

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: NDIKA, J.A., GALEBA, J.A., And ISMAIL, J.A.)

CIVIL APPEAL NO. 665 OF 2023

DEBORA JAMES IKHALA APPELLANT

VERSUS

NYASULU ENOCK NKYAPI RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of Tanzania,
Land Division at Dar es Salaam)**

(Msafiri, J.)

dated the 21st day of June, 2023

in

Land Case No. 253 of 2021

JUDGMENT OF THE COURT

1st & 25th November, 2024

NDIKA, J.A.:

The respondent, Nyasulu Enock Nkyapi, prevailed in an action he initiated against the appellant, Debora James Ikhala, in the High Court, Land Division of Dar es Salaam. The lawsuit alleged a breach of the contract of sale for a parcel of land located at Plot No. 37, Block 'B', Tegeta, Kinondoni Municipality, Dar es Salaam, hereinafter referred to as "the property." She is now of the opinion that justice was not served and hence, she urges us to reverse the trial court's verdict on the grounds of procedural indiscretion and the factual findings being contrary to the weight of the evidence.

The property in dispute was owned by Asha Mfaume Abdallah (DW2) upon a letter of offer until 2005, when she executed a contract for its sale and transferred her title to the appellant. This was not a subject of dispute. The appellant did not promptly complete the formalities for the transfer of the title in her name. It was not until 23rd November, 2021, that she was issued a certificate of title number DSMT1016066 in her name.

In the interim, the parties signed a contract of sale for the property (exhibit P1) on 19th February, 2016 to transfer the title to the respondent for TZS. 200,000,000.00, payable in three instalments. Although it was confirmed that the initial tranche of TZS. 70,000,000.00 was remitted to the appellant's bank account upon the contract's signing, the second instalment was the subject of intense debate regarding whether it was made in accordance with the contract's terms.

On the one hand, the respondent contended that he swiftly transferred TZS. 79,000,000.00 to the appellant on 25th February, 2016, after deducting TZS. 1,000,000.00 that he had paid the appellant in cash on 19th February, 2016. He was, therefore, adamant about adhering to the payment term for the second instalment, which

was set at TZS. 80,000,000.00, within seven days of the contract's execution. Conversely, the appellant initially denied the alleged settlement of the second portion during her testimony; however, she later conceded that the funds were transferred to her bank account and that she appropriated the money. Nevertheless, she highlighted two concerns: firstly, that the money was credited out of time on 21st March, 2016, as indicated by her bank statement. Secondly, that the amount paid was TZS. 1,000,000.00 less than the agreed-upon amount. In other words, she refuted the claim that she received TZS. 1,000,000.00 from the respondent on the day the contract was signed and executed.

The apparent minor difference between the parties, who acknowledged that they were fellow congregants at the Mbezi Evangelical Lutheran Church of Tanzania, morphed into a full-scale dispute. The respondent, for his part, contended that he had fulfilled his obligation under the contract by complying with Clause 3 of the contract, by settling the second instalment whereupon the appellant was obligated to relinquish vacant possession of the property and surrender the documents of title to a designated law firm for the purpose of processing the transfer in accordance with Clauses 5, 6,

and 7 of the contract. He argued that the obligation to pay the third installment of TZS. 50,000,000.00 would not materialise until the title was transmitted to him. Based on this, he averred that the appellant was accountable for the contract's breach. He alleged that the appellant was attempting to circumvent the contract in a bid to resell the property to another individual at a premium.

Conversely, the appellant contended that her counterpart had violated the contract by neglecting to pay the second tranche of the money in accordance with the strict terms of the contract. She denied that she had attempted to terminate the contract with the view to reselling the property to a third party at a higher price. Consequently, she prayed that the respondent be compelled to vacate the property and that she be permitted to refund the initial instalment she received from the respondent.

The High Court heard and decided the suit on two issues: whether the contract was breached and, if so, by which party, and what reliefs the parties were entitled to, given the undisputed existence of the property sale contract.

