

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO 67 OF 2016

BETWEEN
SOULTED RIVER AUCTION MART AND COMPANY LTD -----PLAINTIFF
VERSUS
D.K.M LEGAL CONSULTANTS-----1ST DEFENDANT
E.EC TANZANIA MFC LTD-----2ND DEFENDANT

JUDGMENT

SONGORO, J

Soulted River Auction Mart Company Ltd, the Plaintiff sued DKM Legal Consultant and EFC Tanzania MFC Ltd the 1st and 2nd Defendant claiming that, on the 8/12/2015 it entered into a Memorandum of Understanding with the 1st defendant to conduct auctioneers services and debt collection. Plaintiff claimed all those work, he will discharge them as an agent of the 1st Defendant.

In the light of the said Memorandum of Understanding he signed with the 1st Defendant authorised the plaintiff to auction the house situated at Plot No 97 held under the Certificate of Title No 1861667/83. Following the assignment the plaintiff claimed that, he advertise the sale of the said house in Habari Leo Newspaper of 29/12/2015.

Next, the plaintiff claim for unknown reason the 1st defendant also instructed R.R Auction Mart and General Broker to auction the same house which was advertised by him in Habari Leo Newspaper of 20/12 /2015. The plaintiff therefore claimed the plaintiff breached the contract and further prayed for the following orders and reliefs;-

- a) A declaration that, the 1st defendant breached the memorandum of understanding signed with the plaintiff.
- b) The 1st defendant be ordered to pay the plaintiff a sum of shs 50,000,000 as compensation for commission that, was to be earned by auctioning the said property.
- c) The second defendant be restrained from assigning auctioning duties to the 1st defendant.
- d) The 1st defendant be ordered to pay general damages.
- e) Interest at commercial rate on item (b) above.

f) Costs to be provided for.

In response to the plaintiff suit, and claims, the two defendants filed a joint written statement of defence and admitted that, the plaintiff was hired R& R Auction Mart & General Brokers to auction the house and not the plaintiff because the plaintiff did not have a valid business licence

On the Memorandum of Understanding the 1st defendant stated that, it only created a relationship with the plaintiff as an agent who was supposed to act under instructions of the 1st defendant. The defendants disputed the remaining plaintiff's claims and was put to strict proof.

In the light of the plaintiff's claims and defendants denials the court in consultation with counsels from both sides drew the following issues for determinations;-

- 1) Whether or not there was a memorandum of Understanding entered between the plaintiff and defendants, and if defendants breached its terms.
- 2) Whether the property subject of the dispute was disposal off by a way of auction.
- 3) If the answer to item 2 above is in affirmative then whether or not the plaintiff is entitled to shs 50,000,000 as compensation.
- 4) What relief or reliefs are parties entitled too.

So the plaintiff suit was heard and determined on the basis of the above mentioned agreed issues. During the hearing of the suit the plaintiff was represented by Mr Nuguna, Learned Advocate and defendants were represented by Mr. Mbuga, Learned Advocate.

In pursuing his claims, the plaintiff called Ally Moshi Omari who testified as PW1 and relied on his witness statement. In his testimony aPW1 told the court that, is the Managing Director of Soulted River Auction Mart, an auctioneer company based at Dar es Salaam.

He then explained that, was hired by DMK Legal Consultants the 1st defendant who was acting on behalf of EFC Tanzania Limited the 2nd defendant to sale by auction house on Plot No 79 situated at Upanga Dar es Salaam held under a certificate of title No 18611667/82.

Also, he explained to the court that, was assured by the 1st defendant in the Memorandum of Understanding that, will be paid a commission of shs 50,000,000 from proceed arising from sale of the house .

Further, PW1 claimed in the witness statement that, the 1st defendant frustrated the auction and breached the agreement by appointing another auctioneer in the name of R& R Auction Mart & General Brokers to conduct sale of the house without informing the plaintiff, or terminating the agreement.

It was the argument and submission PW1 in the witness statement that, in order to protect the plaintiff rights under the agreement, the court should order the 1st defendant to pay agreed sum of shs 50,000,000/= since he worked on the auction as per agreement and the house was sold.

