

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)**

AT MWANZA

COMMERCIAL CASE NO. 05 OF 2018

BETWEEN

MAGRETH MINJA.....PLAINTIFF

VERSUS

SHOHAM PROPERTY

DEVELOPERS LIMITED.....1ST DEFENDANT

TIB DEVELOPMENT BANK LTD.....2ND DEFENDANT

JUDGMENT

B. K. PHILLIP,J.

A brief background to this case is as follows; In the year 2011 the late Francis Minja, who was trading as Kishari Hardware Limited obtained a loan facility from the 2nd defendant to a tune of Tshs 180,000,000/= .He mortgaged the property located on Plot No 278 Block "J" C.T. No.9912 ,L.O No. 105758,Nyamanoro Area in Mwanza City as a security for the aforesaid loan facility. The Plaintiff who was the spouse of the late Minja, consented to mortgage of their property aforementioned.

The late Minja failed to repay the loan amount as agreed. He left an outstanding amount to a tune of Tshs 120,000,000/= . The plaintiff who had consented to the mortgage of the aforementioned house, upon realizing that her husband had defaulted to the repayment of the loan,she decided to take some steps to rescue the situation. In her endeavour to

rescue the situation she sold her piece of land with unexhausted improvements located on Plot No.162 Block "H", Title No.18839,L.O. No.254402 Nyamanoro Area in Mwanza City to the 1st defendant herein for a sum of Tshs. 120,000,000/= .The terms of the contract were as follows; The purchase price was supposed to be paid in installment by posted cheques and the payee was agreed to be Kishari Hardware Limited so that the amount could be deposited straight in the bank for clearing the outstanding loan amount.The 1st defendant issued posted cheques for the total amount of the purchase price as agreed. However, only one cheque for Tshs. 15,000,000/- was honoured by the 2nd defendant. The rest of the cheques were dishonoured, leaving an outstanding balance to a tune of Tshs. 105,000,000/= . Consequently, the plaintiff and the late Minja, had a discussion with the 1st defendant on what happened. The 1st defendant registered his apology and promised to fulfill his obligations in the agreement by 17th November 2017.Despite the promise and assurance to pay the money as agreed, the 1st defendant did not make any payment apart from the aforesaid Tshs. 15,000,000/= .As at 14/5/2018 the loan amount had increased to a tune of Tshs. 172,247,370/= due to accrued interests. Consequently, the 2nd defendant served the plaintiff with a sixty (60) days' notice of intention to exercise his right of sale over the mortgaged property. Thus, the plaintiff decided to lodge this case praying for judgment and decree as follows;

a) An ordered for the specific performance of the contract between the 1st defendant and the Plaintiff be issued as well as an order for discharging the terms and conditions under an assurance/undertaking between the 1st Defendant and the 2nd

Defendant by paying to the latter the principal sum and accrued interest out of the loan in which the Plaintiff offered her consent to the mortgage be issued.

b) The 2nd Defendant be permanently estopped/restrained from auctioning property located on Plot No. "278" Block "J" C.T. No. 9912LR MWANZA, L.O No. 105758, Nyamanoro area in Mwanza City in the name of the late Augustino Francis Minja.

c) The Defendants be condemned to bear costs of this suit.

d) Any other relief(s) that this Honourable Court deems just to award.

In his defence the 1st defendant admitted that he entered into a sale agreement with the plaintiff in respect of the plaintiff's property on plot No.162, Block "H" with Title No. 18839, L.O. No. 254402, Nyamanoro Mwanza. He stated that he issued the posted cheques for the payment of the purchase price on condition that the same were supposed to be presented to the bank by the plaintiff upon prior communication with the principal officer of the 1st defendant.

In addition to the above, the 1st defendant alleged that the plaintiff breached the terms of the sale agreement by presenting the cheques to the bank without prior communication as agreed. Moreover, the 1st defendant denied to have assumed any responsibility in respect of the loan granted to Kishari Hardware Limited or the mortgage of the property on Plot No.278 Block J, Nyamanoro Area , Mwanza City.

In his defence the 2nd defendant denied to have been involved in the arrangement for repayment of the loan granted to Kishari Hardware Limited by the 1st defendant. He alleged that due to the default in the

repayment of the loan, he was prompted to advertise the sale of the mortgaged property on Plot No. 278,Block "J" Nyamanoro, Mwanza City.

At the Final Pre-Trial Conference the following issue were framed for determination by the Court;

- i) Whether the 1st defendant did breach the terms and conditions of under the sale agreement executed with the plaintiff on 9th January 2017.*
- ii) Whether the 1st defendant did breach the letter of assurance to the 2nd defendant dated 28th September 2017 as regards the payment of Tshs. 105,000,000/=*
- iii) What reliefs parties are entitled to.*

At the hearing of this case the learned Advocate Diocles Rutahindurwa appeared for the plaintiff whereas the learned Advocate Motete Kihiri and the learned State Attorney Matendo Manono appeared for the 1st and 2nd defendants respectively.

