IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 116 OF 2022

A.M TRAILER MANUFACTURER LIMITED……PLAINTIFF

VERSUS

NCBA BANK TANZANIA LIMITED …….. DEFENDANT

JUDGMENT

Date of Last Order: 04/07/2023
Date of Judgment: 08/09/2023

NANGELA, J.:

Plaintiff, a limited liability company carries out a business of manufacturing trailers and other business in Tanzania. The Plaintiff is suing the Defendant, a banking institution licenced under the Banking and Financial Institutions Act, the BFIA, Cap.342 R.E 2019. The facts constituting this suit are brief.

It all started on the 21st of July 2018 when the Plaintiff and the Defendant inked an agreement for sale of a commercial landed property known as Plot No.3/1 situated at Mbezi Industrial Area in Dar-es-Salaam, with CT No. 120378/1. The Defendant herein sold the property in question in her capacity as the Mortgagee and, thus, in exercise of her right as mortgagee, she was paid US$ 1,200,000/- s consideration for the transaction.

In their agreement, however, the parties had agreed that the Defendant was to give vacant possession of the property to the Plaintiff within sixty (60) days from the date of signing and upon deposit of a 10% of the purchase price as advance payment, a fact which the Plaintiff complied with. The Defendant had covenanted with the Plaintiff that the property was free from all encumbrances and the property was sold on an understanding its land use was designated for industrial/commercial purposes.

Whereas the Plaintiff fulfilled her part of the sale agreement, it is alleged that the Defendant failed to deliver vacant possession and caused significant losses to the Plaintiff, including loss of business opportunity as the Plaintiff could not meet her intended expectations. The Plaintiff has, consequently, moved a step and sued the Defendant, praying for judgment and Decree against the latter as follows:

1. A declaration that the Defendant breached the sale agreement in respect of commercial property known as Plot No.3/1 situated at Mbezi Industrial Area in Dar-es-Salaam, with CT No. 120378/1.
2. An Order for payment of US$ 2,500,000, being special damages suffered as per paragraph 17 of the Plaintiff's Plaint.
3. An Order for payment of general damages amounting to US$

2,000,000 or as will be assessed by this Honourable Court.

4. An Order of payment of interest for the sum prayed in (2) above at the commercial lending rate of 9% for USD from the date of purchase of the property to the Judgement.

5. An Order of payment of interest on the decretal sum at the court rate for the sum claimed in Nos.2 and 3 above.

6. An Order for payment of costs of this suit.

7. Any other relief(s) this court deems just and fit to grant.

On the 1st day of December 2022, the Defendant filed her written statement of defence denying the claims and further raising a defence of *force majeure*. Having gone through the preliminary stages, a final pre-trial conference was convened on the 24th of April 2023. On the material date, this court recorded four (4) pertinent issues to guide its deliberations when disposing of this suit.

The four issues agreed upon and recorded by this court were as follows:

1. Whether there was a breach of contract in the course of execution of the Sale Agreement in respect of a property known as Plot No.3/1 situated at Mbezi Industrial Area in

Dar-es-Salaam, with CT No. 120378/1.

2. If the answer to the first issue is in the affirmative, whether the conduct of the parties subsequent thereto amounted to affirmation of the contract.
3. Whether the Plaintiff suffered damages.
4. If the answer in the 3rd issue is in the affirmative, whether the suffering of such damages was at the instance of the Defendant.
5. To what relief are the parties entitled.

At the hearing stage, the Plaintiff enjoyed the services of Mr. Karoli Tarimo, learned counsel while Mr. Samson Mbamba, learned counsel appeared for the Defendant. The Plaintiff called two witnesses (Mr. Salum Mashaka Salum testifying as Pw-1) and Mr. Muffazal Essajee (who testified as Pw-2). Both witnesses had filed in court their respective witness statements which were received as their testimonies in chief.

In his testimony, Pw-1 testified that, as professional banker and partner in a firm known in the name of AMJ Partners, his firm has been retained by the Plaintiff for advisory services in the areas of investment, borrowing and business administration since the year 2020 to date. He testified that, in August 2022, his firm was consulted and instructed carry out an assessment of losses which the Plaintiff's company suffered due to a non-delivery by the Defendant of vacant possession of a

property known as Plot No.3/1 located at Mbezi Industrial Area, Dar-es-Salaam.

Pw-1 testified that, while executing the assignment, he was availed with various documents including a sale agreement in respect of the said property, Report and Financial Statements of the Plaintiff FY-2019, 2020 and 2021 together with profits and loss account for the year 2022.

