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 ATTORNEY GENERAL ..... INTERESTED PARTY

JUDGMENT

06/12/2018 & 08/02/2019

SEHEL, J.

The present judgment arose from the implementation of Joint Venture Agreements entered between the plaintiff and the defendant in respect of two plots situate at Plot No. 322, Ruvu Road, Oysterbay Area, Dar es Salaam (Contract Number KMC/150/2007); and Plot No. 277, Mawenzi Road, Oysterbay Area, Dar es Salaam (Contract Number KMC/151/2007).

It is not disputed that the plaintiff and the defendant herein entered into two separate joint venture agreements namely;

"Agreement for Joint Venture Development and Joint Ownership" (hereinafter referred to as "the agreements") on two properties situate at Plot No. 322, Ruvu Road, Oysterbay Area, Dar es Salaam (Contract Number KMC/150/2007); and Plot No. 277, Mawenzi Road, Oysterbay Area, Dar es Salaam (Contract Number KMC/151/2007). It is also not disputed that the parties agreed for the plaintiff to construct two blocks of 24 units of residential apartments on Plot 322 and four blocks of 40 units of residential apartments on plot 277. However, through an addendum entered on 8th day of June, 2009 the plaintiff and the defendant added four more apartments on Plot 277 and making the total number of apartments to be constructed are 68. It is further not disputed that the ownership of the properties shall be jointly owned at the ratio of 75% by the plaintiff and 25% by the defendant.

It is alleged by the plaintiff that upon successful completion of the construction of the joint venture development projects, on 16th August, 2010 the plaintiff wrote a letter to the defendant notifying the defendant of the completion and the defendant issued a

Certificate of Occupation certifying Plaintiff's completion upon completion, it wrote several letters to defendant reminding of the completion and requesting for the defendant to undertake the process of issuance of new certificate of Title bearing joint names of both parties in accordance with the terms of the contracts. But the defendant refused and/or neglected hence the present suit was filed.

The plaintiff is claiming against the defendant for:

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

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 Thousands only (US $ 300,000) 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 developed properties;

v. Order for payment of general 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 Court;

vi. Order for 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 month of August, 2010 being the date of completion of the buildings, to the date of judgment, and interest at Court's rate from the date of

judgment to the date of payment in full satisfaction of the decree;

vii. Costs of the suit; and

viii. Any other relief the Court may find fit and just to grant.

The defendant in its amended written statement of defence categorically denied to have breached the terms of the agreements. It averred 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. It averred that the plaintiff required the defendant prepare certificate of right of occupancy to each apartment, and it claimed for perpetual joint ownership.

In order to fully adjudicate upon the dispute, the Court framed five issues. The issues are:

1. Whether the defendant breached the terms and conditions of the agreement of joint venture and joint ownership of the

properties by refusing to transfer the right of occupancy into joint ownership?

2. Whether the agreement entered into between the plaintiff and the defendant specified the time limit for joint ownership of the properties?

3. Whether the agreement entered between the plaintiff and the defendant was of joint ownership of properties or build operate and transfer?

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 are the parties entitled.

Before going into examining the issues, let me point out that the plaintiff called a total of four witnesses to prove its case. These witnesses are Samardizic Bakir (PW1), the Director of the Plaintiff; Mr. Shi Yua also a director of the plaintiff (PW2); Mr. Hu Bo (PW3) a contractor for the plaintiff; and Mr. Gabriel Ponsian Makundi (PW4)

working with S.E.C (E.A) Co. Ltd a sub contracted for the plaintiff. All witnesses for the plaintiff were heard by my learned Sister Hon. Bukuku, J, (as she then was) and the trial of the suit was concluded by Hon. Nchimbi, J (as he then was). After conclusion of the hearing of the suit, judgment was entered in favour of the plaintiff. Dissatisfied with the judgment, the defendant appealed to the Court of Appeal. When the appeal came up for hearing the Court of Appeal observed that the trial of the suit was handled by more than one judge and there was no reasons assigned as to why the case file was transferred from one judge to another. The Court of Appeal having heard the parties' counsels on the issue, ruled that the omission occasioned was fatal and vitiated the proceedings and thereby in exercising its revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 , the Court of Appeal quashed the proceedings before learned judge Nchimbi and directed for the case to be placed before another judge for continuation from where the anomaly was occasioned. Hence the case filed landed to my hands.

