viii) Any other relief(s) as the honourable court may find fit and just to grant.

Upon being served with the plaint, the defendant filed written statement of defence disputing plaintiff's claims and stated that it is the plaintiff who created circumstances by claiming terms which were not in the contract such as issuing certificate of title to each unit and tenure for unlimited time. On that note, the defendant urged this court to dismiss the suit with costs.

The facts giving rise to this suit are not complicated. It is stated that, the plaintiff and defendant on 13th December, 2007 entered into two separate

joint venture agreements each termed as "Agreement for Joint Venture Development and Joint Ownership" in respect of plots No. 322 situated along Ruvu road, Oysterbay area, Kinondoni Municipality within Dar es Salaam city with certificate of title No. 10392 and plot No. 277 situated along Mawenzi, Oysterbay area, Kinondoni Municipality within Dar es Salaam city with certificate of title No. 10383 (hereinafter referred to as "the contracts"). Under the contracts, the plaintiff was to construct 2 blocks of 24 units residential apartments on plot No.322 and 4 blocks of 40 units residential apartments on plot No.277. Further facts were that, by an addendum to the contracts dated 8th June, 2009, the plaintiff was to erect additional 4 units on top of the 40 units on plot No. 277 making the total units to be 44. It was agreed between parties that the ownership of the developed properties was to be at the ratio of 75% to the plaintiff and 25% to the defendant. Further facts are that the defendant was to undertake and transfer the titles to be in the joint names of the plaintiff and the defendant in accordance with their respective ratio of ownership.

It is further alleged that the plaintiff performed her part to completion and wrote the defendant requiring her to do her part but refused,

neglected, or otherwise ignored to fulfill its obligations contrary to the terms and conditions of the contracts and instead came up with proposed changes to the terms and conditions of the contracts from ratio ownership for unexpired residual term to Build Operate Transfer (BOT) mode.

This state of affairs necessitated the plaintiff to complain to the Prime Minister, whose intervention made the defendant to surrender the Certificate of Titles before the Commissioner for Lands but the process did not materialize. This culminated the institution of this suit for breach of contract by the plaintiff claiming the reliefs as contained in the plaint.

Upon being served with the plaint, the defendant filed a written statement of defence denying to have breached the terms of the contracts. Instead the defendant alleged that it is the plaintiff who created circumstances of making some of the terms not to be discharged within time by imposing conditions which were not in the contract such as requiring the defendant to prepare certificate of right of occupancy to each apartment and claimed perpetual joint ownership. Consequently, the defendant prayed that the instant suit be dismissed with costs.

In essence parties allege for breach of contract against each other.

Before, hearing took off, the following issues were framed and agreed between parties for the determination of this suit, namely:

1. Whether the defendant breached the terms and conditions of the agreements of joint venture and joint ownership of the properties by refusing to transfer the right of occupancy into joint ownership?
2. Whether the agreements entered into between the plaintiff and the defendant specified the time limit for joint ownership of the properties?
3. Whether the agreements entered into between the plaintiff and the defendant was joint ownership of the properties or Build Operate Transfer (BOT)?
4. Whether the plaintiff suffered loss as a result of the defendant's refusal to transfer the right of occupancy over the properties into joint ownership? and
5. To what reliefs parties are entitled.

Unfortunately to parties, this suit has twice suffered orders for retrial and rewriting judgement from the Court of Appeal. This time around an order for rewriting judgement was ordered because the trial judge raised and determined the issue of expiry of the approval of the Commissioner for

Lands without affording parties' right to be heard. On my part, I will start with this point and in so doing, I invited parties' learned trained minds to address me as to the effect of expiry of the certificate of approval by Commissioner for Lands. In essence after hearing parties' learned trained minds, I noted that the expiry of the certificate of approval by Commissioner for Lands under section 39(6) (c) of the Land Act, [Cap 213 R.E. 2019] is not an issue between parties and it did not affect parties' rights and obligations because the same can be renewed under section 40 of the same Act. However, the learned State Attorney tried to show what caused the changes not to be accomplished and pleaded for parties to have the matter settled out of court, which was positively received by the plaintiff.

Therefore, as rightly submitted by Mr. Nyika, learned advocate for the plaintiff and not seriously objected by Mr. Chang'a, learned Principal State Attorney, I am entitled to agree and hold that the expiry of the certificate of approval by the Commissioner for Land do not fetter parties' rights under the agreements in dispute.

