

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL CASE NO. 159 OF 2021

TAHER KUTBUDDIN TAIBALI..... 1ST PLAINTIFF

SALIMA TAHER TAIBALI..... 2ND PLAINTIFF

VERSUS

AZANIA BANK LIMITED..... DEFENDANT

JUDGMENT

20/06/2023 & 25/07/2023

BWEGOGGE, J.:

The above-mentioned plaintiffs commenced civil proceedings against the defendant herein claiming that having purchased the property on Plot No. 63/27 CT No.38083/83, Apartment "C" (1803) 18th Floor, Upanga area within Ilala Municipality (henceforth suit property) during the public auction conducted by brokers (Mark Auctioneers) under the instruction of the defendant, the same failed to hand over vacant possession of the property. Now, the plaintiffs pray for the following reliefs;

- 1. The defendant to pay each of the plaintiff's damages in the sum of 1,000 United states Dollars per month since the purchasing date to the date of judgment being specific damages including service charges per month to the tune of TZS*

417,600/= for causing the plaintiffs delay to use the suit premises as per paragraphs 8 and 10 of the plaint.

- 2. The defendant to yield vacant possession of the suit premises plot No. 63/27 CT No.38083/83 Apartment "C" (1803) 18th Floor, Upanga area within Ilala Municipality by handing over the apartment Keys and put the Plaintiffs in actual possession forthwith.*
- 3. The defendant to pay the plaintiffs interest as per paragraph 1 above from the date of cause of action to the date of judgment at the commercial rate 22%.*
- 4. The defendant to pay the plaintiffs interest on the decretal amount at the court rate of 7% from the date of judgment till when payment is made in full.*
- 5. The defendant to pay the plaintiffs' costs of, and incidental to, the suit.*
- 6. Any other reliefs this court deems fit to grant.*

The prosecution case, as depicted by pleadings filed herein and evidence adduced in this court, albeit briefly, is as follows: The suit property herein namely, an apartment located on Plot No. 63/27 CT No.38083/83, Apartment "C" (1803) 18th Floor, Upanga area within Ilala Municipality was initially owned by a limited company namely, Cosmos Developers Limited. The property was pledged by the original owners as security for a loan sought and granted from the defendant herein. Allegedly, the original owner (Cosmos Properties Limited) failed to repay the loan within the contractual period, and the defendant exercised her recovery right by selling the property thorough public auction. The defendant had

instructed the broker (Mark Auctioneers) to sell the property. The suit property was auctioned on 02nd day of August, 2020. The plaintiffs herein were the highest bidders during the public auction of the suit property who had been declared as the lawful purchasers of the same. However, allegedly, despite the issuance of the certificate of sell and necessary documents to the purchaser, the plaintiffs herein, the same failed to access and, or take possession of the purchased property for nearly consecutive three years now, and the attempts made by the plaintiffs to that effect proved futile to their psychological and financial detriment. Hence, the plaintiffs were left without any other option but to commence civil proceedings against the defendant herein.

Contrarywise, it is the defence case that having sold the property to the plaintiff, the previous owner has sought and obtained an injunction order from this court to restrain the defendant from taking vacant possession of the suit property, followed by multiple suits to that effect. Likewise, the defaulter has engaged a security company, namely, Suma JKT, to secure the suit premise from any intrusion, with intent to impede access by the defendant. Hence, on above grounds, the defendant failed to hand over vacant possession of the suit property to the plaintiffs herein. Generally, it is the defence case that it was not deliberate, but due to the prevailing

circumstances militating against the defendant that prevented the same from handing over vacant possession of the suit premise to the lawful purchaser, the plaintiffs herein. Therefore, the defendant cannot be liable for damages claimed by the plaintiffs.

The plaintiffs were represented by Mr. Roman Lamwai, learned advocate, whereas the defendant had the services of Ms. Upendo Mbagi and Mr. Mbagati Nyarigo, learned advocates.

At the commencement of this suit, the following issues were framed by this court upon deliberation with parties herein:

- 1. Whether the defendant failed to hand over vacant possession of the suit property.*
- 2. (If the above in affirmative, then) Whether the plaintiffs suffered loss for the defendant's failure to hand over the vacant possession of the suit premise.*
- 3. To what reliefs do the parties herein are entitled to.*

Before embarking on the discussion of the aforementioned issues framed by this court, I find obliged to revisit the cherished principles guiding this court to arrive to the just end of this case. The said principles are thus:

- i) The burden of proof in civil proceedings lies on the person alleging existence of certain facts and on the party who alleges anything in his favour. Likewise, the burden of proof in civil proceedings lies on the litigant who would fail if no evidence at all were given on either side. See sections 110 and 111 of the Evidence Act [Cap. 110 of the Evidence Act [Cap. 6 R.E. 2022]. See also the decision of the Apex Court in **Godfrey Sayi vs. Anna Siame, Legal Representative of the Late Mary Mndolwa** (Civil Appeal 114 of 2014) [2017] TZCA 213.
- ii) The standard of proof in civil proceedings is based on the preponderance or balance of probability. See section 3(2) (b) of the Evidence Act (supra) and the decision of the Apex Court in **Anthony M. Masanja vs. Penina (Mama Mgesi) & Another**, Civil Appeal No. 118 of 2014, CA (unreported). See also in this respect the case of **Hamed said vs. Mohamed Mbilu** [1984] TLR 113.
- iii) The precepts of justice demand: To live honorably; not to injure another, to give each his due (*Honest vivere: Alterum non laedere Suum Cuique tribuere*).

Having revisited the above principles of law guiding this court, I am bent on canvassing the above-mentioned issues serially commencing with the 1st issue. In substantiating the pleaded claims herein, one Taher Kutbuddin Taibali (PW1), the 1st plaintiff herein deponed that on the 02nd day of August, 2020, in company of his wife, one Salima Taher Taibali (PW2), attended an auction conducted by Mark Auctioneers and Court Brokers Company Limited acting on the instruction of the defendant herein. The property auctioned was a suit property herein. It is also the testimony of PW1 that they emerged the highest bidder in the relevant public auction; hence, the house was sold to them at the tune of TZS 350,000,000/=. Eventually, they were issued with certificate of sale (exhibit P1) by the auctioneer and an acknowledgement letter (exhibit P2) by the defendant herein on 20th August, 2023. Likewise, the plaintiffs were issued with hand over certificate of title, transfer under power of sale, and application to record change of name (collective exhibits P3) as well as certificate of title (exhibit P4) by the defendant herein. PW1 complained that for nearly three years now, they have failed to access the purchased property and their efforts in demanding handing over of vacant possession of the suit property has proved futile. PW1 enlightened this court that previously, he engaged the company namely, RICU Management Solution Limited, to facilitate hand over of the vacant possession of suit property,

but his effort, likewise, ended in vain. Admittedly, the feedback report (exhibit P6), speak volume in this respect.

The testimony of PW1 was corroborated the testimony of his wife, one Salima Taher Taibali, PW2 herein who had deponed a replica of evidence adduced by her husband, PW1 herein. I need not replicate the same herein.

Conversely, the claims made by plaintiffs herein were vehemently disputed by the defendant. Nonetheless, one Raphael Bishota (DW1), the defendant's bank officer, conceded the fact that the plaintiffs validly purchased the suit property through the public auction and they were handed over with necessary documents to enable them to process transfer of the title deed of the suit property and effect their absolute ownership of the same. However, despite the efforts mentioned above, DW1 enlightened this court that the defaulter (Cosmas Developers Ltd) initiated civil proceedings against the defendant, specifically, Civil Case No. 29 of 2020; Misc. Land Application No. 468 of 2020 (exhibit D1); and Misc. Land Application No.561 of 2020 in this court aimed to preempt efforts taken by the defendant to take possession of the suit property and intended hand over of the same to the plaintiffs herein. That the court order in the Misc. Land Application No. 468 of 2020 (exhibit D1) granted

90 days injunction order against the defendant to refrain from alienating or transferring the suit property to the plaintiffs herein, among others. Therefore, DW1 enlightened this court that, on the above account, the defendant failed to hand over vacant possession of the suit property to the plaintiffs whereas the plaintiffs were duly informed and offered an option to be reimbursed their purchase amount but the same were not interested in the offer.

In tandem to above, it is the DW1's testimony that the defaulter ((Cosmas Developers Ltd) employed security guards from SUMA JKT to prevent the defendant from taking possession of the suit property. That, the defaulter further filed the complaint against the defendant to the District Commissioner but the complaint was resolved in the defendant's favour; hence, the eviction process was ongoing. DW1 tendered correspondences between the defendant and Chief Administrator for SUMA JKT (Exhibits D2 and D3 respectively) to prove the defendant's attempts made to seek removal of the security guards from the suit premise in order to allow the defendant to take possession of the suit property and effect hand over of the same to the plaintiff herein. And, DW1 enlightened this court that the attempts to take possession of the suit property failed for reason that the Chief Administrator for SUMA JKT refused to remove the security guards

from the suit premises on the pretext that there were pending court proceedings in court. Thus, it was the DW1's opinion that the defendant's failure to hand over vacant possession of the suit premise is not deliberate but on circumstances beyond her control.

