For the reasons given above the appeals are dismissed in their entirety.

STELLA MASHA *v.* TANZANIA OXYGEN LIMITED

HIGH COURT OF TANZANIA AT DAR ES SALAAM

(Nsekela, J.)

COMMERCIAL CASE No. 61 OF 2000

Contract – Tender – Advertisement for Tender – plaintiff submitted her tender and defendant wrote to sell the property to plaintiff – Whether the defendant's letter was an offer to sell.

Contract – Formation of contract – Acceptance of an offer – Purchase price required to be paid in full – Purchase price paid partly in banker's cheque and partly in irrevocable bank guarantee – Whether acceptance of offer was absolute and whether purchase price was paid in full.

Evidence –Advertisement for tender not attached to pleadings or tendered in evidence – Whether Trial Court may rely on it.

In May 1999 the defendant advertised a tender for sale of its residential houses including the suit premises. The tender was re-advertised. The plaintiff and her husband submitted their bid for the purchase of the suit premises. The defendant, in response to the plaintiff's bid replied in writing that the defendant had "decided to sell the property to the plaintiff at the market value of TZS. 55 million. The amount should be paid in full by 31 August 1999 failure of which this award will stand withdrawn". The plaintiff and her husband effected payment partly by a banker's cheque for TZS. 17 500 000 and partly in an irrevocable bank guarantee for TZS. 37 500 000. The Bank issuing the guarantee wanted the defendant company to surrender the title deed to the suit premises as security for the loan which the Bank was extending to the plaintiff's husband. The defendant refused to surrender the title deed and informed the husband

accordingly. The defendant further contended that the contractual purchase price was not tendered in full when the plaintiff purported to pay the balance by an irrevocable bank guarantee.

Held: (i) On a proper construction the defendant was offering to sell to the plaintiff the residential property on Plot 1202 Msasani Peninsular, on the terms and conditions stipulated therein in the defendant's letter;

(ii) The plaintiff and her husband did not accept the defendant's offer as it is understood under the basic law of contract; an acceptance, in order to constitute an agreement, must in every respect meet and correspond with the terms and conditions of the offer;

(iii) On a balance of probabilities, the balance of TZS. 37 500 000 was not paid on 10 September 1999 through the irrevocable bank guarantee; the plaintiff and her husband are in breach of their obligations to the defendant and cannot therefore succeed;

(iv) Since the advertisement for tender was not annexed to either the plaint or the Written Statement of Defence and, in addition, it was not produced in Court as an Exhibit, in cannot be relied upon in evidence.

Order accordingly

Cases referred to:

(1) *Gibson v. Manchester City Council,* [1979] 1 W.L.R. 294

(2) *John D Kerenge v. Joel L. Mabiba,* CAT - Civil Appeal Number 54 of 1998 (CA) (unreported).

(3) *Coker v. Ajewole* 1976(1) ALR Comm 230

(4) *Australian Hardwoods Pty. Ltd v. Commissioner for Railways* [1961] 1 W.L.R. 425

Statutory provision referred to:

(1) Civil Procedure Code 1966, Order VIIIA and B

Mr Kamugisha, for the plaintiff

Mr Mbamba, for the Defendant

JUDGMENT

(Dated 5 April 2001)

Nsekela, J.: The plaintiff in Commercial Case Number 61 of 2000 is Stella Masha (PW1), the wife of Lawrence Masha (PW2), an advocate of the High Court of Tanzania. At some point he was an employee of the defendant company. This suit is basically for specific performance of an alleged sale of a residential house situate on plot number 1202 Msasani Peninsular belonging to the defendant. It is alleged in the Plaint that the defendant sometime in May 1999 advertised a tender in newspapers for the sale of six residential houses including the suit premises. Unfortunately the said advertisement was not tendered in evidence and consequently, I am unaware of its contents. It is also alleged that the tender was re-advertised and the plaintiff and PW2 submitted their bid for the purchase of the suit premises. The Plaint goes on to allege that the plaintiff and PW2 were the successful bidders and they effected payment of the purchase price by means of a bankers cheque for TZS. 17 500 000 and by what was termed as an "irrevocable bank guarantee" in the sum of TZS. 37 500 000 hence completing the purchase price of TZS. 55 million. On its part, the defendant company filed Written Statement of Defence on the 6 November 2000 and the disputants, having failed to reach an amicable settlement through mediation under Order VIIIA and B of the Civil Procedure Code 1966 as amended, the following issues were framed and recorded on the 22 December 2000. These were:

(a) Whether or not there was a concluded contract between the plaintiff and the defendant for the purchase by the plaintiff of the defendant's premises on Plot Number 1202 Msasani Peninsular;

(b) What were the terms and conditions of the said agreement, if any;

(c) Did the defendant breach any of the terms and conditions of the said agreement?

(d) To what reliefs are the parties entitled to.

The trial commenced on the 27 February 2001. Mr Kamugisha, learned advocate, represented the plaintiff and Mr Mbamba, learned advocate, represented the defendant company. PW1 was Stella Masha, the plaintiff. She testified that she submitted a bid for the purchase of the suit premises, a residential house on Plot Number 1202 Msasani Peninsular; that she was successful in her bid and the defendant company wrote a letter to that effect, Exhibit P1. I shall revert to this letter in the course of this judgment. She added that the purchase price of TZS. 55 000 000 was not paid on the 31 August 1999 but on the 9 September 1999 since the defendant company had previously agreed to extend the time within which to pay the same (See: Exhibit P2). The purchase price was then paid by means of a bankers cheque for TZS. 17 500 000 (Exhibit P3) and by means of a "irrevocable bank guarantee" in the sum of TZS. 37 500 000 (Exhibit P4). As far as she was concerned, that was the end of the matter on their side. Her contractual obligations had been fulfilled on the 9 September 1999, but to her dismay, the defendant company has refused to date to deliver vacant possession of the suit premises. On the 6 March 2000 PW1 stated that she received a letter, Exhibit P5 to the effect that the contractual purchase price of the suit premises had not been paid. When cross-examined by Mr Mbamba, PW1 insisted that full payment of the contractual amount of TZS. 55 million had been honoured by the "bankers cheque and irrevocable bank guarantee" but admitted that she did not discuss with the defendant the conditions as regards the title deed in Exhibit P4. PW2 was one Lawrence Masha, the husband of PW1, the plaintiff, whom he described in his evidence as a "co-purchaser." PW2 testified that he was formerly an employee of the defendant company and took part in advertising tenders for the purchase of the suit premises. The defendant company informed them that they were successful in their bid and they were to pay the purchase price of TZS. 55 000 000 which was to be paid by the 31 August 1999.

The deadline for this payment was then extended to 10 September 1999. On the 9 September 1999, he added, a bankers cheque in the sum of TZS. 17 500 000 was paid together with an "irrevocable bank guarantee" upon presentation by the defendant of title deeds to the Kenya Commercial Bank Tanzania Limited. This evidence corroborates that of PW1 except for the element of title deeds to be surrendered to the Kenya Commercial Bank (T) Limited. PW2 testified further that he had prepared a draft sale agreement and forwarded it to the defendant company for review but it was not signed despite repeated demands. This marked the close of the plaintiff's case.

The defendant company called one witness, DW1 Abdulrahman Mohamed Khatib, Acting General Manager, of the defendant, Tanzania Oxygen Limited. He testified that the plaintiff and PW2 had submitted a bid to purchase the suit premises at Plot Number 1202 Msasani Peninsular at a purchase price of TZS. 55 million to be paid by 31 August 1999 which was extended to 10 September 1999. He added that on the 10 September 99 the plaintiff and PW2 brought a bankers cheque for TZS. 17 500 000 and a letter from Kenya Commercial Bank guaranteeing the payment of TZS. 37 500 000. The letter from Kenya Commercial Bank wanted the defendant company to surrender the title deeds to the suit premises as security for the loan the said bank was extending to PW2. The defendant company did not surrender the title deed and PW2 was informed accordingly. According to DW1 the plaintiff and PW2 had only paid TZS. 17 500 000 and not the full contractual purchase price of the suit premises.