Having so hold, I now turn to the merits of the suit. The plaintiff called 4 witnesses in proof of her case. The first witness was Mr. BAKIR to be

referred herein as PW1. PW1 under oath told the court that he is the director of the plaintiff who manages the day to day activities of the plaintiff, which company is engaged in property development and financing. PW1 went on to tell the court that his company is in partnership in two projects with the defendant, which are Mawenzi and Ruvu Road projects. Under the projects, PW1 told the court that the plaintiff was to provide complete financing of the projects as specified in the contracts and that his company fulfilled all the obligations as agreed and received a certificate of occupation.

PW1 further testimony was that, upon completion, they requested the defendant to issue new certificate of titles in the name of joint ownership but the request was in vain. PW1 testified that, he requested and wrote to the defendant to fulfill his obligation but his letters were not replied to. In the circumstances, PW1 went to the Prime Minister for assistance and a meeting was called where the defendant agreed to fulfill the contract. PW1 testified that the defendant surrendered the certificates of titles to the Ministry of Lands and the Ministry directed that the new certificate of titles be issued but again it was in vain.

Further testimony of PW1 was that instead of the agreed terms, the defendant came with new terms and PW1 refused to accept them. Eventually, PW1 issued several statutory demand notices which upon their maturity the plaintiff decided to come to court for redress. Lastly but not least, PW1 prayed that this court be pleased to declare that the defendant is in breach of the contract, order the defendant to issue the new title deeds in the joint names according to the contracts, defendant pay losses and costs of the suit.

In proof of her case, PW1 tendered in court the following exhibits:

1. Two contracts collectively marked as exhibit P1;
2. Certificates of occupation as exhibit P2 ;
3. Two letter addressed to the defendant as exhibit P3;
4. Letter to the Prime Minister as exhibit P4;
5. Two letters dated 05th March and 14th March collectively as exhibits P5;
6. The Surrender of certificates of titles as exhibit P6;
7. Two letters as exhibit P7;
8. Letter to the defendant as exhibit P8;
9. Letter from Kinondoni Municipal Council as exhibit P9;

10. Notice of legal action as exhibit P10;

11. Notice from K&M as exhibit P11;

12. Notice from FK Chambers as exhibit P12;

Under cross examination by Mr. Mahenge, learned Municipal Solicitor, PW1 told the court that other owner of the plaintiff is Ms. Yuan Achiness with 450 shares in the company. PW1 admitted that in 2006 he was not a citizen but they obtained a certificate of investment from TIC. PW1 told the court that he signed both contracts. PW1 when asked what do the words in the contracts 'unexpired" meant he said it is not limited, it is open. And when asked what certificate of occupancy means he said the property is ready for use. PW1 admitted that part of the property were under him and were rented but quickly added that since he has no titles he cannot do business with other flats. He did that in order to minimize losses and that the titles are yet to be handed to him by the defendant.

Under re-examination, PW1 told the court that the contracts were won through tendering after following the procedures. According to PW1, the contracts were drafted together by parties and in the contracts the defendant was to issue titles. Around 70% of the apartments are rented

and 17 are for defendant. PW1 denied to have restricted the defendant in using the apartments.

PW1 was later recalled under the provisions of section 147(4) of the Tanzania Evidence Act, [Cap 6 R.E.2002]. PW1 under oath testified that parties have since 2012 tried to complete transfer of the titles as per contracts in vain. According to PW1, the old titles were surrendered in 2011 and they have gone to the Ministry of Lands for more than 12 times and were told there are certain forms which need to be signed by both parties.

PW1 went on to tell the court that exhibit P1 provided for joint ownership of the property at the ratio of 75% to the plaintiff and 25% to the defendant. According to PW1 the contracts had no limitation of time despite being aware that the title deeds were for 99 years. PW1 went to testify that despite the life span of the title deeds being limited, he knew that they will be renewed unless there are special circumstances for not renewing. PW1 insisted that, the contracts do not state anything about limitation of time.