Since there were some developments between the period the judgment was entered and the appeal was determined. The counsel for the plaintiff prayed under Section 147 of the Evidence Act, Cap. 89 to recall PW1. The defendant did not object the prayer thus PW1 was recalled. Upon conclusuion of the plaintiff's case, the defendant's case started and it was supported by two witnesses namely Mr. Palmon Martin Rwegoshora (DW1) and Einhard Chidaga (DW2). I will consider the evidence brought forward by the plaintiff and the defendant when determining each issue.

Whether the defendant breached the terms and conditions of the agreement of joint venture and joint ownership of the properties by refusing to transfer the right of occupancy into joint ownership

As I said both parties are in agreement that the plaintiff entered into two agreements for joint venture with the defendant. The agreements are for development and joint ownership over two plots, situate at Plot 322 Ruvu Road, Oysterbay Dar es Salaam and at Plot 277 Mawenzi Road, Oysterbay Dar es Salaam. The separate joint

venture agreements entered by the parties were admitted as Exhibit P1 collectively.

It was also the testimony of PW1 that the plaintiff was to provide complete financing and to build the flats of which it did fulfill the terms and conditions of the agreements. He said the plaintiff completed the construction and was issued with the Certificate of Occupation which was admitted as Exhibit P2. PW1 further said the plaintiff then requested the defendant to issue new certificate in the name of the joint ownership names but the defendant did not issue the certificate. Two letters requesting for issuance of certificates were admitted collectively as Exhibit P3. It was the evidence of PW1 that there was no response to his letters thus he requested for convening of a meeting. A meeting was convened after complaining to the Prime Minister whereby the defendant agreed and did surrender the Title to the Ministry of Lands for issuance of new Certificate of Title. A letter to the Prime Minister was admitted as Exhibit P4 and the surrender Certificate of Title was admitted as Exhibit P6.

PW1 further stated that the plaintiff tried to complete the transfer but the defendant failed and or neglected to complete the transfer. It was his testimony that the defendant was required to pay for capital gain tax in order to complete the transfer but the defendant failed to do so. He tendered and were admitted several letters including demand notices and approval for disposition issued by the Ministry of Lands as Exhibit P4; P5; P7; P8; P9; P10; P11; P12; P13; P14; P16; and P17. It was stated by PW1 that sometime in 2016 the plaintiff received a copy of a letter written by the defendant addressed to the Office of the Attorney General claiming that the plaintiff is not a citizen of Tanzania. A copy of the said letter dated 8th July, 2016 was admitted as Exhibit P18. To prove that the plaintiff is a citizen, PW1 tendered and admitted certified copy of the Certificate of incentive issued by the Tanzania Investment Center in the name of the plaintiff as Exhibit P19.

In his testimony in chief, PW1 further testified that the defendant introduced new terms that required the plaintiff to change the agreement from joint ownership into Build Operate and Transfer. PW1

testified that the agreement described the ownership shall be jointly as a tenant in common. Further PW2 testified that the plaintiff and the defendant entered into a joint venture agreement for development of two plots and that the properties will be divided according to the shares provided in the agreements. In his cross examination, he also acknowledged that some of the apartments are in occupancy.

It is the defense of the defendant through DW1 and DW2 that the defendant did surrender the Title to the Commissioner for Lands but the Commissioner for Lands halted the transfer upon discovery that both shareholders of the plaintiff are not citizen of Tanzania though the company is registered in Tanzania. DW1 explained that for the plaintiff to be recognized as citizen of Tanzania its 51% shares must be held by a citizen of Tanzania.