The trial court determined the first issue against the appellant. Cognisant that the second instalment had to be paid in accordance

with Clause 3 of the contract seven days after the signing of the contract, the court noted that the remittance had to be made by 26th February, 2016. In finding that the payment was made on 25th February, 2016, the court reasoned as follows:

"... there is evidence from PW3 [Clement Mwanzalima], a Bank Officer, which is corroborated by the evidence of the defendant herself that the money – TZS. 79,000,000.00 was paid by SWIFT on 25/02/2016 but it could not be directly deposited into the defendant's account for the reason of verification processes which [...] were delayed by the defendant herself who took time to give details needed for [the] verification. As a result, the [transferred] money was not deposited into the defendant's account until 21/03/2016. This fact that the plaintiff deposited TZS. 79,000,000.00 on 25th February, 2016 is also supported by exhibit P3, a fund transfer form."
[Emphasis added]

The trial court also upheld the respondent's argument regarding the reason for the remittance being for TZS. 79,000,000.00 rather than TZS. 80,000,000.00:

"It is in the evidence that the plaintiff paid TZS. 79,000,000.00 only. This was explained by the plaintiff that he paid cash one million [shillings] to the defendant on 19/02/2016, that is why he paid only TZS. 79,000,000.00 in the second instalment. There was evidence from PW2 [Rose Valencia Njau] and PW4 [Howard Macfarlane Msechu] that they witnessed the plaintiff paying cash one million shillings to the defendant."

The trial court determined that the appellant was immediately obligated to comply with Clauses 5 and 6 of the contract by relinquishing vacant possession of the property and transferring the title documents to HOMAC Advocates, the designated law firm, for the purpose of facilitating the transfer of title, following the respondent's payment of the second instalment. The appellant was found to be in breach of the contract by the court, for refusal to provide the law firm with the documents of title.

Consequently, the trial court entered judgment for the respondent with costs. It granted an order of specific performance thus: first, enjoining the appellant to hand over the documents of title within a week of the date thereof; secondly, requiring the respondent to process the transfer of title in accordance with the terms of the

contract; thirdly, directing the respondent to pay the third instalment within a week after the transfer of title is effected; and finally, ordering the appellant to give vacant possession of the property as per the terms of the contract.

Initially, this appeal was predicated on two grounds, which for clarity, we have rephrased as follows:

- 1. That the trial court erred in law and in fact by concluding that the appellant was in breach of the contract for the sale of land, despite the absence of any evidence to support this assertion; and*
- 2. That the trial court erred in law and in fact by concluding that the appellant failed to provide the original documents of ownership after the first instalment was paid, even though the contract did not contain a provision to that effect.*

During the appeal hearing, we granted the appellant permission to argue an additional ground of appeal in accordance with rule 113 (1) of the Tanzania Court of Appeal Rules, 2009:

- 3. That the trial court erred in law when it progressed based on the general amendment of the plaint made by the plaintiff which the trial court equally granted generally without specifying the nature and extent of amendment to the original plaint, a fatal*

failure which vitiated the trial proceedings resulting into a judgment that cannot be spared.

Mr. James A. Bwana, learned counsel for the appellant, who was assisted by Mr. Yudathade Paul, also learned counsel, argued the additional ground first. His essential submission was that the trial proceedings were vitiated because they proceeded on a plaint that was amended upon an order of the trial court dated 9th June, 2022 that was general or open-ended. He submitted that this irregularity was an egregious contravention of Order VI, rule 17 of the Civil Procedure Code, Cap. 33, hereinafter "the CPC". He cited the trial proceedings of 9th June, 2022, which are detailed on page 138 of the record of appeal to elucidate his point. The learned counsel's argument was founded on the cases of **Kilombero North Safaris Limited v. Registered Trustees of Mbomipa Authorities Association** [2021] TZCA 374, **Peter Wegesa Chacha Timas & Others v. North Mara Gold Mine Limited** [2023] TZCA 30 and **Muntazir Mohamed Raza Dhirani v. Devendra B. Patel** [2024] TZCA 546.

Mr. Charles G. Tumaini, the learned counsel for the respondent, who was accompanied by Mr. Amon Meja, the learned advocate, argued that the amendment in question was made at the initial stage

of the proceedings, prior to the appellant's receipt of the original plaint. He further stated that the amendment was not prejudicial, as it only excluded, Asha Mfaume, then the second defendant, from the lawsuit.

Rejoining, Mr. Bwana maintained that the amendment was so irregular that the trial proceedings and the decision cannot be spared.