According to Pw-1, the instructions given to him involved analysing the losses which the Plaintiff suffered for failure to invest on the said property following the Defendant's failure to give vacant possession of the same to the Plaintiff within the time agreed. It was Pw-1's testimony therefore, that, he was to establish, as part of his task, the truth concerning the property purchased, obtain the growth margin and profitability of the Plaintiff's company, as well as the viability of the business expected to be carried out if the property was to be put in use.

Pw-1 told this court that, having carried out the assignment, findings were made establishing that, from the year 2019 to 2021, the Plaintiff's company was stable, with average sales of TZS 8,000,000,000/= per year and had risen to a turnover of TZS 11,000,000,000 in the year 2022. He was of the view, therefore, that, from such an investment the Plaintiff could have made huge profits had the property been handed over to her within the agreed time.

Pw-1 told this court further that, upon receiving instructions form the Plaintiff, he prepared a financial report on losses due to the non-expansion of the company's business as

expected from the period between the 1st day of October 2018 when the company expected vacant possession over the property to the 30th day of April 2022, the last month when the property was handed over to the Plaintiff. In his report, Pw-1 noted three categories of opportunity the company had to generate income from the property and all such opportunities were lost due to its non-delivery to the Plaintiff.

According to Pw-1, the first category of loss was the loss arising from the non-expansion of her production line of trailers from 30 units to 50 (fifty) per month. He testified that, with such expansion plan, the Plaintiff could have generated US$ 3000 for each unit of the 20 units of manufactured trailer per month, the Plaintiff's loss accumulated to US$ 9,522,009.35 for the entire period of delayed vacant possession.

Concerning the second category of loss, Pw-1 told this court that, such arose from lack of expansion of business from "new business of importing trucks units". He told this court that, the Plaintiff had expected to carry out the new business using the purchased property as his "show room" and "sales centre". He was confident that the "new business" would have enabled the Plaintiff to also produce trailers for the imported trucks but failed to do so for lack of storage space, sales centre and show room from the year 2020 when for the first time the Plaintiff imported trucks but failed to continue with business for lack of space.

According to Pw-1 the loss was for about 600 trailer units for such a period which loss translates to US$ 4,009,076.30.

The Report concerning the financial losses suffered was tendered in court as **Exh.P-1**. Pw-1 told the court that, the third category of loss was in loss arising from diverted funds from the business to repay loan earlier been issued to the Plaintiff by the Defendant when the former was purchasing the suit property.

It was Pw-1's testimony that, the Plaintiff's expectations from the borrowing were to utilize the landed property she had purchased from the Defendant to generate income and use the profits so far generated to repay the loan. Pw-1 quantified the loss to US$ 1,012,500 as **Exh.P-1** (page 4, paragraphs 2-5) and concluded, therefore, that, from his analysis carried out so far, the losses suffered by the Plaintiff when put together amount to US$ 17,101,839.16, out of which US$ 6,840,735.00 being 30% and 10% would have been paid as corporate tax.

However, Pw-1 was of the view that, if US$ 447,000 was to be deducted, it being an amount which the Defendant had paid the Plaintiff as rent compensation due to the non-use of her property, the total loss suffered should stand at US$ 9,814,103.50.

According to Pw-1, the remaining amount was to be treated as total income from which a 50% off could be the worst-case scenario which the Plaintiff could have suffered. He surmised, therefore, that, the balance of US$ 4,907,051.75 would have remained as the actual income, which was unrealized and, hence, constituting the actual loss due to the non-delivery of vacant possession over the landed property

named as Plot No.3/1 Mbezi Industrial Area, DSM, CT.No.120378/1.

During cross-examination, Pw-1 told this court that, though he is not an economist he is trained in financial economics. He told the court that, he is the one who prepared and signed **Exh.P.1** for the purposes of showing the accumulated investment losses from 2018 when the Plaintiff secured a loan from the Defendant to purchase the landed property to 30th of April 2022. He acknowledged that **Exh.P.1** was signed 2023.

Pw-1 told the court further that, had the court, had the area purchased by the Plaintiff utilized as earlier planned, she could have increased the parking space for more trailers she operated under space limitations. He testified that his assignment looked at the existing trends regarding the Plaintiff's income as the benchmark for his income projections.

Pw-1 told the court that the rental compensation was a compromise which the Defendant thought would be wise to offer to the Plaintiff to cushion the losses which the Plaintiff was incurring. He admitted that the Defendant did offer that amount to compensate for the losses the Plaintiff was incurring. He told the court that, the Plaintiff did receive the amount and did acknowledge that it was for compensation for the loss suffered.

During re-examination, Pw-1 told this court that, the money paid by the Defendant was rental compensation, meaning that, had the Plaintiff rented it, that would have been the amount which he would have received. He told the court

that no other amount was received as compensation other than what was paid to the Plaintiff. He told the court that the period covered by **Exh.P-1** was up to the year 2022 as per the terms of reference given to him.