In the same vein, one Izack Nguku (DW2) who is Court Broker working under Mark Auctioneers, likewise, acknowledged plaintiffs as the lawful purchaser of the suit premise. However, DW2 asserted that they encountered a hindrance during the hand over process as the defaulter stationed security guards from SUMA JKT to prevent the process. That, later on, the defaulter sought a court injunction to that effect; hence, they were left without any other option but wait for conclusion of the court proceedings. Nevertheless, DW2 insinuated that, for the moment, all the impediments have been removed and they are ready and willing to hand over the suit property to the plaintiff.

Further, Mr. Nyarigo, the defendant's counsel, in his final submission, having reiterated the substance of the evidence adduced by defence witnesses he argued that, as there was pending court injunction against the defendant, any attempt to evict the original owner would amount to contempt of lawful court order. Hence, he likewise asserted that the defendant's failure to hand over vacant possession of the suit property to

the plaintiffs herein was occasioned by reasonable cause and, or unforeseeable factors.

Based on the evidence revisited above, it is not disputed that the plaintiffs herein are the lawful purchaser of the suit premise. Likewise, it is the defence case that the alleged failure by the defendant to hand over vacant possession of the suit property to the plaintiffs was accessioned by the injunction entered by this court in Misc. Land Application No. 468 of 2020 (exhibit D1) coupled with the subversive acts martialled by the original owner of the suit property. However, as rightly asserted by the plaintiffs' counsel, the injunction order of this court had a lifespan of 90 clear days, commencing from 12th October, 2020 to 12th January, 2021. Thus, it goes without saying that no proof was given by the defendant to establish that there is any court order in force restraining the defendant from exercising their contractual obligation to hand over vacant suit premise to the plaintiffs.

Otherwise, admittedly, DW1 and DW2 had enlightened this court about the subversive acts of the defaulter who had placed the security guards to secure the suit premise from defendant's access. Undoubtedly, documentary evidence (D2 and D3) tendered by DW1 speak volumes of the defendant's modest attempts to remove the impediments facing them

by pleading with the Chief Administrator of SUMA JKT to have the security guards removed from the suit premise. However, I reckoned that the defendant had not attempted to take legal measures against the alleged impediments for nearly two years, apart from the modest approach invoked. I need not mention the fact that the placement of security guards at the suit premise was not sanctioned by the court order, as the only valid order was in force from 12th October, 2020 and eventually expired on 12th January, 2021.

Therefore, in view of the foregoing, it is self-evident that, to date, there is no valid ground precluding the defendant from handing over the suit property to the plaintiffs. Hence, it is my considered opinion that the defendant has failed to discharge her contractual obligation to hand over vacant suit property to the plaintiff. Consequent to this finding, I would assert that the 1st issue has been answered in affirmative.

At this juncture, having answered the 1st issue in affirmation, I proceed to canvass the 2nd issue as to whether the plaintiffs suffered loss for the defendant's failure to hand over the vacant possession of the suit premise. It is in the PW1's testimony that in purchasing the disputed property; he employed all his savings and secured a loan to a tune of USD 60,000 from Indian Community to facilitate the purchase as he expected to move in

the purchased property immediately. The same complained that, to date, he failed to access and, or take possession of the suit property. Hence, he was forced to rent a costly apartment to his financial detriment. Likewise, it is the testimony of PW1 that, to provide shelter to his extended family, he entered into lease agreement with UPA Investment Limited (exhibit P7) whereas he was obliged to pay USD 180 per month, equal to TZS 420,000/= as maintenance charges. The payment receipts were tendered and admitted in evidence as collective exhibit P5. PW1 had also deponed that the agreed monthly payable rent to UPA Investment Limited was USD 1000 per month. And, as PW1 was not in a position to pay for agreed rent having expended all his savings and further incurred debt in pursuit of his intention to purchase his private residence, it was agreed that he would only be obliged to pay the maintenance charges whereas the rental fees would be paid after he had settled his dispute with the defendant herein and possessed the purchased suit premise. In the same vein, PW1 enlightened this court that he had religiously paid service charges of his rented residence as covenanted for consecutive contractual period of two years. However, to this very moment, PW1 is yet to pay the rent. The lease agreement tendered by PW1 (exhibit P7) was not disputed by the defendant.

PW2 had replicated the evidence adduced by PW1 in that they had to take loan from their own community for the purchase of suit premise, to free themselves from renting shelter, whereas their expectations have been shattered by failure to access the suit property. PW2 reiterated that they expended all their savings to purchase the property and lacked means to meet the payable rent for the shelter they rented whereas their large family of seven people remained packed in sole two-bedroom house.