The counsel for the plaintiff ruled out the defendant's defense that the plaintiff is not a citizen thus could not own the properties. The counsel submitted that such a defence was never part of the defendant's pleadings and in support of the cases of Bata Shoe

Company Vs Standard Chartered Bank & Another, Commercial Case No. 3 of 2005; NBC (1997) Limited Vs Mehboob Karmali & 2 Others, Commercial Case No. 39 of 2000 (both High Court unreported); and Interfreight Forwarder (U) Limited Vs East African Development Bank, (1990-1994) E.A 117 implored the Court to disregard it. It was also submitted that such a defence is unfounded because the Commissioner approved the transfer of the property as evidenced by Exhibit P14. It was further submitted that the approval was done after the Transfer Deeds Exhibit P13 was signed on 28th July, 2015 and lodged with the Commissioner and the such as Memorandum and Articles of Associations of the Plaintiff and annual returns of the plaintiff were submitted to the Commissioner as requested through a letter dated 28th August, 2015 (Exhibit P17). The counsel further said there is sufficient evidence that the plaintiff is a Tanzanian citizen and that the plaintiff being the holder of the Certificate of Incentive has a right to own land for investment purpose.

The counsel for the defendant insisted in its final submissions through reference to Section 20 (1) of the Land Act, Cap. 113 and Section 23 of the Law of Contract Act, Cap. 345 that the plaintiff being not a Tanzania citizen at the time of entering into the agreements the plaintiff is not entitled to hold land and that is why the Commissioner for Lands stopped the process of transfer.

Much as I appreciate the efforts and industry put by the counsels in their final submissions but I will not go into details of their submissions simply because I totally agree with the counsel for the plaintiff that the defendant in its pleadings did not raise the issue of the plaintiff being a non citizen of Tanzania. Such a defense was not part of the pleadings of the defendant. In **Charles Richard Kombe t/a Building Vs Evarani Mtungi & 2 Others**, Civil Appeal No. 38 of 2012 (Unreported-CAT) the Court of Appeal held:

> *"It is a cardinal principle of pleadings that the parties to the suit should always adhere to what is contained in their pleadings unless an amendment is permitted by the Court. The rationale behind this proposition is to bring the parties to an issue and not*

to take the other party by surprise. Since no amendment of pleadings was sought and granted that defence ought not to have been accorded any weight."

I therefore accord no weight to the statements of DW1 and DW2 that the plaintiff is not a citizen of Tanzania.

With that said, the issue which this Court is invited to determine is whether the defendant breached the terms of the agreements. It is the case for the Plaintiff that the defendant refused to transfer the right of occupancy into joint ownership and that the Certificate of Title was not issued by the Commissioner for Lands because the defendant failed to pay capital gain Tax. The defendant's case, as I said hinged on the fact that the defendant did comply with all the procedures but the Commissioner for Lands did not proceed with the issuance of Certificate of Title because the Commissioner for Lands noted that the plaintiff is not a citizen of Tanzania.

It is trite law that the evidential burden lies upon the party who desires for the Court to give judgment. The Court of Appeal of Tanzania in the case of **Godfrey Sayi Vs. Anna Siame as Legal**

Representative of the late Mary Mndolwa, Civil Appeal No. 114 of 2012 (Unreported) explained:

> *"It is similarly common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities. In addressing a similar scenario on who bears the evidential burden in civil cases, the Court in* ***Anthony M. Masanga Vs Penina (Mama Ngesi) and Another****, Civil Appeal No. 118 of 2014 (Unreported), cited with approval the case of* ***In Re B [2008J UKHL 35****, where Lord Hoffman in defining the term balance of probabilities states that:*
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> *"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates in a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the*

burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned to and the fact is treated as having happened."

It is thus upon the plaintiff to establish its case on the balance of probabilities (See Section 3 of the Evidence Act, Cap. 6) that the Certificate of Title was not issued because the defendant breached the terms and conditions of the agreements by either failing to pay capital gain tax and or by refusing to transfer the right of occupancy into joint ownership.