According to Order VI, rule 17 of the CPC, which regulates the alteration or amendment of pleadings, the following is stipulated:

"The court may at any stage of the proceedings allow either party to alter or amend his pleading in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

In **Peter Wegesa Chacha Timas** (*supra*), the Court expressed its disapproval of orders of amendment that provided the party in whose benefit they were issued with a blank cheque:

"An order for amendment of pleadings **should not be general or open ended. It must specify points that are going to be added**

or removed from the pleading sought to be amended. The risk of making a blanket order of amendment without specifying what is to be amended, is to expose a party in favour of whom the order is made to a temptation to include in the new pleading, matters of his own choice, and which may not be necessary for the purpose of determining the real questions in controversy between the parties. Matters to be included in the amended version of the pleading, according to the above law, must be known to the court for it to determine whether they are necessary for determination of the dispute before it. Short of that, an open-ended order for amendment cannot be compliant with the above provisions.”[Emphasis added]

It is evident from above quotation that, in executing its mandate under Order VI, rule 17 of the CPC to allow alteration or amendment of a pleading, the trial court must determine the manner of, and the terms upon which the amendment must be effected. In doing so, the court sets forth the parameters within which the amendment is made. Distilled from **Peter Wegesa Chacha Timas** (*supra*), **Kilombero North Safaris Limited** (*supra*) and **Muntazir Mohamed Raza Dhirani** (*supra*) is the general principle that trial proceedings

conducted upon a pleading altered or amended upon an open-ended order of the trial court are a nullity.

It is essential that we conduct a thorough examination of the pertinent trial court proceedings prior to determining the issue at hand. The case was first presented to the trial Judge on 9th June, 2022, following the filing of the plaint on 18th January, 2022, as indicated in the record of appeal (page 138). Admittedly, it had been brought to the attention of the Deputy Registrar on 21st March, 2022, and 5th May, 2022, to obtain the necessary orders. The respondent, who was then the plaintiff, appeared before the trial judge on that day (9th June, 2022) through Mr. Amani John Richard, learned counsel. The appellant, who was then the first defendant, and the second defendant were absent because they had not yet been served with the summons and plaint. Mr. Richard moved the court for leave to amend the plaint within fourteen days at that early stage. Acceding to that prayer, the trial court granted leave in the following terms:

"Amendment of the plaint to be done within fourteen days from today. The summons to be re-issued [regarding] reservice on the defendants. Reservice to be done through Court Process Server."

The order above is inherently open-ended, as it failed to establish the parameters within which the amendment was to be implemented. Nevertheless, we are hesitant to apply the perspective described in the above cited decisions in this case, as we are of the firm conviction that the factual circumstances in these cases are incomparable. First and foremost, as Mr. Tumaini correctly argued, it is significant that the amendment in question was made at the earliest stage of the proceedings, prior to the appellant and her co-defendant being served with the court process that mandated the submission of their respective written statement of defence. In fact, in the perspective of the appellant, there was no amendment because, as was admitted by Mr. Bwana, the appellant, up to the time of the hearing of this appeal, never saw the original plaint, which means to her, the only plaint she saw and responded to was the amended plaint. It is, therefore, fair to say that the plaint upon which the case was tried was the "original plaint" in the perspective of the appellant.

Secondly, we also agree with Mr. Tumaini that the amendment as implemented was of a limited scope, as it simply excluded the second defendant (Asha Mfaume) from the proceedings. The primary objective of Order VI, rule 17 of the CPC is to prevent the party in

whose favour an order for amendment is granted from utilising the opportunity to plead matters that are not essential for the purpose of determining the genuine issues in dispute between the parties. In this instance, it is not credible to imply that the respondent exploited the open-ended order to extend his lawsuit or assert an entirely new cause of action against the appellant. It is difficult to see how the appellant could be harmed or prejudiced by the removal of the second defendant from the proceedings. We, therefore, do not believe that the additional ground of appeal is of any value.

It was Mr. Paul's turn to argue the first and second grounds of appeal together. After reviewing Clauses 4, 5 and 6 of the contract, he contended that the respondent breached the obligation to pay the second instalment. Referring to page 134 of the record of appeal, he elaborated that the alleged payment of TZS. 79,000,000.00 was made out of time on 21st March, 2016 by Lupi Company Limited based in Dar es Salaam, which was certainly not the respondent. He also contended that there was no evidence to suggest that the respondent paid the appellant TZS. 1,000,000.00 on the day of the contract's signing. We interpreted his statement to indicate that the respondent

did not pay the entire second tranche, which totalled TZS. 80,000,000.00.