When asked by the court, Pw-1 stated that, the assignment to prepare **Exh.P-1** was given to him before the court case and was not told that it was for use in court. He also told the court that, the compensation amount was paid to cover the time for which the property remained unused.

The second witness who testified for the Plaintiff was Pw-2. In his testimony in chief received by this court, Pw-2 told this court that he is a shareholder and managing director of the Plaintiff Company which was incorporated in the year 2005. According to Pw-2 in year 2018 the Plaintiff and Defendant inked a Sale Agreement for the purchase of the landed property named as Plot No.3/1 Mbezi Industrial Area, DSM, CT.No.120378/1 for a consideration of USD 1,200,000.00. A copy of the Sale Agreement was tendered and admitted in court as **Exh.P-2.**

According to Pw-2, the Defendant, as per **Exh.P-2** was to give vacant possession of the said landed property to the Plaintiff within 60 days of signing of the **Exh.P-2** and upon their being 10 % of the purchase price as advance payment, a requirement which he told the court the Plaintiff duly fulfilled.

Relying on **Exh.P-2**, it was Pw-2's testimony that the Defendant covenanted with the Plaintiff that the property will be free from all sorts of encumbrances, the purchaser would

pay all associated costs of disposition of the property from the mortgagee and ultimately transfer the property in the name of the Plaintiff.

Pw-2 told this court, therefore, that, the property was sold on a full understanding that it was for industrial/commercial use. He told this court, however, that, due to the Defendant's failure to grant vacant possession as earlier agreed under **Exh.P-2**, the Plaintiff sent emails dated 12th of December 2018, the 10th of April 2019. He told this court that, those emails were responded to by the Defendant's chief executive one Gift Shoko who promised to give a call to the Plaintiff to discuss the way forward. The emails were collectively received in court as **Exh.P-3**.

Pw-2 told this court that, on the 30th of April 2019 the parties had a physical meeting at the Defendant's head office with one Mansoor M. Bagarama, an officer of the Defendant. He told the court that, following a disclosure of a problem which the Defendant had with the Tanzania Revenue Authority (TRA), the Plaintiff was informed of a TRA's distress warrant which was in place against the landed property which the Plaintiff had bought from the Defendant, a distress warrant which had not only affected the landed property but also the goods which were kept therein, all that being the source of the delayed handover of the property to the Plaintiff.

Pw-2 told this court that the Defendant never disclosed when exactly was the distress warrant issued by the TRA but on the 07th of May 2019 the Plaintiff did receive an email from the

Defendant promising to resolve the issue with the TRA be end of May 2019. The email in question was part of the emails received collectively as **Exh.P-3**.

According to Pw-2, following that disclosure of information to the Plaintiff, the Plaintiff made own follow up at the TRA for more details and noted the distress warrant was there from the 08th of September 2017. The copies the inquiry made, and the distress warrant were admitted collectively as **Exh.P-4**. He told this court that, the Plaintiff was shocked by the revelation as the Defendant had fraudulently misrepresented to the Plaintiff and had induced the Plaintiff to enter into the Sale Agreement (**Exh.P-2**).

Pw-1 told the court that, while knowing that that the handing over of the property timely will not be possible the Defendant inserted a clause on *force majeure* in the contract instead of disclosing the fact to the Plaintiff. In his view, even if the clause was to operate in favour of the Defendant, the Defendant did not ensure that the terms and conditions precedent for it to operate, in particular, clauses 8.2, 8.3, 8.4, 8.5 and 8.6 were observed.

Pw-1 told this court that the Defendant's fraudulent misrepresentation induced the Plaintiff to enter into the Sale Agreement over the landed property known as Plot No.3/1, CT. No.120378/1, Mbezi Industrial area in Dar-es-Salaam with clear mind that it was free from all encumbrances and, as such the Plaintiff gained possession of it within the 60 days after signing the agreement.

He stated that, the property was intended to be for commercial purposes, and was very significant for expansion of the Plaintiff's business of assembling Trailers and for purposes of developing a new business of selling trucks. Pw-2 told this court that, the Plaintiff obtained credit facility from Defendant to facilitate the purchase of the property. He tendered in court a facility agreement which was admitted as **Exh.P.5**. Pw-2 told this court that after the Plaintiff had purchased the commercial property with CT No.120378/1, the Plaintiff imported 12 trucks ready for their marketing and sale on that respective Plot No.3/1 CT. No. 120378/1 Mbezi Industrial Area. The documents for importation of the 12 trucks were admitted as **Exh.P-6**.