The plaintiff and 2nd defendant filed one witness statement each while the 1st defendant did not file any witness statement. Consequently, the case against the 1st defendant proceeded ex-parte. However, since the 1st defendant filed the written statement of defence, I accorded the advocate for the 1st defendant a right to cross examine the plaintiff's and 2nd defendant's witnesses.

In proving her case the plaintiff testified in court as PW1. The 2nd defendant's principal officer, Mr. Emmanuel Bushiri testified as DW1.

As regards the 1st issue, that is, *whether the 1st defendant did breach the terms and conditions of under the sale agreement executed with the plaintiff on 9th January 2017*, PW1 testified that her late husband Francis Minja was a businessman, trading as Kishari Hardware Kimited. He obtained a loan from the 2nd defendant to tune of Tshs 180,000,000/=.She consented to the mortgage of their premises situated on Plot No.278 Block "J" CT No.9912, L.O. 105758 Nyamanoro,Mwanza as security for the aforesaid loan.Further, she testified that her late husband managed to pay part of the loan and left an outstanding amount to a tune of Tshs 120,000,000/=. Knowing that their premises mentioned herein above was mortgaged as security for the loan, she decided to take measures to rescue the mortgaged property from being auctioned for recovery of the outstanding loan amount. She sold her piece of land situated on plot No. 162 Block "H", with Title No.18839,L.O No. 254402 Nyamanoro Area, Mwanza to the 1st defendant for a consideration of Tshs 120,000,000/=. (Exhibit P1).The consideration was agreed to be paid by installments, by posted cheques. (Exhibit P2 collectively), the payee being Kishari Hardware Ltd, so that the money could be deposited direct to the Bank account of Kishari Hardware Ltd to clear the outstanding amount. It was PW1's testimony that when the cheques (ExhibitP2 collectively) were presented to the Bank (2nd defendant), were all dishonoured for lack of fund, save for one cheque only which was worth Tshs15,000,000/=.Thus, the outstanding amount was reduced to Tshs. 105,000,000/=.Moreover, PW1 testified that, following the above explained scenario, she convened a meeting with the 1st defendant together with her husband, whereby it was agreed that the 1st defendant would pay the remaining consideration in the sale

agreement, that is, Tshs. 105,000,000/= direct to the 2nd defendant so as to clear the remaining outstanding loan amount. The 1st defendant wrote a commitment letter to that effect.

In addition to the above, PW1 testified that despite writing the commitment letter, the 1st defendant did not deposit the remaining purchase price as agreed. Consequently, the outstanding amount was not cleared. So the 2nd defendant served Kishari Hardware with a 60 (sixty) days notice of default and intention to exercise his right of sale under the mortgage deed.

On the other hand, DW1 testimony was to the effect that by a credit facility agreement dated 7th June 2011 the 2nd defendant granted a loan to Kishari Hardware Ltd to a tune of Tshs. 180,000,000/=(Exhibit D1). The plaintiff consented to the Mortgage of property on Plot No. 278 Block "J" Nyamanoro, Mwanza City. It was DW1's testimony that the said loan was not cleared. Consequently, the 2nd defendant decided to advertise in the newspaper his intention to exercise his right of sale of the mortgaged property. DW1 further testified that on 28th September 2019, the 2nd defendant received a letter from the 1st defendant titled "Assurance of the payment of Tshs. 105,000,000/= in regard to Kishari Hardware Limited within one month from the date of the letter", in which the 1st defendant made assurance that he was going to pay the said Tshs. 105,000,000/= under instruction from Kishari Hardware Limited, following the sale of Plot No. 162 Block 11, Title No. 1889, Mwanza to the 1st defendant.

In addition to the above, DW1 testified as follows; That the 2nd defendant acknowledged the receipt of the letter and by the letter dated 27th October

2017 (Exhibit P3 collectively), the 2nd defendant reminded the 1st defendant the dead line for the payment of the money ,but the 1st defendant did not honour his letter of assurance, instead he kept on requesting for extension of time for making the payments.

From the foregoing, the testimonies of both PW1 and DW1 prove that the 1st defendant did breach the terms and conditions of the sale agreement between the plaintiff and the 1st defendant dated 9th January 2017. According to Exhibit P1 (the sale agreement) the terms and conditions therein are to the effect that the 1st defendant was supposed to pay the purchase price in six (6) installments and payments were supposed to be done direct to the bank account of Kishari Hardware Ltd as follows; 1st installment of Tshs. 20,000,000/= was due on 30th January 2017, 2nd installment of Tshs. 15,000,000/= was due 28th February 2017, 3rd installment Tshs. 15,000,000/= was due 30th March 2017, 4th installment of Tshs. 15,000,000/= was due on 30th April 2017, 5th installment Tshs. 25,000,000/= was due on 30th May 2017 and 6th installment of Tshs. 20,000,000/= was due 30th June 2017.