To support his point, that, the plaintiff and 1st defendant entered into memorandum of understanding that, the plaintiff will offer auctioneer's services, PW1 tendered a Memorandum of Understanding entered between the plaintiff and 1st defendant which was admitted as Exhibit P1 Next, PW1 was cross examined and re-examined and the plaintiff case was closed and defence case was opened.

On his part the 1st defendant called Diane Matondane who testified as DW1 and stated in her witness statement that, is a partner in DKM Legal Consultants, the 1st defendant's company which deals with legal issues. She then explained that, their company entered into Memorandum of Understanding with the plaintiff on 8/12/2015 to render services of general auctioneers and debt collections.

Furthermore, DW1 explained that, in the Memorandum of Understanding it was agreed that, the plaintiff was to render services of general auctioneers and debt collections works which will be assigned to him. Also, the two companies agreed that, the commission will be 5% of the total amount collected upon recovery of the purchase price arising from services. . The witness also indicated that, there were other auctioneers who were rendering such services to the 1st defendant and the plaintiff was aware of their existence.

Concerning sale of the house DW1 admitted in paragraph 6 of her witness statement that, on 2nd January 2016 the plaintiff was assigned to auction and sale the house by the 1st defendant. However the auction and sale could not proceed due a court case filed by owner of the house to oppose the sale. So contention that, that, defendants frustrated the sale which was organized by the plaintiff and breached terms of memorandum of understanding is not true

The witness further explained that, immediately after a court case was r struck out at Ilala District Court, the plaintiff was notified by the 1st defendant to bring his valid business licenses for updating purposes, but the plaintiff did not comply with that, requirement. DW1 then explained efforts to communicate with Ally Moshi PW1 who was the director and owner of Soluted River Auction Mart the plaintiff's company proved futile. So the 1st defendant opted to engage the services of R& R Auction Mart & General Brokers Limited to auction the house.

It was the statement of DW1 that, the plaintiff after knowing the 1st defendant has engaged another auctioneer, he went and posted an advertisement in Newspapers that, is selling the house with the aim of frustrating the customers

Regarding the sale of the house, DW1 explained that, the sale has not taken place because the owner of the house has instituted a Land Case at the High Court of Tanzania challenging the intended sale which is still post- date.

The defence witness strongly argued that, there has been no breach of terms of the Memorandum of Understanding, because the property has not been sold, there was no any sale proceedings which took entitled the plaintiff to be paid commission fees from the purchased price. He then explained that, even if there was sale or auction transaction to be conducted the plaintiff would not been hired to conducted sale or auction due to lack of valid business licence. Also the plaintiff suit is just an afterthought.

To support defence case that, the house has not be sold to-date and commission may not be paid DW1 tendered a court summons of Land Case No 269 of 2016 from High Court Land Division which was admitted as Exhibit D1. After DW1 testified was cross examined and re-examined. Subsequently the defence case was closed.

Following closure of the plaintiff and defendant's case both counsels with the leave of the court were invited to make their closing submissions.

On his part, the plaintiff counsel pointed out to the court that, the claim is based on breach of terms of the Memorandum of Understanding in which the plaintiff was assigned to auction the property situated at Plot No 97 held under CT 186166/82.

The counsel then indicated that, the when plaintiff was performing his assigned duties of auctioneer, the 1st defendant engaged another auctioneer in the name of R & R Auction Mart who interfered with the auction process which was initiated by the plaintiff company and the interference frustrated the plaintiff work which was midway.

It was the plaintiff's counsel submission that, the plaintiff conducted the auction and successful bidder was selected and purchase price was paid, but the 1st defendant blocked the payment of auction price from a customer who wanted to pay purchase price.

Plaintiff counsel then pointed out that, the plaintiff and 1st defendant are bound by Memorandum of Understanding. The counsel then maintained that, since there is a testimony of DW1 that, the purchase price was paid, certainly the plaintiff is entitled to commission of shs 50,000,000 arising from proceeds of sale as per their agreement. Next, the plaintiff's counsel submitted that, the plaintiff is entitled to judgment decree and damages as prayed in the plaint.