According to Pw-2, due to the Defendant's failure to handover the Plot No.3/1, C.T. 120378/1 Mbezi Industrial Area, the Plaintiff was unable to use it for marketing purposes or as a sales centre for the trucks he had purchased. He told this court, therefore, that, the Plaintiff was forced to dispose ten of them of at a forced price of USD 31,000/00 per truck making a total of USD 310,000, and the selling was on instalment basis. The sale agreement was admitted in court as **Exh.P.14**.

He also tendered in court financial statements for the Plaintiff's account and business licence which were collectively admitted as **Exh.P-7**. He told this court that, since there was a failure to hand over the Plot to the Plaintiff suffered loss of not less than USD 4,907,051.75 but the Plaintiff has chosen to claim only USD 2,500,000.

Pw-2 also told the court that the delay occasioned untold hardships to the Plaintiff who struggled to service the loan facilities and her name got tarnished in the financial markets to the extent of being listed by the Defendant in the Credit Bureau as a person not worth of borrowing money from any financial institution in Tanzania. He tendered in court a Letter from Police Head Quarters addressed to the Plaintiff and the same was admitted as **Exh.P-8**.

Pw-2 told this court that, he even lost some of his clients' orders for manufacture of trailers as some clients withdrew or cancelled their orders causing the Plaintiff a loss of US$ 165,000.00 in respect of orders for assembling 55 trailers of which the Plaintiff was expecting to make a profit of USD 3000 per trailer. He tendered in court the purchase orders which the court admitted as **Exh.P-9**. Pw-2 told this court that, due to the Defendant's failure to deliver, and, hence, a breach of **Exh.P-2**, he sent demand letter to the Defendant and the letter was admitted collectively as **Exh.P-10, 11** and **12** respectively. He also tendered in court a letter to the Defendant expressing the Plaintiff's disappointment over various matters and the same was admitted as **Exh.P-13**.

Upon being cross-examined, Pw-2 was affirmative that the suit is about loss of profit due to the non-use of the property due to a none-handing over of the property on time as he was to have it for use within 60 days. He told the court that he came to know of the TRA distress warrant on 21st May 2019 when the bank communicated to him about the TRA issues which were

delaying the process. He told the court that the email was of 11th April 2019.

He told the court further that, earlier he had written to the Defendant on the 12th of April 2019 and had a meeting on the 30th of April 2019 to discuss about the handing over of the property and the challenges which the Plaintiff was facing. He emphasized that the warrant of distress was known to the Plaintiff on his own effort when inquiring from the TRA sometime in May 2019.

When shown an email dated 11th April 2019, he admitted that, that email did introduce to the Plaintiff the TRA issue but the Plaintiff took the option of proceeding with the agreement as the Defendant had already breached the it for failing to hand over the property to the Plaintiff within 60 days but instead it was handed over to on the 13th of May 2019

He told the court that the TRA issue had nothing to do with the Plaintiff. When shown clause 7 of the **Exh.P-2**, Pw-2 admitted having seen that clause. He admitted that the warrant of distress was not addressed to the Defendant by another person and the Defendant was not copied either. However, he admitted that by 30th of April 2019 when he attended the meeting with the Defendant, he was aware of the TRA's Distress Warrant.

When asked about the rental compensation the Plaintiff received, he admitted that the Plaintiff did agree with the Defendant to be paid the rental compensation and that there was an agreement signed to that effect. The same was admitted

as **Exh.D-1**. He admitted that the compensation was from the date of the failure of handing over the date of handing over. He admitted that as well that, there was nothing outstanding on the part of the Defendant concerning the payment of the rental compensation.

When asked if, in terms of the **Exh.D-1** the bank had any liability pending, Pw-2 admitted that the Defendant was released from any liability. He stated, however, that, the Plaintiff's decision to accept the rental compensation did not bar her from suing the Defendant for breach of contract. He told the court that the property was purchased for the purpose of enhancing the Plaintiff's business for production and display of his trucks/ trailers.

According to Pw-2, the property was rented at a forced rent since the plan was not to purchase a property for renting to the Defendant or anybody. He told this court that, at the time possession was not in the hands of the Plaintiff and so he received agreed to rent it due to the Defendant's failure to hand it over to the Plaintiff as earlier agreed.

He told the court that, the property was supposed to generate income. He told the court that, as the Plaintiff pocketed the rentals the Defendant pocketed the instalments paid with interest thereon by the Plaintiff. In re-examination he told this court that the handing over of the property to him was done in August 2022. He stated that, the distress warrant issued by the TRA would not constitute a force majeure event. Also,

that, the receipt of rentals did not bar the Plaintiff from claiming for the loss of business.