PW1 further testimony was that stamp duty was paid but transfer was incomplete because the defendant did not pay capital gain tax. According

to PW1, parties had several meetings but in one of the meetings, were asked to change the agreement to Build Operate Transfer (BOT) but he refused and the ATTORNEY GENERAL intervened. PW1 told the court that exhibit P18 is misleading because he is a citizen of this country.

PW1 further testimony was that since 2011 he has been unable to rent and sale the apartments to no avail because he has no documents for ownership and his tenants were harassed and the price has reduced from USD.2500 to USD1500 but still no tenants.

Under cross examination by Ugulum, PW1 told the court that he became a citizen in 2008. PW1 admitted that by the time the contracts were signed he was not a citizen. PW1 went on to tell the court that he obtained certificate of investment from TIC in 2008 which enabled him to get some exemptions and certain securities which cater for joint ownership.

Pressed with questions, PW1 admitted that the defendant had no access to the apartments because the plaintiff denied him the same for failure to comply with their duties under the contracts.

Under cross examination by Mr. Hoseah, PW1 told the court that, the purposes of exhibit P19 was proposed to build luxury residential apartments for lease. PW1 further admitted that by the time he signed the contracts he was not a citizen. PW1 when asked what he understand of the phrase **"unexpired residential term"** he replied that he understood it to mean that after expired residual term, their term will be renewed. Further, when asked what he understand of clause 4.2 which state that certificate of title is free from encumbrances, he stated that he understood it to mean **"free from any encumbrances or conditions other than those conditions ordinarily contained".**

PW1 pressed with questions admitted that, the defendant signed the transfer documents but are waiting to pay capital gain tax.

Under re-examination by Mr. Nyika, PW1 told the court that according to exhibit P1 article 16 stipulates what happens when the agreement expires. It was to be renewed after expiry as per the laws. According to PW1, transfer is not yet completed because the approval documents submitted by the defendant expired and the issue of naturalization was not raised before the order of Court of Appeal for revision. TIC certificate gave an opportunity to own land despite not being a citizen. PW1

admitted that the defendant have not taken possession of the property since 2010.

In proof of the case for plaintiff, PW1 tendered the following exhibits:

13. Two transfer of a right of occupancy in respect of CT. 10383 and 10392 as exhibit P13;

14. Two certificate of Approval of a disposition as exhibit P14;

15. Two Addendum as exhibit P15;

16. Two letters dated 22nd November, 2016 and 8th April 2016 collectively as exhibit P16;

17. A letter dated 28th August 2015 as exhibit P17;

18. A letter dated 8th July, 2016 as exhibit P18;

19. A certified copy of the certificate of incentive dated 24th December,2016 as exhibit P19.

Next witness was Shi Yuan to be referred as PW2. PW2 under oath told the court that he is a director to the plaintiff company and whose testimony was more or less the same to that of PW1.

Under cross examination, PW2 told the court that he never signed the contracts and according to him 'unexpired residual term' means no limit of time. PW2 said under clause 9 each of the parties were free to deal with their shares of the joint venture interest. Further pressed with questions, PW2 told the court she is no longer a director of the plaintiff and was not aware of what is going on save that the plaintiff is suffering loss.

Under re-examination, PW2 told the court that companies have authorized signature and there is no dispute about that. PW2 further pressed with questions said she is not aware of what is going on because she transferred her shares.

Next witness for plaintiff was Mr. HUBO to be referred as PW3. PW3 under oath told the court that he wanted to buy the apartments but they did not have titles.

Under cross examination, PW3 told the court that he saw the contracts and they had understanding that we are to buy the apartments.

Under re-examination, PW3 told the court that the issue of buying was advised by their lawyer and that he had intention to buy the apartments.

Last witness for plaintiff was Mr. GABRIEL PONSIAN MAKUNDI to be referred as PW4. PW4 under oath told the court that he was employed by the plaintiff for supplying of two elevators along Mawenzi road. PW4 went on to tell the court he did not buy the apartments because they had no titles and when they wanted to buy they found that the plaintiff has no title deed or certificate of occupancy to the apartments.

Under cross examination, PW4 when shown clause 9.7 said he did not read it and that there are some tenants.

Under re-examination, PW4 told the court that according to the contract each party was free to deal with its shares upon giving notice to the other party.

This marked the end of the plaintiff's case and same was marked closed.