The plaintiff in establishing its case tendered the agreements entered between the parties (Exhibit P1). Exhibit P1 specifically Clauses 4:1; 4.2 and 4:3 to Article IV stipulates the obligation of the defendant in respect of the transfer of right of occupancy:

"4.1 KMC shall undertake to transfer the Right of Occupancy of the property to be in the joint names of KMC and the partner M/S OYSTERBAY VILLAS LTD as per the venture interests. As

provided in Article 2.2 this transfer shall be affected upon completion of the building.

4.2 KMC shall make sure that before the Title to the property is partly surrendered from KMC to the partner, the property shall be free from any encumbrances or conditions other than those conditions ordinarily contained in the Certificate of Title.

4.3 Land rent, service charges in connection with the transfer of the said property shall be cleared by the KMC."

The evidences before the Court and what I gather from the pleadings, the main complaint of the plaintiff is that the defendant failed to pay capital gain tax and refused to transfer the right of occupancy into joint ownership.

It is gleaned from the evidences and from the submissions made by the counsels that in attempt to try to comply with the provisions of the agreements, the defendant surrendered the original Certificate of Titles to the Commissioner for Lands by delivering a deed of surrender dated 2nd February, 2011 (Land Form Number 36

(Exhibit P6)). A letter from the Ministry of Lands addressed to the defendant shows that the Commissioner for Lands accepted the surrender and returned the said surrendered Certificates to the defendant in order for the defendant to proceed with other procedures of transfer of the Title Deeds (Exhibit P7).

Pursuant to Section 62 of the Act the defendant applied to the Commissioner for Lands for the transfer of 75% shares to the plaintiff by delivering an instrument of transfer of a right of occupancy (Exhibit P13). It is on records through Exhibit P14 that on 18th February, 2016 the Commissioner for Lands, through his authorized land officer one David Matungwa Mushendwa, approved the disposition of the right of occupancy with condition that the consent was granted as per minute 37 of 16th September, 2015. Approval for disposition is made under Section 39 (5) of the Act after the Commissioner for Lands or an authorized officer having received a notification for disposal in the prescribed form before or-at the time the disposition is carried out together with the payment of all premium, taxes and

dues prescribed in connection with that disposition (See sub section 3 to Section 36 of the Act).

Taking into account efforts taken by the defendant, it is clear that the defendant adhered to the terms and conditions stipulated under Clauses 4.1 and 4.2 of the agreements. Further to such efforts made by the defendant, the Commissioner for Lands pursuant to Section 39 (5) of the Act consented to the defendant's application of disposition. The said consent was granted subject to "Minute 37 of 16-9-2015". Unfortunately we have not been availed with Minute 37 of 16-9-2015 in order to ascertain the conditions stipulated therein. We do not know whether minute 37 of 16-9-2015 required the defendant to pay capital gain tax. The plaintiff failed to bring this critical piece of evidence. Consequently, I am comfortable to give the plaintiff a value of 0 in respect of its case and I treat its assertion, the defendant failed to pay capital gain tax, not true. Taking the fact that the defendant complied with its obligations as contained in the agreements, the first issue is answered in the negative.

I now turn to the second issue that is **whether the agreement entered into between the plaintiff and the defendant specified the time limit for joint ownership of the properties.**

PW1 explained that the ownership as per the terms of Exhibit P1 shall be for the "unexpired residual". It is the opinion of PW1 that "unexpired residual term" refers to the term provided in the Certificate of Title and that upon expiry of the period of the right of occupancy then the President may extend the period as such it was argued that the term of the agreements is perpetual.

The defendant argues that the lifespan of the agreements was dependent upon the term of the Certificate of Titles. Both DW1 and DW2 interpreted the "unexpired residual term" to mean that the term of the agreements is contingent to the term of the Certificate of Title in that the term of the agreements end upon the expiry of the life of the Certificate of Title and that upon expiry the ownership of the properties reverts back to the President of the United Republic of Tanzania.