When asked by the Court, Pw-2 stated that, there was a loan he took from the Defendant to finance the purchase of the property sold by the Defendant and the Plaintiff has been servicing the loan. He told the court that, the servicing of the loan has been eating from the working capital. He stated that, he sued since the Defendant had not disclosed about the TRA distress issue.

At the closure of the Plaintiff's case, the defence case commenced by calling one witness only. The defence witness testified as Dw-1. In his testimony in chief, Dw-1 who is a bank specialist admitted that the parties entered into a Sale Agreement **Exh.P.2**. He also admitted that the landed property was not handed over to the Plaintiff in time as the parties had earlier agreed the problem being the TRA distress warrant which had earlier been issued to the Mortgagor, a Company known as *Mining, Agriculture & Construction Company Services* (MACS).

Dw-1 told this court that the distress warrant not under the Defendant's knowledge as it was communicated to her after the parties had signed **Exh.P-2**. He told this court that the Plaintiff was informed of the impossibility for immediate handing over and the dusts of delayed handing over were long settled as between the parties as they opted to continue with the agreement instead of rescinding it.

According to Dw-1, the parties did engage each other on the matter and a price for the delayed handing over was agreed upon and paid in the form of rental compensation. In court Dw-1 tendered two compensation agreements which were collectively admitted as **Exh.D-2**. He told this court that after such "settlement of the dusts" nothing more was demanded on the part of the Defendant who on the 16th of May 2022 handed over the property to the Plaintiff. He tendered the handing over noted as evidence and the same was admitted as **Exh.D-3**.

When Dw-1 was cross-examined by Mr. Tarimo, he told this court that, indeed the property was handed over to the Plaintiff on the 16th of May 2022, about three years and eight months after the initial signing of the **Exh.P-2** on the July of 2018. He admitted that the handing over was indeed supposed to be after 60 days from the date of signing the **Exh.P-2**.

He admitted that an event in the form of *force majeure* cannot be one known beforehand and so if the distress warrant was known it cannot constitute a *force majeure* event. He admitted that when the earlier owner of the Plot defaulted payment of her loan facility the Defendant sent her a default notice and engaged a receiver before the property got sold to the Plaintiff herein.

Dw-1 stated further that the Defendant came to know of the distress warrant during the handing over process. He admitted, however, that informally the Defendant was informed of the distress warrant and in January 2019 she formalised the matter with the TRA. He told the court that the parties did

discuss about possible pulling out of the deal in a meeting held on 30th April 2019.

According to Dw-1 **Exh.D-1** does show that the amount paid to the Plaintiff as rental compensation shall be cover all future liabilities. So far that was the defence case. During re-examination Dw-1 denied there being fraudulent misrepresentation on the part of the Defendant.

Under sections 110 and 111 of the Evidence Act, Cap.6 R.E 2019 the law has laid down one cardinal principle related to proof. The principle is often shortened in the form of "he who alleges must prove". The said principle is referred in a host of cases, both reported and unreported. See, for instance, the cases of **Standard Chartered Bank (T) Ltd vs. Haruna Yusuf Mavere t/a G.H Hardware,** Commercial Case No. 56 of 2022 (unreported), **Jasson Samson Rweikiza vs. Novatus Rwechungura Nkwama**, Civil Appeal No.305 of 2020 (unreported), **Paulina Samson Ndawavya vs. Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017 (unreported) and **Berelia Karangirangi vs.Asteria Nyalavambwa**, Civil Appeal No.237 of 2007 (unreported).

The Plaintiff is, therefore, required to prove every allegation made, this being her duty throughout. The standard of proof, however, is on the balance of probability. See **Barelia Karangirangi's case** (supra). With that in mind, let me proceed to address the issues. The first issue was:

> Whether there was a breach of contract in the course of execution of the Sale Agreement in respect of a

property known as Plot No.3/1 situated at Mbezi Industrial Area in Dar-es-Salaam, with CT No. 120378/1.

In their closing submissions, both learned counsel for the parties have relied on section 17, 18 and 19 of the Law of Contract Act, Cap.345 R.E 2019. However, they addressed the issues in a "blanket" manner, the Plaintiff's counsel praying that this court rule in favour of the Plaintiff while the learned counsel for the Defendant urging me to dismiss the suit. I will, however, address the issues as they are, in seriatim.

The first issue which I reproduced hereabove is about breach of contract. Generally, a breach of contract is a material non-compliance with the terms of a legally binding contract. It occurs when one of the parties fails to perform his/her obligations to the detriment of the other party. In this suit before me as I look at **Exh.P-2**, there is no doubt that the parties agreed that in 60 days' time upon signing of the agreement and a deposit of 10% of the purchase price, the Defendant was to give vacant possession of the landed property to the Plaintiff.