When cross-examined by Mr Kamugisha, DWl stated that the defendant company wanted to be paid in full whether by cash, bankers cheque or by whatever means to that effect. Exhibit P4 was rejected by the defendant company and that this information was communicated to PW2. He added that Exhibit D2 was not returned to Kenya Commercial Bank including TZS. 17 500 000 that had been paid by bankers cheque. This then is the summary of the evidence by the three witnesses.

The learned advocates for the parties at my request, submitted written submissions and I shall make reference to their rival contentions in the course of answering the issues that were framed. The first issue was in the following terms:

> Whether or not there was a concluded contract between the plaintiff and the defendant for the purchase by the plaintiff of the defendants premises on plot number 1202 Msasani Peninsular.

What is crystal clear from the pleadings of the parties, the oral testimony of the witnesses and the Exhibits tendered in Court, is that there was no formal sale agreement signed between the disputants hereto. The main question to be considered and determined however is whether or not in the correspondence that was exchanged between the plaintiff and the defendant company there can be found a legally enforceable agreement for the sale by the defendant to the plaintiff and PW2 Lawrence Masha of the suit premises on Plot Number 1202 Msasani Peninsular. In answering the first issue the second one, namely -

> What were the terms and conditions of the said agreement, if any;

will inevitably be inextricably involved and hence the two issues will be considered together. To answer the first two issues, I shall closely follow what has been often called "the conventional approach" very lucidly explained by Lord Diplock in the case of *Gibson v. Manchester City Council* (1). His Lordship stated thus at page 297:

> My Lords, there may be certain types of contract though I think they are exceptional which do not fit easily into the normal analysis of a contract as being constituted by offer and acceptance; but a contract alleged to have been made by an exchange of correspondence between the parties in which the successive communications other than the first are in reply to one another, is not one of these. I can see no reason in the instant case for departing from the conventional approach of looking at the handful of documents relied upon as constituting the contract sued upon and seeing whether upon their true construction there is to be found in them a contractual offer by the corporation to sell the house to Mr Gibson and an acceptance of that offer by Mr Gibson.

A convenient starting point is Exhibit P1, a letter dated 9 August 1999 from the defendant company to the plaintiff Stella Masha and PW2 Lawrence Masha. It reads as follows:

> **Re: Award of Tender for Purchase of TOL Limited Residential property on Plot Number 1202 Msasani Peninsular, Dar es Salaam**
>
> ---
>
> Please refer to your bid for the purchase of TOL Limited residential property located on plot number 1202 Msasani Peninsular, Dar es Salaam.
>
> We are pleased to inform you that it has been decided to sell the property to you on condition that you match the market value of the property which is TZS. 55 000 000 (say TZS. Fifty-five million only).
>
> The amount should be paid in full by 31 August 1999 failure of which this award will stand withdrawn [emphasis supplied]

Exhibit P2 dated 6 September 1999 extended the date for the payment of the purchase price to 10 September 1999 and all the three witnesses PW1; PW2 and DWI have testified to that effect. It was also in evidence that prior to this the defendant company had on two occasions advertised tenders in the newspapers for the sale of its properties including the suit premises.

In the written submissions, Mr Kamugisha, learned advocate for the plaintiff has submitted as under, and I quote:

> My Lord it is our humble submission that the defendant's advertisement of the tender was an invitation to treat addressed to the whole world asking for the intending buyers to come forward and contract with the defendant for the purchase of the premises in question pursuant to the advertisement, the plaintiff sent in her tender, or offer, which the defendant accepted. Thus, it is our submission my Lord that the contract between the plaintiff and the defendant was concluded on the basis of the plaintiff's tender or offer on the one hand and the defendant's acceptance of it on the other.