The defendant in disproof of the plaintiff's case called two witnesses. The first witness for the defendant was Mr. PAUL MARTIN RWEGOSHORWA to be referred as DW1. Led by Mr. Chang'a, learned State Attorney, DW1 under oath told the court that he works with Ubungo Municipal Council as Senior Land Officer since 2016. DW2 went on to tell the court that, his duties are to prepare land ownership documents, to inspect land

properties, renewal of land rights, to give evidence before the court of law in respect of land ownership. According to DW1, there are two ways of ownership; one co-ownership and single ownership. DW1 went on to tell the court that, in co-ownership owners must be more than one.

DW1 told the court that he knows of the existence of the contracts between the plaintiff and defendant for development of the properties situated at Oysterbay entered in 2007. According to DW1, unit titles are possible to occupier of land that started implementation in 2009 whereby the owner of mother title can divide the title into units so that occupiers of unit can get their separate titles. DW1 insisted that under the Land Act, 1999 in order for a person to own land in Tanzania he must be a citizen and be above 18 years of age. To DW1's recollection, owners of the plaintiff were not citizen and as such did not qualify to own land. DW1 further told the court that there is no way unit title ownership can operate retrospectively as the agreement was entered into 2007 and concluded that it was not possible for the plaintiff to be declared as owner of title by way of unit title.

Further led by Mr. Ugulum, learned Municipal Solicitor, DW1 told the court that, according to the Land Act No.4 of 1999 it is not possible to issue

right of occupancy to tenancy in common where one of the parties is not a citizen unless the citizen shareholder has more than 51% of the shares. DW1 told the court that before being transferred to Ubungo, he was working with Kinondoni Municipal Council from 2010 to 2016. DW1 prayed that the instant suit be dismissed with costs.

Under cross examination by Mr. Nyika, DW1 told the court that, he is a Land Officer and holder of degree in law with vast experience in land matters. DW1 told the court he knew nothing about the tendering but knows of the contracts and when shown exhibits P1 and P2 recognized them and insisted that parties intended to have co-occupancy. When shown clause 1(e), DW1 said tenancy in common is to own land together and each has a right to deal with its shares as he deem fit. DW1 went on to tell the court that transfer was to be done after completion of the construction which was in 2010. DW1 insisted that unit titles cannot apply to this case. DW1 testified that he cannot tell the dispute is about unit title. DW1 denied to have heard of BOT and that the transfer should tie with the terms of the contracts.

Under re-examination by Chang'a learned State Attorney, DW1 told the court that transfer was not completed after discovering that there was an

error. DW1 went on to tell the court that his testimony is based on recollection from the records of the office. The contracts had no clause for renewal, insisted, DW1.

Next witness for defence was Mr. EINHARD CHIDAGA to be referred as DW2. DW2 under oath told the court that he is a retiree and was working with the defendant since 2003 to 2018 as valuer and secretary to the Municipal Investment Committee which is duty casted to identify area of investment and advice the council and competent investors. DW2 went on to tell the court that, plots 277 and 322 Oysterbay were among the earmarked plots for such investments. DW2 told the court that in the course they got the plaintiff as potential investor for house apartments. The investment was for plot No.277 for 40 apartments and for plot No322 for 68 apartments. According to DW2, the ownership was for 75% to Oysterbay Villas Ltd and 25% shares to the defendant. The contract period, according to DW2 was the expired residual period of 47 years as proved in clause 2:1 of exhibit P1. DW1 denied that the agreements was perpetual and no agreement for separate title deeds. DW2 further denied that the contracts provided for sale of the apartments but for joint

ownership upon completion of the apartments, whereby each was to get proceeds in accordance to its shares.

DW2 went on to submit that the council surrendered the title deed as required and exhibit P6 proved to that effect. According to DW2, the joint ownership did not materialize because the plaintiff came with claim of perpetual ownership instead of 47 years and claim of sale of the apartments of the units. DW2 denied to have breached the contract and the surrender was signification of readiness to honour the contract.

It was further testimony of DW2 that, they gave the plaintiff certificate of occupancy exhibit P2, to allow usage of the property but the defendant has never received a rent. DW2 denied to have breached contract because they took all necessary steps for the implementation of the contracts. DW2 refuted that the plaintiff suffered any loss. DW2 told the court that they are ready to register the contracts provided it is executed to the letter of the contracts. DW1 insisted that the damages claimed have no basis and prayed that the instant suit be dismissed with costs.