Taking into account the testimonies of both Pw-2 and Dw-1, there is also no dispute that no vacant possession was given in respect of the landed property in question within the agreed 60 days as per **Exh.P-2**. That was contrary to Clause 7.1 of the **Exh.P-2** and would indeed constitute a breach of what the parties had covenanted under **Exh.P-2**. However, in

the Defendant's pleadings and the testimony of Dw-1, the Defendant seems to be raising the defence of *force majeure*.

What is *force majeure*? The concept of *force majeure* or "superior force or supervening event" constitutes a mechanism used to reallocate risks of loss associated with a failure to perform which failure results from a specified events or occurrences. In the case of **Atcor Ltd. v. Continental Energy Marketing Ltd.,** 1996 ABCA 40 (CanLII), paragraph 12 the court was of the view that force majeure clauses are intended to "protect the parties from events outside normal business risk".

Ordinarily, in most commercial agreements, parties do expressly include a provision taking care of any such unforeseen acts of constituting *force majeure*. Under such a *force majeure* clause the parties set forth the circumstances in which a party owing a duty under the contract is excused from all or partial performance of that obligation, given that such a supervening circumstance is beyond the obligor's reasonable control.

In our law of Contract Act, Cap.345 R.E 2019, although the term "force majeure" is not used in the Act, still one may consider that sections 32 to 36 of the Act relate to force majeure as they deal with "contingent contracts". But in our case the contract was not couched in a manner that one would term it as a contingent contract in the first place, although the parties did include in it a *force majeure* clause.

In his testimony, Pw-2 told this court that the Defendant had a prior knowledge of the distress warrant by the TRA which

was the source of delayed performance of **Exh.P-2** but never disclosed it when the parties were inking the contract. In some way I tend to agree with what Pw-2 is saying given that, his version has support from the testimony of Dw-1 who admitted, where under cross examination that, the Defendant had informal notice of the TRA distress but did formally get the full information sometime in January 2019.

That being the case, the force majeure cannot be relied upon when the event which is said to be constituting *force majeure* is known beforehand by the party who intends to rely on it as a shield. *Force majeure* is often considered, and indeed so, to be an unforeseen supervening event which neither party was aware that it will happen and when it happens and they have agreed such will constitute a force majeure event, then the performing party will be shielded.

But it is worth noting that, the concept is at times discussed alongside the legal concept of frustration, given that both involve the occurrence of events which disturb the parties' ability to smoothly performing their contract, and/or which leave a party to the contract unable to perform its contractual obligation(s). Notably, however, is the fact that, although both concepts are similar, they are also distinct, in nature.

Whereas *force majeure* is expressed in a contractual clause intended to "*protect the parties from events outside normal business risk*", the doctrine of frustration will apply when an unforeseeable event, which is not the fault of either party, makes performance of a contract impossible or radically

different from what was originally agreed to. Now, could the Defendant rely on the doctrine of frustration?

In our law, however, the said doctrine of frustration is provided for under section 56 (2) Law of Contract Act, Cap.345 R.E 2019 and is to the effect that:

> "A contract to do an act which after the contract is made becomes impossible, becomes void when the act becomes impossible."

However, the above doctrine of frustration is not just lightly invoked. So, when can one invoke it? The case of **M/S Kanyarwe Building Contractor vs. The Attorney General and Another** [1985] T.L.R 161, this Court (Mwalusanya J, as he then was) observed that:

> "our courts do not readily invoke the doctrine of frustration unless it is shown that the contract as originally conceived, bears little or no resemblance to the new state of things. It is not sufficient merely to show that conditions have changed so that one party is in a more onerous position, financially or personally. It should be shown that it is now impossible to perform the contract not merely more difficult or expensive ... [Frustration] is a sort of shorthand: it means that a contract has ceased to bind the parties because the common basis on which by mutual understanding it was based has

> failed. It would be more accurate to say, not that the contract has been frustrated, but that there has been a failure of what in the contemplation of both parties would be the essential condition or purpose of the performance....The principle is that where supervening events, not due to the default of either party, render the performance of a contract indefinitely impossible and there is no undertaking to be bound in any event, frustration ensues. I have underlined the phrase 'indefinitely impossible' for emphasis....The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound. It is often difficult to draw the line. But it must be done. And it is for the courts to do it as matter of law."

In my humble view, based on the above I would as well not be convinced that the issue of frustration would come in when one considers the facts constituting the suit at hand. The contract **Exh.P-2** was not completely impossible to perform. As Mwalunsanya, J (as he was then) stated in the case of **M/S Kanyarwe Building Contractor (supra)**, the event should have made the contract unperformable and on no parties' fault.