On his part, Mr Mbamba, learned advocate for the defendant had this to say:

> My Lord at the risk of repeating the facts, the defendant invited the public to submit tenders for the purchase of the disputed premises whereby the plaintiff and her co-purchaser offered to buy the premises. The defendant, by his letter dated 9 August 1999 addressed to the plaintiff and co-purchaser, accepted the offer on condition that the plaintiff and co-purchaser match the market value of TZS. 55 million.

Admittedly, PWl; PW2 and DWl have all testified that the defendant did advertise in the newspapers the sale of its properties including the suit premises. As I have had occasion to point out before, there is no documentary evidence which has been tendered to that effect. In a suit of this nature, such evidence is crucial. I would venture to say that the advertisement in the newspapers perhaps contained the terms and conditions to be fulfilled by the would be purchasers. Since the so called advertisement was neither annexed to the Plaint nor Written Statement of Defence and in addition it was not produced as an Exhibit, such evidence cannot be relied upon: (See: *John D Kerenge v. Joel L Mabiba* (2).

The first document before me is Exhibit PI which I have quoted *in extenso* earlier on. The opening phrase in paragraph 2 of this Exhibit reads as under:

> We are pleased to inform you that it has been decided to sell the property to you.

It is my considered view that on a proper construction of Exhibit P1 the defendant was offering to sell to the plaintiff and PW2 Lawrence Masha the residential property on plot 1202 Msasani Peninsular on the terms and conditions stipulated therein. These conditions were:

(a) the purchase price was TZS. 55 million to be paid in full;

(b) the cut-off date for payment of the purchase price was 31 August 1999;

(c) the offer would lapse if the purchase price was not paid in time.

As we have noted before, in terms of Exhibit P2, the period for the payment of the purchase price was extended to 10 September 1999. What was the response of the plaintiff and her husband PW2 on receipt of Exhibits P1 and P2. The evidence on record shows that they wrote a letter to the defendant, Exhibit P6. It is a critical letter worth quoting. It was addressed to the Acting General Manager of the defendant, one AM Khatibu, DW1. It is dated 29 October 1999. It reads in part as follows:

> **Re: Plot 1202 Msasani Peninsular**
>
> Kindly refer to your letters dated 9 August 1999 whereby you offered to sell the above referred property to me for TZS. 55 million as well as your subsequent letter dated 6 September whereby you extended the period of payment to 10 September, 1999.
>
> You will recall that on the 9 of September my Bank, Kenya Commercial Bank Tanzania Limited, presented to you and you accepted a Bankers payment of TZS. 17 500 000 along with an Irrevocable Bank Guarantee of 37 500 000. You will also recall further that you presented the said Bankers payment for clearance and the said payment was cleared on the 19 September 1999. Despite repeated requests that the sale transaction be concluded, you have either failed or neglected to conclude this transaction despite various costs being suffered by myself and my *fulfillment* of my obligations in this transaction.
>
> I am hereby writing to once again request that you liase with my Bank so that this issue is finalized *as per the terms of the guarantee which you have accepted"*. [emphasis supplied]

Exhibit P7 was a reminder to the defendant of Exhibit P6. It will be recalled that Exhibit PI was the offer to sell the suit premises to the plaintiff and PW2. The question is was Exhibit P6 an acceptance by the plaintiff and PW2 of the offer as contained in Exhibit PI? It is my settled view that the answer must be in the negative. Firstly, the purchase price was to be paid in full by the 10 September 1999. Exhibit P6 was written on the 29 October 1999, well over a month after the offer had been made. Secondly, it contained conditions not reflected in the defendant's offer. There was reference in this letter to Kenya Commercial Bank Tanzania Limited presenting to