The defence counsel, in her final submission, argued that the service charges (exhibit P5), hired services of Riku Management Solutions Limited (exhibit P6) and lease agreement (exhibit P7) tendered by the plaintiffs in proof of the claims against the defendant and admitted in evidence by this court have no connection to the alleged plaintiff's failure to occupy the suit premise. I refuse to agree with the defence counsel in this respect. It is an uncontroverted fact that by purchasing the suit property, the plaintiffs had a foreseeable and legitimate expectation that they would have immediately moved into the suit premise and free themselves from further incurring rental expenses. Further costs incurred by the plaintiffs for renting shelter, in my opinion, were not expected, specifically over two years period.

Therefore, on above accounts, I am of the settled view that the plaintiffs herein have suffered financial loss for the defendant's failure to hand over vacant possession of the suit property within reasonable period.

Lastly, I proceed to delve into the third and pertinent issue herein as to reliefs the parties herein are entitled to. **First**, the plaintiffs prayed for judgment and decree against the defendants for payment of damages in the sum of USD 1,000 per month and service charge per month to the tune of Tshs 417,600/= since the purchasing date of the suit premise to the date of judgment, being specific damages.

As afore said, the plaintiffs herein were forced to rent a shelter after the expected possession of suit premise became illusory. The exhibit P7 (rent agreement) depicts that the plaintiffs were obliged to pay USD 180 per month as maintenance charges. The payment receipts (exhibit P5) prove that the plaintiffs herein paid service charges as covenanted. Further, the lease agreement entails that the agreed monthly payable rent was USD 1000/. The lease agreement entails that the 2-year lease commenced on 01st December 2020. Impliedly, it ended on 01st December, 2022. It was deponed by the plaintiffs herein that the rent is yet to be paid, awaiting final determination of the dispute herein.

The defence counsel herein, in her final submission, argued that the plaintiff herein, by purchasing the suit property in public auction, after original owner defaulted to service the loan, implies that the same willfully accepted the risk and any inconvenience which would arise due to court proceedings taken by defaulter and consequential injunctions in favour of mortgagor. That in that respect, the plaintiffs cannot be heard claiming for damages from the defendant who has taken all necessary steps to hand over the property to the same even by offering refund of principal sum paid for the purchase of suit property.

In consideration of the defence case generally, I would only agree with the defence counsel in that the sole valid ground for the defendant's failure to hand over suit premise to the plaintiffs is the injunction order issued by this court (exhibit D1). As I repeatedly said, the court injunction was in force for only 90 days having expired in January, 2021. The defence has failed to establish the existence of any injunction order from the pending proceedings in this court which prevents the defendant to discharge their contractual obligation. And, I find it needless to reiterate that in respect to the alleged interference by the security guards from SUMA JKT, the defendant had adopted the modest approach of requesting the same to forbear from interfering with her possession of suit property

through official correspondences. No legal recourse was taken to that effect.

The defence counsel had argued that by purchasing the suit property the plaintiffs had willfully assumed the risk and any inconveniences which would arise. I would purchase the arguments of the defendant's counsel if the plaintiffs were availed all the necessary material information to that effect. It is in the testimony of DW2 that he even failed to disclose the fact that the former owners/defaulters of the suit property had commenced court proceedings against him in the subordinate court, resisting the attempt to take vacant possession of the suit property. He clearly told this court; he was not supposed to disclose the said fact. Therefore, it cannot be said with certainty that the plaintiff had consented to the risk forthcoming. I need not mention the fact that defendant was not in actual possession of the suit property when she authorized the sale by public auction.

Having considered the evidence laid on the table, I am of the considered opinion that the plaintiff should recover damages specifically proved in respect of 24 months due rent payable to the APA Investment Limited to the tune of USD 24,000. Likewise, the plaintiff should be allowed to

recover the proved costs of the rental charges of eight months as per exhibit P5 to the tune of USD 1440.

Secondly, the plaintiffs prayed for payment of TZS 20,000,000/= for the psychological torture endured and TZS 100,000,0000/= as general damages. Both plaintiffs herein (PW1 and PW2), in validating these claims, deponed that they endured the psychological torture by awaiting the handing over of suit premises for nearly three years and the aftermath of parting with considerable amount of money with expectation of possessing a home, the expectation which became illusory, apart from further costs they have to incur for further renting a shelter. Further, PW1 established that, being a pilot, he had to quit several job opportunities within his employment with Air Tanzania Company to reduce his mind workload in order to control stress and concentrate on pilot position for the safety of passengers he carried. In the same vein, PW2 asserted that they had taken loan from their community, yet still endure shame and ridicule from their community for lack of personal residence, apart from the discomfort they are going through for failure to access their lawful property.