From the testimonies and evidences brought before the court, it is not disputed that the parties entered into joint venture agreements for the ownership of the properties and that the percentage of venture interests shall be plaintiff 75% and defendant 25% (See Clause 2.2 (a) of Exhibit P1). It is on records through Exhibit P13 that the defendant made an application for transfer of 75% shares to the plaintiff. The contentious issue is whether the said ventures have an expiry period.

It was insisted by the counsel for the plaintiff in his final submission that the joint ownership had no time frame especially when the agreement is looked holistically in terms of Article D in the recitals, Article 1.0(e), Article II (2.1; 2.2), and Article IV the parties agreed to jointly develop and thereafter jointly own the properties to be constructed. He said the determination of the contract can only be done through Article 16 of the Agreements that provides for "Force Majeure" circumstances and if the work failed to commence within six months from the date the agreements were executed. It was further submitted that the agreements provide for the joint

ownership of the properties as occupiers in common in the percentage agreed under Article II Clause 2.2 (a) of the agreements and that the residual term referred under Clause 2.1 was intended to show what was being transferred as the disposition can only be for the residual tenure of the right of occupancy and that the transfer of 75% shares included also the right of renewal upon expiry of the right of occupancy. The counsel used Sections 32 (3) and 67 (a) of the Act to back up his submissions. Section 32 (3) deals with renewal of right of occupancy upon expiry of its time and Section 67 (a) deals with implied covenants in every instrument in a disposition of a right of occupancy.

The learned counsel for the defendant in support of its case placed reliance on the wording of Clause 2.1 especially on the words "**unexpired residual term**". He tried to define the meaning of such term by using Burton's Legal Thesaurus, 4th Edition printed in 2007 and Black's Law Dictionary, 8th Edition. He thus came to the conclusion that the agreements between the parties did specify the

time for joint ownership which is 47 years computed from the remainder years of 99 prescribed in the Certificates of Titles.

The dispute here is what was the true meaning of the agreements entered between the plaintiff and the defendant in respect of tenure of the agreements. Lord Hoffmann in **Investor Compensation Scheme Ltd Vs West Bromwich Society** [1998] 1 ALL ER 98 at page 114 to 115 sets out five principles in interpreting a contract, he said:

> *"My Lords, I will say at once that I prefer the approach of the learned judge. But I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in Prenn v Simmonds [1971] 1 WLR 1381, 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 WLR 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the*

way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of "legal" interpretation has been discarded. The principles may be summarised as follows:

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the

document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which

are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 2 WLR 945

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in The Antaios Compania Neviera SA v Salen Rederierna AB [1985] 1 AC 191, 201:

"... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

The matrix of fact in the present case is as acknowledged by both parties that the plaintiff and the defendant entered into joint venture agreements and that such joint ventures shall be on percentage basis of 75% owned by the plaintiff and the remaining 25% shall be owned by the defendant. The said ownership shall be in common for unexpired residual term. Suffice to quote here the observation made by the Court of Appeal of Tanzania in the case of **Nitin Coffee Estate and 4 Others Vs United Engineering Works Ltd and Another** [1988] T.L.R 203 that:

> *"A Right of Occupancy is something in the nature of a lease and a holder of a right of occupancy occupies the position of a sort of leasee vis-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 the 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 Land Regulations."

It follows then that the occupancy in common by the plaintiff and the defendant over the two Plots is for a specified term of "unexpired residual term" and its disposal is subject to the consent of the Commissioner for Lands (the superior).

The words "**unexpired residual term**" have not been defined in the agreements (Exhibit P1). Therefore their true meanings are a matter of dictionaries and grammars and they should be construed according to their natural and ordinary meaning in order to give effect to the real intention of the parties. **Burton's Legal Thesaurus** 4th Edition, 2007 defined the word "**unexpired**" as "**remaining terms, residual time, surplus time, unelapsed period.**" And **Black's Law Dictionary** defines the word "**residual**" as "**a left over quantity, a reminder...**".