the defendant on the 9 September 1999 a banker's cheque for TZS. 17 500 000 and an irrevocable bank guarantee of TZS. 37 500 000. There was no prior arrangement between the defendant company and the plaintiff and PW2 that the Kenya Commercial Bank would be the agent of the plaintiff and PW2 in effecting the purchase price to the defendant. This arrangement was certainly not contained in Exhibit PI. This is not all. Payment of the purchase price was to be in full. The plaintiff and PW2 had only paid TZS. 17 500 000 as evidenced by Exhibit P3 which is an acknowledgement from the defendant that the defendant had received TZS. 17 500 000 from Stella Masha and Lawrence Masha being part payment for purchase of the suit premises. It is obvious by now that Exhibit PI did not envisage part payment but full payment by the stipulated deadline of 10 September 1999. I think I have sufficiently shown that the plaintiff and PW2 did not accept the defendant's offer as it is understood under the basic law of contract. Indeed section 7 of the Law of Contract Ordinance Chapter 433 provides as follows:

> 7 *In order to convert a proposal into a promise the acceptance must:*
>
> (a) be absolute and unqualified;
>
> (b) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes the manner in which it is to be accepted and acceptance is not made in such manner, the proposer may, within a reasonable time after acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner and not otherwise, but if he fails to do so he accepts the acceptance.

The learned advocate for the plaintiff and PW2 made spirited submissions apparently with deep conviction that the plaintiff and PW2 made full payment of the purchase price of TZS. 55 million on the 9 September 1999 through:

(a) A Bankers cheque in the sum of TZS. 17 500 000 issued by Kenya Commercial Bank in favour of the defendant; and.

(b) An irrevocable Bank Guarantee in the amount of TZS. 37 500 000 also issued by the Kenya Commercial Bank.

The evidence on the record, Exhibit P3 shows that TZS. 17 500 000 was received from the plaintiff and PW2 and not from Kenya Commercial Bank (T) Limited. I have discussed this matter already. The defendant does not dispute at all that this amount of money was actually received. The defendant however has submitted that on the 10 September 1999 the plaintiff and PW2 did not effect full payment in terms of the offer, Exhibit Pl. There was a balance of TZS. 37 500 000 to be paid. The plaintiff and PW2 have submitted that the said amount was paid on 9 September 1999 as well, through Exhibit P4 which contained PW2's bankers "irrevocable bank guarantee". This is an ingenious argument but I am not persuaded by it.

The defendant was not a party to Exhibit P4. This so called "Bank Guarantee" was in my view unsolicited information to the defendant as to the financing arrangements of PW2. That explains why the defendant did not surrender the title deed to the suit premises to the Bank. The defendant had nothing to do with PW2's financial acrobatics as to where he would get financial assistance to fund the purchase of the suit premises. I am not surprised that there was no official from the Kenya Commercial Bank to testify that the Bank paid to the defendant TZS. 37 500 000 on 9 September 1999. Why was this crucial piece of evidence not forthcoming? He who alleges must prove! I am satisfied on a balance of probabilities that the balance of TZS. 37 500 000 was not paid on the 10 September 1999. A bank guarantee is defined as under in the **Oxford Dictionary of Business** (2 ed):

> An undertaking given by a bank to settle a debt should the debtor fail to do so. A bank guarantee can be used as a security for a loan but the banks themselves will require good cover in cash or counter-indemnity before they issue a guarantee (See also: section 78 Law of Contact Ordinance Chapter 433).

Surely the plaintiff and PW2 cannot seriously argue that Exhibit P4 was full payment as contemplated by Exhibit Pl. In Sanjiva **Rows Contract Act and Law Relating to Tenders** etc. Volume 1 (9 ed) the learned editors at page 728 state thus:

> An acceptance, in order to constitute an agreement, must, in every respect, meet and correspond with the offer, neither falling short of nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand. In the absence of such an acceptance subsequent words, acts or conduct of the parties cannot create a contract.

The acceptance, in order to consummate an agreement, must in every respect meet and correspond with the terms and conditions of the offer. It has been said that an acceptance must be a "mirror image" of the offer. The plaintiff's and PW'2 letter, Exhibit P6 did not mirror the defendant's Exhibit P1 as modified by Exhibit P2.