The rationale behind the award of general damages and, or any award of compensation, is aimed to put the injured party, the claimant, back in the

financial position he would have been in, had the injury complained of not occurred. Thus, the law seeks to put the affected party albeit in the same position he would have been if the alleged civil wrong had not ensued. Based on the above pivoted point underlying the payment of damages, I have taken into considerations of the facts that: **One**, it is undisputed fact that the plaintiffs purchased suit property from the defendants on 02nd August, 2020. The same had legitimate expectation that they would have moved into the purchased property within reasonable period. It is now approximately three good years the same are still awaiting to take possession of the suit property which they have expended all their treasure to purchase. **Two**, the plaintiffs had strained themselves financially to purchase the suit property to free themselves from the yoke of renting shelter, among others. Yet, not only that their legitimate expectations have yielded to nothing, but the same have further plunged into indebtedness on account of being constrained to remain into the rented shelter. And, I would further reiterate that the defendant has no cogent reason(s) for her failure to discharge her contractual obligation. **Three**, I am constrained to agree with PW1 and PW2, the plaintiffs herein, in that the above unfolded misfortunes, among other inconveniences incidental thereto, were not foreseeable events. I would further add that the plaintiffs herein are victims of the circumstances beyond their control.

Hence, the law should be employed in favour of the plaintiffs to repair the damages suffered. I would conclude that, taking into consideration the circumstances of this case, I find the prayer for general damages with substance. I am of the considered view that the general damages to the tune of TZS 20,000,000/= would meet the justice of this case.

Thirdly, the plaintiffs prayed for an order against the defendant, to yield vacant possession of the suit premises (plot No. 63/27 CT No.38083/83 Apartment "C" (1803) 18th Floor, Upanga area within Ilala Municipality) by handing over the apartment Keys and put the Plaintiffs in actual possession forthwith. This prayer need not detain this court. In times without number, I have echoed that, since the expiry of the injunction order of this court on 12th January, 2021 the defendant has no legal justification for failure to hand over vacant possession of the suit premise. The defendant is legally obliged to render to the plaintiffs their due. Thus, the principle "*honest vivere: Alterum non laedere Suum Cuique tribuere*" applies. Consequently, the defendant is hereby instructed to take necessary actions available in her disposal to effect the handing over of the vacant possession of the suit property to the plaintiffs.

Fourthly, the plaintiffs prayed for commercial and court interests on the decretal sum at the rate 22% and 7% from the date of judgment till

payment in full. Based on the circumstances of this case, interest on the court rate of 7% from the date of judgment to the date of payment in full is legally justified. Thus, the interest at the court rate to the tune of 7% is hereby granted.

Lastly, the plaintiffs prayed for the costs of litigation. It is the settled law that the winning party should be entitled to the costs of litigation. And, in this respect, I feel constrained to borrow a leaf in the holding of the Apex court in **Blue Anchor Line, by Agent Kuehne & Nagal SDN BHD of Singapore & Another vs. Hassan & Sons**, Civil Appeal No. 89 of 2005 CA, (unreported) that:

*"Legally, costs are the court's discretion, but the practice has been established that costs follow event in that, **unless there are reasons and which should be recorded, dictating otherwise, the winning party should be awarded costs.**"* [Emphasis mine].

Based on the above cherished practice, I would find that the plaintiffs herein should be allowed to recover the costs of this litigation.

Finally, in view of the foregoing, I hereby find that the plaintiffs have succeeded to prove their claims on the balance of probabilities. I hereby enter the judgment in favour of the plaintiffs to the extent discussed herein above. It is hereby ordered as under:

1. The plaintiff should recover damages specifically proved in respect of 24 months due rent to the tune of USD 24,000 payable to the APA Investment Ltd. Likewise, the plaintiff should be allowed to recover the proved costs of the rental charges of eight months paid to the APA Investment Ltd as to the tune of USD 1440.
2. The defendant to pay general damages to the plaintiffs to the tune of TZS 20,000,000/.
3. The interest on the court rate of 7% from the date of judgment to the date of payment in full is hereby charged on the decretal amount.
4. The defendant to take necessary action available in her disposal to effect the handover of vacant possession of the suit property to the plaintiffs.
5. Plaintiffs shall have the costs of this litigation.

So ordered.

DATED at **DAR ES SALAAM** this 25th July, 2023




O. F. BWEGOG
JUDGE