By analogy of the above definitions, the term or period of the joint ownership of both plots is the remaining left over period

contained in the Certificate of Occupancy (Exhibits D1). The term provided in Exhibit D1 is 99 years to be computed from 1st January, 1954. In order to obtain the left over period one has to resort to the time when the parties executed the agreements. The plaintiff and defendant entered into the agreements sometime in 2007. Counting the remaining term of 99 years in Exhibit D1 from the year 2007 when Exhibits P1 were executed will get a remainder of 46 years. It follows then that the period for the agreements (Exhibit P1) is 46 years which is the residual and or remaining term of Exhibits D1. The second issue is therefore answered in the affirmative in that the time limit specified in the agreements is "unexpired residual term" which is 46 years.

The third issue is **whether the agreement entered between the plaintiff and the defendant was of joint ownership of properties or build operate and transfer.**

PW1 testified that the plaintiff entered into joint venture agreements with the defendant for the development of two plots for commercial purposes whereby the plaintiff will provide the financing for the construction and the defendant will provide land. PW1 further

said the parties agreed that the interests in the venture agreements upon completion of the building shall be 75% owned by the plaintiff and 25% owned by the defendant as tenants in common. It was the view of PW1 since the agreements provide for the ownership of the parties' rights and benefits as tenant in common then each party has a right to deal with its properties as he wished without interference from the other. PW1 categorically denied for the agreements to be BOT.

The case for the defendant through the testimonies of both DW1 and DW2 is such that the agreements provide for the plaintiff to build the apartments, rent them and recoup its money from rental in the ratio of 75% for the plaintiff and 25% for the defendant.

The learned counsel for the plaintiff argued that all features contained in the agreements point to a joint ownership as opposed to BOT. He pointed out that the title of the agreements is "joint development and joint ownership of the property"; recital D provides that the defendant is willing to surrender 75% of its interest in the property to the partner (the plaintiff); Article 1 (e) rights of the parties

means rights and benefits as tenant in common; Article IX upon completion of the construction the property shall be owned by the parties in the proportion to the percentage of the joint venture interest as provided under clause D and Article 2; Article 9.6 each party is free to deal with its shares of the joint venture interests; and Article 16 determination of the joint venture was for failure to commence construction and upon occurrence of force majeure events. The learned counsel for the defendant had a different view. He argued that the agreements in it had a concept of BOT as the parties agreed for the distribution of 75% to 25% shares for the life of the agreements which is 47 years wherein the plaintiff will recover its construction costs together with profit margin then conceptually parties intended for BOT. I do not subscribe to this submission because at the time parties executed the agreements the concept of BOT was not in place. The concept was introduced through the enactment of the Public Private Partnership Act in 2010 some years later after parties herein have concluded their agreements. Consequently, it cannot apply by any stretch of imagination be

applied retrospectively. Furthermore, it is an established principle of the law of Contract that parties entered into an agreement when there is a consensus ad idem and a modification of such a contract requires a like consensus. One party cannot unilaterally alter the terms of the contract especially when it is in writing. The other party's consent is necessary. This position was stated in the case of **Edwin Simon Mamuya V. Adam Jonas Mbala** [1983] TLR 410(HC) that:

> *"(i) Where a contract is in writing, its terms can only be varied in writing,*
>
> *(ii) The agreement which varies the terms of an existing contract must be supported by consideration....."*

I therefore see no reason to associate myself with the defendant's stance. I find the answer to issue number three that the agreements entered between the plaintiff and the defendant are for joint ownership of properties and not build operate and transfer.