The last issue to be considered and determined is the relief, if any, to which the parties are entitled. The learned advocate for the plaintiff submitted that the Court should order specific performance of the contract. To state the obvious, specific performance is a discretionary remedy which compels a party in breach to perform its contractual obligations. This of necessity means that there must be a concluded contract between the disputants. Again I think it is trite law that specific performance will only be granted if monetary compensation will not be adequate. In the instant case what is at stake is a residential property which cannot possibly be replicated and therefore monetary compensation will be inadequate. However, in the case of *Coker v. Ajewole* (3) at page 235, Idebje, J.S.C. stated:

> It is settled law that a person seeking to enforce a contract must show that all the conditions precedent have been fulfilled and that he has either performed or is ready and willing to perform all the terms which ought to have been performed by him. Accordingly, generally a plaintiff in an action for specific performance of an agreement cannot succeed if there is failure on his part to discharge his obligations under the said agreement. (See also: *Australian Hardwoods Pty. Ltd v. Commissioner for Railways.* (4).

A From what I have stated before in this judgment, it is abundantly clear that the plaintiff and PW2 are in breach of their obligations to the defendant and cannot therefore succeed in obtaining the relief of specific performance. In the premises, the suit is hereby dismissed
B in its entirety with costs. It is accordingly ordered.

C

TANZANIA HARBOURS AUTHORITY *v.* MOHAMED R MOHAMED

D

COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

(Makame, Ramadhani and Lubuva, JJ.A.)

E

CIVIL APPEAL No. 80 OF 1999

(From the decision of the High Court of Tanzania at Dar es Salaam, Bubeshi, J. dated 23 June 1999, in Civil Case No. 7 of 1999)

F *Civil Practice and Procedure – Applications – Application for extension of time to file a written statement of defence – Whether extension can be made at any time or is restricted to within 21 days after expiry of the time provided – Section 93 and Order VIII, rule 1(2) of the Civil Procedure Code 1966.*

G After the respondent had filed his plaint the appellant was ordered to file a Written Statement of Defence by 25 March 1997. The appellant delayed to file the Written Statement of Defence by 98 days. On the day it filed the Written Statement of Defence the appellant applied for an extension of time to file the Written Statement of Defence
H to the date it was filed. The respondent successfully raised a preliminary objection to that application and the Written Statement of Defence was struck out. The appellant appealed against that decision of the High Court and argued that Order VIII, rule 1(2) of the Civil Procedure Code 1966, which restricts the application for extension
I of time to within 21 days, is against the provisions of section 93 of the same Code.

Held: (i) While section 93 of the Civil Procedure Code 1966, imposes no restriction whatsoever in the court's discretion in extending time, the proviso to Order XIII, rule1(2) imposes limitation on the discretion of the Court to extend the time within which the defendant can file a Written Statement of Defence and requires an application to extend time must be made within 21 days of the expiry of the time set for the lodging of the Written Statement of Defence; A B

(ii) This Court has said in a number of decision that time would be extended if there is an illegality to be rectified; however, this Court has not said that time must be extended in every situation; C

(iii) In this case the defence has been grossly negligent and surely cannot be heard now to claim that there is a point of law at stake;

(iv) This Court is duty-bound to see that Rules of Court are observed strictly and cannot aid any party who deliberately commits lapses because to do so, as in the present case, would defeat the whole reasoning behind amending the Civil Procedure Rules in 1994. D

Appeal dismissed E

Statutory provisions referred to:

(1) Civil Procedure Code 1966, Order VII, rule 1(2), Order XIII, rule 1(2)

(2) Civil Procedure Code section 93 F

Mr Mnzava, for the Appellant

Mr Magesa, for the Respondent

JUDGMENT G

(Dated 6 April 2001)

Ramadhani, J.A.: The respondent filed a plaint on or about 13 February 1997 and the appellant was ordered to file a Written Statement of Defence (WSD) by 25 March 1997. That was not done and instead the Written Statement of Defence was filed on 2 July 1997, that is, after 98 days. On the same day of lodging the Written Statement of H I