Mr. Paul acknowledged that the timelines for payment of the instalments were a matter of significance in the contract's stipulation when the Court enquired about it. He also urged us to maintain this position. He was adamant that any payment of an instalment beyond the designated timeframe was a violation of the contract.

In rebuttal, Mr. Tumaini affirmed the trial court's determination that the second instalment was completely paid within the designated timeframe. He urged us to maintain the trial court's determination that the appellant was the culpable party, as the undisputed evidence demonstrated that she did not surrender the documents of title. He also noted that her account was credited with the sum of TZS. 79,000,000.00 on 21st March, 2016. He stated that the appellant had already received TZS. 1,000,000.00 in cash in advance and that the sum of TZS. 79,000,000.00 was paid in a timely manner on 25th February, 2016.

To determine whether the contract was infringed, the Court should evaluate its content in relation to the parties' actions during its

execution. For clarity, we have elected to reproduce the substantive portion of the contract in the following manner:

"Now, therefore, it is agreed to by the parties as follows:

1. **Type of intended disposition:** Outright sale of all that land registered under the above reference held through granted right of occupancy under letter of offer **No. LD/126749/17/MGM.**
2. **Consideration:** Tanzanian Shillings Two Hundred Million only (200,000,000.00)
3. **Mode of payment of consideration:** In three instalments as stipulated here below:
 - a. The first instalment of Tanzanian Shillings Seventy Million only (70,000,000.00) to be paid to the vendor on the date of signing this contract.
 - b. The second [instalment] of Tanzanian Shillings Eighty Million only (80,000,000.00) to be paid to the vendor within one week after signing this contract.
 - c. The third and final instalment of Tanzanian Shillings Fifty Million (50,000,000.00) to be paid on completion of the transfer after the signing of this contract.
 - d. All the above instalments may be paid through the vendor's account via:
 - i. Bank – KCB Bank Tanzania Limited
 - ii. Branch – KCB Oysterbay Tanzania
 - iii. Account Name – Deborah James Ikhalla
 - iv. Account Number – 3301289940
4. **Date of execution of the deed of disposition:** Promptly upon signing and delivery of the downpayment (first instalment).
5. **Date of delivery of possession of the property:** Upon payment of the second instalment, the vendor shall promptly hand over to the

purchaser vacant possession of the property with the right to enter thereon to use and/or carry out any development.

6. **Documentation:** The vendor shall immediately hand over genuine copy of the letter of offer **No. LD/126749/17/MGM**, land rent receipt and any other documents to HOMAC Advocates (hereinafter "the common lawyer") and the common lawyer shall keep the said documents for processing the transfer of ownership.
7. **Completion of the transfer:** the common lawyer will notify all parties as soon as transfer is complete and require the purchaser to fulfil his obligation under Clause 3, the common lawyer shall remain with the genuine documents until the second/final instalment is paid to the vendor.
8. **Interest and expenses on cancellation of contract:** in the event that this transaction is cancelled by the vendor or the documents are not handed over to the common lawyer upon completion of payment of the first instalment herein then an interest of 30% per month shall be charged to the vendor from the date of this contract on the amount paid to the vendor and all the expenses incurred by the purchaser up to the date that the purchaser will be refunded in full. The purchaser shall have the right to demand in full at any time when the vendor has expressed [her] intention [for] cancellation."

It is pertinent to note that the parties agree that the respondent was required to satisfy the purchase price through three staggered instalments in accordance with Clause 3. As previously indicated, it is a common cause that the initial installment was deposited into the appellant's bank account on 19th February, 2016, following the signing of the contract. The parties are disputing whether the second portion

of the purchase price was completely paid in a timely manner, as previously mentioned.

We have meticulously examined the evidence on record. In our opinion, the respondent's testimony is corroborated by PW3's evidence. The respondent, through his company, Lupi Company Limited, made a swift transfer in the amount of TZS. 79,000,000.00 in favour of the appellant on 25th February, 2016, as confirmed by PW3 Clement Mwanzalima, a Bank Officer of the KCB Bank Tanzania Limited who operated the appellant's account. This assertion is further substantiated by a funds transfer form from the Kariakoo Branch of Equity Bank Tanzania Limited, which was duly stamped on that date. To be sure, the transfer originated from that bank.