In the case at hand, the Defendant was well-aware that there was a distress warrant by the TRA and Dw-1 did admit to that fact as I earlier said. Still, she went ahead to conclude **Exh.P-2** and agreed to a clause that within 60 days she was to grant vacant possession of the property to the Plaintiff. In my view she must blame for her own decision and not otherwise.

But did the Defendant fraudulently misrepresent the facts to the Plaintiff? The Plaintiff has indeed alleged that. Fraud and misrepresentation are matters covered under section 17 and 18 of the Law of Contract Act, Cap.345 R.E 2019. Pw-2 relied on Clause 3.1of **Exh.P-2** in which the Defendant had committed herself to the Plaintiff that the property was to be transferred to her "free from any encumbrances whatsoever". However, things turned out to be different later and performance was affected as the Defendant could not deliver what she had promised.

In my view and, since the Defendant knew of the encumbrances attached to the property, there was breach of the contract and, moreover, she acted under a fraudulent misrepresentation the effect of which is to attract sections 17 and 18 of the Contract Act, Cap.345 R.E 2019 which will surely apply in favour of the Plaintiff.

From the forgoing discussion, therefore, I would, without hesitation, hold that the Defendant did breach the **Exh.P2** and, thus the first issue is responded to affirmatively. But the second issue is connected to the first issue. It was recorded as follows:

> If the answer to the first issue is in the affirmative, whether the conduct of

> the parties subsequent thereto amounted to affirmation of the contract.

When addressing the first issue I did point out that, **Exh.P-2** was procured in an environment which suggests that one party (the Plaintiff) was blindfolded for not being given all information by the Defendant thus enticing her to ink the agreement blindly and, for that matter, section 17 and 18 of the Contract Act, Cap,345 R.E 2019 could be relied upon by the Plaintiff. Ordinarily, if one considers such instance, it means the contract (**Exh.P-2**) was, by virtue of section 19 (1) of the Contract Act, Cap.345 R.E 2019 voidable at the option of the Plaintiff. However, section 19 (3) of the Act does provide that, a party may still instil that the contract be performed.

In the suit at hand, it was the testimony of both Pw-2 and Dw-1 that, while the Plaintiff had the option to walk away, she however, decided to stay in the contractual journey with hopes that all will be well. And, indeed, the dusts did settle but at a cost in terms of the delayed handing over of the vacant possession of the property the subject of **Exh.P-2**.

In the case of **Heritage Insurance Company Ltd vs. First Assurance Company Ltd**, Civil Appeal No.165 of 2020 (unreported), the Court of Appeal of Tanzania had an opportunity to consider the effect of section 19 (3) of the Law of Contract Act, Cap. 345 R.E 2019. In that case, the Court, while citing with approval the English decision in the case of **Car and Universal Finance Co. Ltd vs. Cadwell**, [1964]1All. ER 290 in respect of an affirmation of a voidable contract, the

Court, had the following to say, at page 31 and 32 of the typed judgement of the Court:

> "An affirmation of a voidable contract may be established by any conduct which unequivocally manifests an intention to affirm it by the party who has the right to affirm or disaffirm. ...Since the respondent did not rescind the contract and instead conducted itself in the manner that established its affirmation, its refusal to settle the claim upon demand through undisputed cash calls was in breach…"

Taking into account the above holding by the Court of Appeal, and when considering the facts in this case, I tend to agree that the subsequent conduct of the parties amounted to the affirmation of the contract which, in the first place, could be rescinded by the Plaintiff but she chose not to. The evidence and testimony of Pw-2 does point to such direction, and, for those reasons, I would uphold the second issue in the affirmative giving room to the third issue.

The third issue was/is:

> Whether the Plaintiff suffered damages.

Essentially, it worth noting that the third issue hereabove does have its bearing from the first and the second issues as it touches on damages suffered. When I was addressing the first

issue, I did make a finding that by failing to deliver vacant possession the Defendant was in breach of the **Exh.P-2**.

Moreover, there was as well breach of Clause 3.1 of **Exh.P-2** which clause had required that the property sold to the Plaintiff be "free from all sorts of encumbrances". However, that assurance made in **Exh.P-2**, turned out to be false and an epithet of fraudulent misrepresentation.

That fact notwithstanding, as already held in relation to the second issue herein, the Plaintiff chose not to walk out from the contractual relations but rather affirmed the performance of the contract. With such affirmation, the question will now be, was the contract performed at last to the extent so required? In my humble view, the contract got performed at the end of the day and, **Exh.D-3** evinces that fact. If there was such performance, can the Plaintiff still claim to have suffered damages?

