



## BUYER BEWARE VIS A VIS THE “AS IS “ CONTRACTS IN CONVEYANCING

It is another day in the outskirts of Dar es salaam. The rains still feel no remorse and I ah well I had to do my weekend justice, I couldn't say no to cup of home made *late'* and biscuits staring at me that the wife just made while reminiscing over a quote I once came across. The quote went something like this~***“They call this war a cloud over the land. But they made the weather and then they stand in the rain and say ‘Shit, it’s raining!’ ”***, weird as it is, it so much drove me to writing this article today. You see, too often, buyers and sellers draft their own contracts and write them in such a way that they're not legally enforceable. They do things and then complain the mess that it got them to.

While most people are most concerned with the negotiations of the purchase price, it is imperative for the consumer to understand what the “As Is” clause in a Real Estate Contract really means. The impact these two small words can have on the business transaction is second to none! Because of the legal and financial ramifications of an “As Is” property, it is important that the Buyer investigate a property's liabilities before starting the price negotiation phase. Furthermore, it is even more crucial to understand what it means by “buyer beware or caveat emptor” and the impact of the former and the later in real estate.

Since time immemorial, even though not in Tanzania, it has become standard for Sellers to include the term “As Is” in Real Estate Agreements or Purchase Contracts, in hopes that this clause will alleviate them from their responsibilities. They intend for the “As Is” clause to be their “official notice” of the property's condition or lack of warranty, thereof. The ideology behind the phrase is two fold. First, the Seller is giving “official notice” and opportunity to the Buyer to discover any defects in the property; and second, the Seller is transferring the responsibility of finding and then accepting said defects to the Buyer.

Most Buyers are lured into accepting the “As Is” clause with the false sense of security they attain from the professionals like Valuers and Real Estate agents and the like. While this clause may give some protection to the Seller, regarding unknown defects, it will not protect them from the blatant misrepresentation and concealment of the property's known defective condition. A misrepresentation is a representation or statement of fact which is false. Where the purchaser signs a contract as a result of certain misrepresentation on the part of the vendor, he is entitled to rescind/repudiate the contract and sue for damages as per sections 18 and 19 of the Law of Contract Act cap 345 RE 2002.

A person has actual notice of all facts which he has actual knowledge of, no matter how that knowledge was acquired. But he is not regarded as having actual notice of facts which have come to his ears only through vague rumours. According to section 2 of the Land Act, it is expressed as *‘the notice which a person has personally, of a matter or action or document or*



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*the rights and interests of another person.’*

In Tanzania statutory notice is provided in section 34 of Cap 3347 RE 2002 that every person acquiring any estate or interest in any registered land is deemed to have actual notice of every subsisting memorial relating to such land in the land register at the time of acquiring such estate or interest including registered incumbrances. Failure to discover or conduct a search to find out about those facts is not a defence. It is crucial to know that any person is free to inspect the land register for any filed documents, index map or plan during office hours.

Parties to a contract of sale must therefore invest a lot of time in inquiring and inspecting to find out about the property to be conveyed. The vendor’s duty is to disclose latent defects and not patent defects. A patent defect is the one which can be easily seen by the eye. A defect is not patent merely because the purchaser has constructive notice of it. It must be one which arises either to the eye or by necessary implication from something which is visible to the eye. An obvious right of way is likely to be patent while a tenancy, a restrictive covenant and a mortgage are all latent defects. Where the vendor conceals of latent defect he will be liable for his action. The justification for holding him liable is that it is fraud for a vendor not to disclose a defect in title which he is aware. The purchaser necessarily relies on him to disclose any latent defects in the property whether he knows them or not

Sellers can, more thoroughly, protect themselves from charges of misrepresentation and fraud when they specifically list known defects in writing. This disclosure usually remedies any future questions as to Seller’s intentions. Rat problems is one example of what the “As Is” clause excludes. Sellers and their Agents should be very careful in all written disclosures and verbal representations. Neither the “As Is” clause, nor the language of the “Merger” clause (found in all contracts) now offers the merits of protection they once did. The “Merger Clause” is legal terminology included in the contract to ensure that all parties understand the written contract is the entire agreement between parties. It is, also, an insurance policy that evidence, outside the contract, will not be admissible in a court of law to contradict the terms of the written agreement should there ever be a dispute.

Buyers, sellers and their representatives should also avoid using a “one-size-fits-all” approach to contracts and set out to create agreements that reflect the risk they’re willing to assume in each transaction. Because real estate agents are not practicing lawyers, they are not able to modify the language in a contract or give you legal advice; therefore, it is imperative that you have a lawyer preview the language of your Offer to Purchase before presentation to the Seller.



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