Under cross examination by Mr. Nyika, DW2 told the court he studied Land Management and Valuation. DW2 told the court that he participated in drawing the contracts in dispute and that according to the contracts,

the property was the property of both parties. The contract was tenancy in common at 25%-75% and the plaintiff is a partner in development of the project. DW2 denied that the project was for sale. Pressed with questions, DW2 admitted that the buildings were completed in 2010. It was testimony of DW2 that while in the process, PW1 wanted to be given unit titles to enable him to sell the apartments contrary to the contracts and the transfer was to be effected in wholesome and not in units terms separately. When asked on units, DW2 replied that law on units was not in existence when they signed the contracts. DW2 insisted that the property was for renting alone. DW2 told the court delays in transfer was caused by the defendant coming up with a new modality of ownership. DW2 asked whether the term 'unexpired residual term' was defined in the contracts he said no, but was quick to add it meant the remaining period because by the time they signed the contracts 52 years in the title deeds had elapsed.

Pressed with questions, DW2 admitted that there is no clause for BOT in the contracts.

Under re- examination, DW2 told the court the issue of unit titles contributed to halt the process among others.

This marked the end of defendant's case.

Having summarized the evidence of both sides of the dispute in this suit, the noble task of this court is to answer the framed and agreed issues based on the evidence on record. However, before going into each issue, this court has noted that there are some of the facts not in dispute between parties, which, in a way, will assist this court in resolving the instant suit. These are: **One,** there is no dispute that the parties herein in 2007 entered into joint venture agreement for development contract for construction of 64 units of apartments on plot No. 322 Ruvu road and plot No. 722 Mawenzi road whereby the plaintiff was to finance the project by 100%. **Two,** there is no dispute that by 2010 the project was fully executed on the part of the plaintiff. **Three,** upon completion of the project the possession and joint ownership was at 75% by the plaintiff and 25% by the defendant shares. **Four,** while this suit was on going, the Attorney General of the United Republic of Tanzania prayed and was joined in these proceedings as an interested party. **Five,** the defendant upon completion of the project, surrendered the titles to the plots to the Commissioner of Lands and have them be processed and a new title be issued in joint names of the plaintiff and defendant.

However, what is in serious dispute between parties is the tenure of the contracts and the mode of ownership as agreed; while the plaintiff was of the view that the tenure is unlimited, the defendant is of the view that the tenure is for residual period within the certificate of titles. Also, while the plaintiff is of the view that each party can deal with the shares as it pleases including sale of the units, the defendant is of diametrical different view that, the joint ownership and possession is limited to renting and no sale at all.

Now back to the suit and the issues framed, I will deal with each issue in the order they appear in my endeavors to resolve this legal dispute. The first issue was couched that **"whether the defendant breached the terms and conditions of the Joint Venture Agreement and Joint Ownership of properties by refusing to transfer the Right of Occupancy into joint ownership."** Having gone through the pleadings, the respective testimonies of the parties and final closing submissions and traversed the exhibits tendered for and against, I am inclined to answer the first issue in the negative. The reasons I am taking this stance are not far to fetch. **One,** it is clear from the record that not only the defendant but also the plaintiff in the course of their efforts to

have the title deeds transferred in respect of the disputed plots and properties therein caused misunderstanding by introducing new terms and conditions not envisaged in exhibits P1 and P2 which is the basis of their relationship. On the part of the plaintiff, claiming issuance of unit titles instead of tenancy in common and misinterpretation of phrase 'unexpired residual term' which were not provided for, amounts to introducing a new term with different consequences to the contracts which could altogether change the whole intention of the parties. For the defendant to introduce the issue of citizenship of PW1 and Build Offer Transfer (BOT) were matters which were unnecessarily introduced and in a way affected the entire commercial joint venture the parties had agreed and anticipated to benefit from.

Needless to say that, before winding up the first issue, with due respect to the learned trained counsels for parties, they did not play their role well in advising their respective parties and if they did it, was purely on legal science of litigation and not on commercial science settling the dispute in order to achieve the intended purposes and to mitigate the undesirable state of affairs in this case. I hasten to say they failed their clients because the contracts exhibit P1 and exhibit P2 under clause 15

allowed amendments and alterations by mutual agreements, which if was approached with commercial science, I am certain this was a case to settle than to fight in court for more than a decade.