The fourth issue is **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.**

It is argued and testified by the plaintiff that the defendant suffered loss because he failed to sell the apartments as he had no title to prove ownership and that sometime in 2011 his tenants were harassed by the police that led to some of the tenants to shy away by moving out. The plaintiff also paraded two witnesses PW3 and PW4 to show that there are people who intended to buy the apartments but they could not as the plaintiff had no title. PW3 said that the construction was completed in 2010 and he wanted to buy one apartment but he could not because the plaintiff had no Certificate of Title. PW4 who was contracted to supply and provide after sales service on two elevators placed at Mawenzi Property said they could not buy because the plaintiff had no Certificate of Title.

Both PW1 and PW2 admitted that some of the apartments owned by the plaintiff were rented but the plaintiff could not sell because there was no title to transfer. DW1 also acknowledged in its

cross examination that the plaintiff used its own money to construct the apartments and that the construction was completed in 2010 but the shares were not transferred to the plaintiff as agreed in the agreement.

With such evidence can I safely say that the plaintiff suffered loss? Of course the plaintiff incurred costs in development and construction of the properties. I am fully aware that the plaintiff is claiming and pleading for loss suffered in rental charges. However, there is no scintilla of evidence in respect of rentals. The plaintiff has neither brought a single lease agreement entered nor paraded a lessee as its witness to substantiate the amount of loss suffered in rental charges.

Regarding loss suffered in respect of the breach by the defendant in failure to transfer or pay capital gain tax, though I have held herein that the defendant did not breach but I have noticed that the process for transfer was not completed. In the case of **Abualy Alibhai Azizi Vs Bhatia Brothers Ltd** [2000] T.L.R 288 at pages

304 -305 the Court of Appeal of Tanzania speaking through Nyalali, C.J (as he then was) said:

> *".....a contract for the disposition of land, which otherwise is proper but for the lack of required consent, is inoperative, that is, unenforceable to the extent that such enforcement is prejudicial to the interests of the paramount landlord. However, where such enforcement is not thus prejudicial, a party who has performed his or her part of the bargain may be assisted by the court to enforce the contract against the defaulting party. So a party who defaults to submit a written contract for consent or refusal by the specified authority may be compelled to do so if the other party has performed his or her part of the bargain. Of course where such consent is sought and is refused, the contract becomes wholly unenforceable, though valid, and any expenses incurred by the parties may be recovered by legal action, if necessary."*

As I said the defendant made all efforts to transfer the properties to the plaintiff but the transfer was not completed. It is not

known as to why it was not completed but in any event the final stage at which the process reached was an approval for transfer was obtained from the Commissioner for Lands in terms of Section 39 (5) of the Act. Sub section 6 (c) of Section 39 of the Act provides for a lifespan of the approval issued by the Commissioner for Lands. It reads: "*an approval of disposition is valid for one year from the date when it was issued.*" As I said the approval was issued on 18th February, 2016. Therefore it expired on 17th February, 2017. In all respects then the agreements entered between the parties herein are valid but wholly unenforceable as the lifespan of the approval expired and the transfer was not completed. As the agreements are unenforceable the plaintiff has come to this court to seek assistance. The assistance it seeks is as contained in its prayers. The present issue now takes me to the last issue that is **the reliefs parties are entitled to**.

The plaintiff prays for:

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

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 Thousands only (US $ 300,000) 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 developed properties;

v. Order for payment of general 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 Court;

vi. Order for 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 month of August, 2010 being the date of completion of the buildings, to the date of judgment, and interest at Court's rate from the date of judgment to the date of payment in full satisfaction of the decree;

vii. Costs of the suit; and

viii. Any other relief the Court may find fit and just to grant.

Having held that there is no breach on part of the defendant and that the agreements though valid but unenforceable then the plaintiff is entitled to recover its expenses. But none of the reliefs sought by the plaintiff be it independently and jointly taken seeks for recovery of costs and or expenses incurred by the plaintiff. Based on the facts of the case and the reliefs sought, I entirely decline all the

prayers made by the plaintiff. In the end, the suit is hereby dismissed with costs. It is so ordered.

DATED at Dar es Salaam this 08th day of February, 2019.

B.M.A Sehel

JUDGE

08th day of February, 2019.