Looking at the terms of the sale agreement, the outstanding amount in respect of the loan granted to Kishari Hardware Limited was supposed to be cleared by 30th June 2017, which was the date for the payment of the last installment of the purchase price. Since the testimonies of PW1 and DW1 show that the 2nd defendant did not pay the outstanding loan amount, then it is obvious that the aforesaid agreement dated 9th January 2017 was breached by the 1st defendant. Thus, the 1st issue is answered in the affirmative.

Coming to the 2nd issue, that is *whether the 1st defendant did breach the letter of assurance to the 2nd defendant dated 28th September 2017 as regards to the payment of Tshs. 105,000,000/=*, the letter of assurance dated 28th September 2017, was tendered in Court as exhibit P3 collectively together with a letter from the 2nd defendant dated 27th October 2017, reminding the 1st defendant that the due date for the payment of the said Tshs. 105,000,000/= was 28th October 2017. According to the testimonies of both PW1 and DW1, the 1st defendant did not pay the said Tshs. 105,000,000/= despite making the assurance to do so and being reminded to fulfill his promise. Thus, again it is obvious that the answer to the 2nd issue is in the affirmative, that is, the 1st defendant breached the letter of assurance to the 2nd defendant dated 28th September 2017 as regards the payment of Tshs 105,000,000/=.

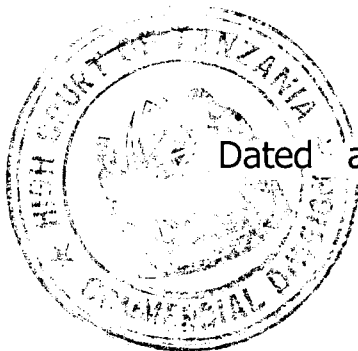
Coming to the reliefs the parties are entitled to, in this case the plaintiff prayed for an order for specific performance of the sale agreement to be issued to the 1st defendant, that is, he should be ordered to pay to the 2nd defendant the principal sum and accrued interests out of the loan granted to Kishari Hardware Limited. I wish to say outright here that under the circumstances, I cannot issue an order for specific performance of the sale agreement between the 1st defendant and the plaintiff, despite the fact that I have made a finding that the 1st defendant breached the sale agreement he entered into with the plaintiff and failed to fulfill his promises he made in the letter of assurance, because if I grant the prayer for specific performance of the sale agreement, in effect I will be creating a contract between the 1st defendant and the 2nd defendant for repayment of the loan granted to Kishari Hardware Limited contrary to the Law of

Contract Act which provides that a contract has to be made by the free consent of the parties.(See section 10 of the Law of Contract Act). In this case the evidence shows that the 2nd defendant (TIB Development Bank) was not involved in the arrangement between the plaintiff and the 1st defendant as far as the repayment of the outstanding amount in respect of the loan granted to Kishari Hardware Limited is concerned. The 2nd defendant is not a party to the sale agreement between the plaintiff and the 1st defendant (Exhibit P1).The prayer for specific performance as couched by the plaintiff aims at shifting the responsibility for repayment of the outstanding loan amount from Kishari Hardware Limited to the 1st defendant. This is not correct because there is no any legal binding contract between the 1st and 2nd defendants for repayment of the loan granted to Kishari Hardware Limited by the 2nd defendant. The evidence shows that the loan in question was secured by a mortgage of a landed property to wit; the premises located on Plot No. 278 Block "J" C.T. No.9912, L.O No. 105758, Nyamanoro Area in Mwanza City which is still valid and cannot be substituted with the 1st defendant's letter of assurance in respect of the sale agreement he entered into with the plaintiff without any agreement and express consent of the 2nd defendant. Likewise, I cannot grant the plaintiff's prayer for an order permanently restraining the 2nd defendant from auctioning the property located on Plot No. 278 Block "J" C.T. No. 9912, L.O. No. 105758, Nyamanoro Area Mwanza, for the same reasons I have explained herein above.

Under the circumstances, since the 1st defendant is in breach of the sale agreement he signed with the plaintiff in respect of the property on plot

No. 162 Block "H" Title No.18839, L.O. No.254402 Nyamanoro Area in Mwanza, for failure to pay the whole of the purchase price as agreed, then the ownership of the above mentioned property has to revert to the plaintiff. Thus, I hereby enter judgment against the 1st defendant as follows;

- i) The ownership of Plot No. 162 Block "H" Title No. 18839, L.O No. 254402, Nyamanoro area, Mwanza, shall revert to the plaintiff.
- ii) The 1st defendant shall hand over to the plaintiff plot No. 162 Block "H" Title No 18839, L.O. No. 254402, Nyamanoro Area , Mwanza .
- iii) The 1st defendant shall pay the plaintiff Tshs 50,000,000/= being general damages.
- iv) Costs of this case shall borne by the 1st defendant.



Dated at Mwanza this 22nd day of July 2020.

A handwritten signature in black ink, consisting of a stylized, cursive script that appears to read 'B.K. Phillip'.

B.K.PHILLIP

JUDGE