Therefore, from the above findings this court finds and holds that both parties caused the misunderstanding which has lasted for more than ten years, hence, it will be unfair to say that it was the defendant who breached the terms and conditions of the contracts alone. This brings one conclusion that, the first issue is answered in the negative for obvious reasons that each party had equal share of blames causing this legal wrangle.

This takes me to the second issue which was couched that "**whether the agreements entered into between the parties did specify time of joint ownership.**" Having gone through the evidence on record and the final written submissions of the learned counsel for parties, and in particular, clause 2:1 to both contracts exhibits P1 and P2, which for ease of reference provides as follows:

2:1. The Kinondoni Municipal Council and M/s. Oysterbay Villas Ltd shall have joint ownership of the said property to be constructed on Plot 322

Ruvu road, Oysterbay and plot 277 Mawenzi raod Oysterbay all within Kinondoni Municipality for the unexpired residual term. (Emphasis mine).

PW1 when asked what does the phrase **'unexpired residual term'** mean and what was his understanding, he categorically said that after the expiry of the time in the title deeds, the renewal was to be applied and according to him that means they were to hold the titles to unexpired terms.

On the other hand of the defendant, DW1 and DW2 both categorically said that the **'unexpired residual term'** though not defined in the contracts was meant that titles are held for specific terms and in the instant contracts the residual term was the remaining term before the expiry of the title deeds in dispute and concluded that the term of the agreements were to expire by 2060 for the remaining period. As to renewal, they said no word renewal was envisaged and agreed between parties.

In the case of NITTIN COFFEE ESTATE AND 4 OTHERS vs. UNITED ENGINEERING WORKS LIMITED AND ANOTHER [1988] TLR 203 it was held that:

"A Right of Occupancy is something in the nature of a lease and a holder of a right of occupancy occupies the portion of the sort of lease visa-a-vis the superior landlord. A Right of Occupancy is for a term, and is held under certain conditions. One of the conditions is that no disposition of the said right can be made without consent of the superior landlord. There is now no freehold tenure in Tanzania. All land is vested in the Republic. So land held under a right of occupancy is not a freely disposable or marketable commodity like a motor car. Its disposal is subject to the consent of the superior and paramount landlord as provided for in the relevant regulations."

Guided by the above stance by the highest Court of the land, I am entitled to find and hold that the tenancy in common envisaged by the plaintiff and defendant was for specified term of the '**unexpired residual term**' and its disposal was subject to the consent of the Commissioner for Lands (the superior landlord for the Republic.)

I have traversed the entire contracts no where the phrase '**unexpired residual terms**' was defined and as such their meaning remains to be

subject to dictionary and their natural and ordinary meaning in order to give them effective meaning to the intention of the parties. Black Law dictionary defined the word **'unexpired'** as remaining term, residual time, surplus time, un-lapsed period and residual as left over quantity, a reminder of a period prescribed by law or agreeement.

From the above definitions, the term as intended by parties was for the period remaining from 99 years in the said titles deeds when the contracts were signed. To give it to the renewal and which parties never said so will amount to adding to what parties never intended.

That said and done, the second issue is hereby answered in the affirmative that the time limit specified in the agreement is unexpired residual term of 46 years reckoning from when the contracts were signed.

Third issue for determination was couched, thus, "whether the agreement entered between the plaintiff and defendant was joint ownership of properties or Build Operate and Transfer." Having dispassionately considered and gone through the entire evidence on record and parties' pleadings, in particular, the testimony of DW2 who was the secretary to the Investment Committee of the defendant and participated from the initial stage to the end, he had this to say:

"there is no clause in the agreement that describe for Build Operate Transfer"

The above clear statement without much ado suffices to culminate this issue that, the concept of BOT was new and foreign to the contracts between parties signed in 2007. Like the issue of unit titles which came into force in 2009 by Unit Titles Act, 2009, BOT concept as well was introduced in our laws in 2010 by the Public Partnership Act, 2010, in the same way it cannot apply under the contracts under consideration unless parties mutually employ the provisions of article 15 to the contracts and it cannot be applied retrospectively. In this suit, the evidence on record points to joint ownership was what parties intended and it should be so.