Well, the issue, according to the testimony of Pw-2 is that the performance took place some months and days later away from the agreed time of 60 days from the signing of the contract and so the Plaintiff suffered loss for non-use as per her plans regarding the use of the property in question. But given the facts as herein revealed, having experienced the difficulties to hand over the property as agreed, the parties did engage into discussions and, both Pw-2 and Dw-1, readily admitted to such a fact in their testimonies.

It is also a fact that, having affirmed to the continuity of the contractual obligations, the parties embarked on a

mitigative measure to cushion whatever pains the Plaintiff was experiencing due to what unfolded. **Exh.D-1** and **Exh.D-2** evince the efforts taken and Pw-1 does not dispute that the Plaintiff received rental compensation paid by the Defendant solely due to the failure on the part of the Defendant to grant vacant possession to the Plaintiff.

In my humble view, the Plaintiff's decision to agree as well to be paid rental compensation would, under the doctrine of estoppel by conduct, bar her from claiming from the Defendant as done herein. In the case of **Taylor Fashions Ltd. vs. Liverpool Victoria Trustees Co. Ltd.** [(Note) [1981] 2 W.L.R. 576, Oliver, L.J., had the following to say regarding the doctrine of estoppel:

> "… estoppel by conduct has been a field of the law in which there has been considerable expansion over the years and it appears to me that it is essentially the application of a rule by which justice is done where the circumstances of the conduct and behaviour of the party to an action are such that it would be wholly inequitable that he should be entitled to succeed in the proceeding."

Considering the above holding by Oliver, LJ, I would tend to argue that it would be utterly inequitable to state that the Plaintiff suffered damages while already she has agreed to be

cushioned by the Defendant in the form of payment of rental compensation due to the non-use of the property and which non-use was based on a fact which the Plaintiff having been made aware of chose not to rescind the contract but affirmed it and further agreed to be compensated under **Exh.D-1** and **Exh.D-2**'s arrangement. From the foregoing, I would respond to the third issue in the negative.

The fourth issue is/was:

> If the answer in the 3rd issue is in the affirmative, whether the suffering of such damages was at the instance of the Defendant.

The fourth issue is dependent on the third issue being responded to affirmatively. However, when responding to the third issue I responded to it negatively. Whether there was any addition suffering on the party of the Plaintiff or not, that cannot be an issue to be atoned by way of a claim as the one raised hereunder.

It is also worth noting that, much as Pw-2 told this court that the mere fact that the Plaintiff agreed to be compensated rentals by the Defendant that would not have been a bar for her not to claim for loss of business, that cannot be an issue which he would bring to the table now since that was or ought to have been discussed by the parties when they inked the other agreements (**Exh.D-1** and **Exh.D-2**).

In my view, the wording of para 3.0 of both **Exh.D-1** and **Exh.D-2** indicated that the payments were made because of the delay to handover the property to the Plaintiff for her own

use. If the Plaintiff was not smart enough to bring to the fold of her discussions with the Defendant all other economics which she now wants this court to take cognizance of, that cannot be condoned for the moment as this court will only look at what **Exh.D-1** and **Exh.D-2** say.

In view of what I have stated herein, it is my findings that, if there be any suffering, which in the circumstance of this case, I find none, the Plaintiff cannot blame the Defendant as the source thereof. Having so held, what then should this court say having responded to all issues? In other words, *to what reliefs are the parties entitled to?* This was my final issue.

The above noted issue depends on whether the burden of proof has been discharged on the required standards. In the case of **Kibogate Tanzania Ltd vs. Grandtech (T) Ltd**, Commercial Case No. 32 of 2021 (unreported), this court noted that, in civil cases, the balance of proof is gauged on balance of probabilities. However, citing the case of **Miller vs. Minister of Pensions [1947]** All E.R. 372; 373, 374, this court noted, as Lord Denning J (as he then was) held regarding the discharge of such a burden of proof, stating that:

> "If the evidence is such that the tribunal can say: We think it more probable than not, the burden is discharged, but if the probabilities are equal, it is not." (Emphasis added),

From the foregoing discussion this court makes a cumulative finding that, this case should fail. It should fail

because, the balance of probabilities is on a tie if all the facts of the case are to be taken in the totality. As stated in **Miller's case** (supra) when there is such a stalemate, then the burden is not discharged, and the case should be dismissed. In the upshot of all that, the court hereby settles for the following orders:

1. That, this case is hereby dismissed in its entirety.
2. That, the dismissal is with an order that each party shall bear its own costs.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 08TH DAY OF SEPTEMBER 2023

HON. DEO JOHN NANGELA

JUDGE

Right of Appeal Explained