Indeed, it is true that the funds were not credited into the appellant's account until 21st March, 2016, which was roughly twenty-four days after the payment deadline of 26th February, 2016. Should the respondent be blamed for this delay? We do not think so. Apart from the fact that he had no hand in the delay, having made the swift transfer in time, the appellant's own banker (PW3) explained that the funds could not be directly deposited into her account due to her own

failure to present a copy of the contract (exhibit P1) for verification of the legality of the money and its source.

Furthermore, the appellant's ambivalence regarding the payment of the second instalment further exposed the despondency of her case. To elucidate the point, we extract the following from her evidence-in-chief at page 205 of the record of appeal:

"The second instalment payment was not effected. But the sale agreement stated that the second instalment [was] to be effected by 25/02/2016, which is within seven weeks (sic!) from the date of the first instalment."

She further testified that she was subsequently confronted by the respondent's attorneys from HOMAC Attorneys (including PW4) who demanded that she surrender the documents of title. She declined to surrender the documents because the second instalment of the payment was still pending. She admitted that the money was credited into her account a few moments later in the same evidence-in-chief, which was quite significant:

"I saw the money; [the] second instalment as per the bank statement on 21/03/2016 – TZS. 79,000,000.00."

The respondent's payment of TZS. 79,000,000.00 to the appellant on 25th February, 2016, as well as the trial court's determination that the respondent is not accountable for the delay in crediting the funds into the appellant's account, are both meticulously established upon this evidence.

Nonetheless, even if it were assumed *arguendo* that the respondent paid the money out of time on 21st March, 2016, we would have to investigate whether the specification of the timeliness for payment of monies was a matter of the essence of the contract to determine the consequence of the purported delay.

We ruled recently in **Esther Kimbulu & Other v. Piganio Mwita** [2024] TZCA 314, following an Indian case of **Gomathinayagan Pillai & Others v. Pallaniswami Nadar** [1967] AIR 868, that setting out the period within which the contract is to be performed "does not make the stipulation as to time of the essence of the contract." Earlier in **Mirambo Mabula v. Yohana Maiko Sengusa & Another** [2022] TZCA 100, we cited with approval the comment in Halsbury's Laws of England, 5th Ed. Reissue Vol. 9 (1) at page 685 that:

"The modern law, in the case of contracts of all types, may be summarized as follows. Time will not be considered to be of essence, except in one of the following: cases: 1) where the parties expressly stipulated that conditions as to time must be strictly complied with; or 2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of essence; or 3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of essence."

See also **Melchiades John Mwenda v. Ramadhani M. Mussa and Another** [2023] TZCA 213.

In our opinion, the contract in the present instance does not explicitly mandate that the timelines outlined in Clause 3 be rigorously adhered to. Therefore, the sheer designation of the timelines did not render them of paramount importance, such that their violation would have been fundamental. Furthermore, we do not infer that the timelines were the fundamental aspect of the contract from the subject matter or its encompassing circumstances. It is perhaps unsurprising that the appellant, realising the purported delay in the

payment of the second portion, failed to notify the respondent of her belief that time was of the essence.

We do not need to travel a great distance to address the remaining aspect of this dispute, which pertains to the allegation that the appellant was paid TZS. 79,000,000.00, which was TZS. 1,000,000.00 less than the agreed sum. We are inclined to concur with Mr. Tumaini's assertion that the trial court's decision to reject the appellant's case on this matter was founded on well-analyzed evidence. The respondent's testimony that he paid her TZS. 1,000,000.00 in cash upon her insistence that she required the money in cash immediately owing to her financial distress was substantiated by both advocates from HOMAC Attorneys (PW2 and PW4) who witnessed the signing and execution of the contract at their offices. The evidence was given complete credibility by the trial court. We are of the opinion that there is no justification for interference.

In conclusion, we have determined that the two grounds of appeal are without substance and, as a result, we are dismissing them. The appellant was obligated in terms of Clauses 5 and 6 of the contract to relinquish possession of the property and hand it over to the respondent. In addition, she was bound to provide the documents of

title to the designated advocates for the transfer of title, as the respondent had fulfilled his obligation under the contract. She violated the contract by failing to fulfil her contractual obligations.

Consequently, we dismiss the appeal with costs.

DATED at DAR ES SALAAM this 19th day of November, 2024.

G. A. M. NDIKA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

Judgment delivered 25th day of November, 2024 in the presence of Mr. Yuda Thadei and Ms. Claudia Nestory, learned Counsels for the Appellant and Mr. Charles Tumaini, learned Counsel for the Respondent is hereby certified as a true copy of the original.