That said and done, the third issue is hereby answered in the affirmative that the agreement was joint ownership between parties and no more unless they exploit the provisions of clause 15 to the contracts.

The forth issue was couched, thus, "whether the plaintiff has suffered loss as result of the defendant's refusal to transfer the Right of Occupancy over the properties into joint ownership". Under this issue the plaintiff under item (iv) of his claims, claimed USD.300,000.00 being compensation for losses, damages costs and expenses incurred by the

plaintiff due to the plaintiff's failure to utilize and/or commercially deal with the developed properties. There is no dispute that these claims are specific in nature and were to be specifically pleaded. No doubt, this amount was pleaded at paragraph 3:1. The next question is was it specifically proved? Under the provisions of section 110 of the Tanzania Evidence Act, [Cap 6 R.E. 2019] is very clear that he who alleges has legal burden to prove what he alleges before a court or tribunal can decide in her favour. Further guidance can be gathered from the case of ZUBERI AUGOSTINO vs. VICENT MUGABE [1992] TLR 137 in which the highest court of the land categorically held and insisted that, it is a trite law in our jurisdiction that specific claims must be strictly pleaded and strictly proved for the claimant to be given.

Guided by the above stance and after going through the entire evidence by the plaintiff apart from pleading to have suffered that amount, nothing was said in his oral testimony at least to substantiate the claims. Not only that but also these claim being result of the losses incurred one would expect them to be proved by production of receipts or voucher to support them. In the absence of all these, this issue is akin to fail miserably.

Not only that but also my holding in the first issue that parties' behaviour watered down the claim, if any, because both parties are at fault in the interpretation and by introducing new terms into the contracts leading, truly speaking, to this unwarranted dispute which has benefited none but all are suffering from commercial gain of the joint venture agreement to date.

That said and done, the issue whether plaintiff has suffered loss as result of the defendant's refusal to transfer the right of occupancy over the properties into joint ownership is hereby answered in the negative for want of evidence to support the claim.

This takes me to the last issue couched, thus, **"what reliefs parties are entitled to."** The defendant prayed that the instant suit be dismissed with costs while on the other hand, the plaintiff prayed several reliefs as contained in the prayer clause. This issue will not detain this court much. Definitely based on my findings in other issues above, prayers (i), (ii), (iv), (v), and (vi) are akin to fail miserably for want of evidence and the uncalled behaviour of both parties being in blames in the performance of this contract.

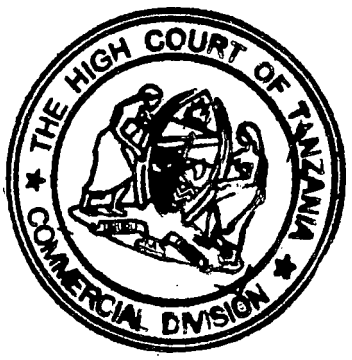
However, on prayer (iii) equally based on my findings that there is no dispute that parties entered into contracts and each performed what is required of her though the process was halted by introduction of the new terms repugnant to the terms of the contracts, I find just and fair to order and grant this prayer by ordering the defendant to immediately apply for renewal of the certificate of approval to the Commissioner for Lands under the provisions of section 40 of the Land Act No 4 of 1999 [Cap 113 R.E.2019] and upon grant of the approval to fully comply with/perform the contracts and fulfill the terms, conditions, obligations and requirements of the contracts by undertaking the process of issuance of new certificates in the joint names of the parties in accordance with the agreed ratio of 75% plaintiff's and 25% defendant's as per article II, IV and IX (Clause 9:3) of the contracts.

Further from the prayer that this court be pleased to order any other relief it may deem fit and just to grant, the plaintiff is hereby ordered that upon completion of the transfer of title deeds into the joint names of the parties to immediately hand over the 25% apartment to the defendant for her own use as stipulate in the contracts.

From the foregoing, the judgement is hereby entered in favor of the parties to the extent shown above. As to costs and given my findings on the above issues, I am inclined to order that each party bear his/her own costs because each party had shares of blames leading to the non-performance of the contracts in dispute.

It is so ordered and directed.

Dated at Dar es Salaam this 16th day of July, 2021.



S. M. MAGOIGA

JUDGE

16/07/2021