On his part, Mr. Mbuga Jonathan, Learned Advocate for defendants submitted that, there is no dispute that, the plaintiff and defendant entered into Memorandum of Understanding under which the plaintiff agreed to provide auctioneers services to the 1st defendant.

Regarding plaintiff contention that, there was a breached of the agreed terms, the defendant counsel submitted the first planned auction was frustrated by court case and after the case was struck out by the Tribunal, the 1st defendant assigned another company to auction the house because the plaintiff did not have a valid business licence. The defence counsel insisted that, re-assignment was done because the plaintiff did not have a valid business licence for year 2006

which authorised him to discharge his contractual obligation of auctioneer, and was not cooperative when he was requested to furnish the valid business licence. . Further, the defendant's counsel submitted that, the plaintiff claim that, the 1st defendant breached agreed terms has no basis because the house was not sold by him.

Turning to the point that, the property was sold by the plaintiff, the counsel submitted that, there is no evidence on when the property was sold, who purchased the property, and what was the price which was offered. He then explained in the absence of the accurate details of who purchased the property, when was it sold, and what was purchase price the plaintiff assertion that, he sold the property remains with no leg to stand but a mere assertion.

Also he submitted the plaintiff assertion for payment of shs 50,000,000 as commission in the absence of sale remains with no leg to stand because the purchase price which plaintiff alleges was paid in the auction which he conducted was not prove to warrant the payment of demanded commission.

In what relief are parties entitled too, the defence counsel submitted that, the plaintiff evidence did not prove if there was a breach of terms of the Memorandum of Understanding committed by the defendants. So he prayed to the court to dismiss the plaintiff claims with costs in favour of the defendant.

The court has considered the plaintiff claims he conducted auction, the property was sold and purchase price was paid and demand for payment of commissioner of shs 50,000,000 and find it mainly depends on what was agreed upon in the Memorandum of Understanding

I therefore find taking into account that, it is the plaintiff who alleges that, as per Memorandum of Understanding is entitled to payment of shs 50,000,000 as commission and defendants for not paying the sum has breached the terms of Memorandum of Understanding, it follows therefore that, it is trite law, under Section 110 (1) and (2) of the Evidence Act, 1967, Cap 6 R.E. 2002 that, whoever request a court to give judgment in his favour as to any legal right on the existence of any fact which he asserts, must prove that, the fact exist. In the present case it is plaintiff who is alleging

and the burden of proof is on his shoulders and the level of proof is that, of the balance of probability.

Guided with Section 101 (1) of the Evidence Act, Cap 6 [R.E 2002] that, burden of proving each and every allegation lies of the plaintiff, I straight went to address the 1st agreed issue of whether in Memorandum of Understanding there was contractual terms that, the plaintiff will be paid commission and if none payment amounted to breach of the agreed terms.

In addressing the above mentioned 1st agreed issue, I find there is no dispute that, there was a Memorandum of Understanding between D.K.M Legal Consultants, the 1st defendant and Soulted River Auction Mart & Co Ltd the plaintiff regarding, General Auctioneer and Debt Collection Services which was admitted as **Exhibit P1**.

Further, the court find that, the scope of work which was agreed upon was that, Soulted River Auction, the plaintiff was required to act and institute debt recovery measure against all selected basket of defaulters. In deed Clause 1 stated that;

"The scope of work as per this agreement required is for Soulted River Auction Mart to act and institute debt Recovery measures against all selected basket of defaulters (as per the list to be provided in future) by D.K.M Legal"

Now on the part of remuneration for services to be rendered, I find what was **agreed upon**, is provided in clause 4 of Exhibit P1. The terms states that, the plaintiff will be entitled to "**fees**" and not "**commission**" as the plaintiff claim in his plaint". Indeed clause 4 stated as follows:-

4. FEES

As remuneration for services to be rendered by Soulted River Auction Mart, D.K.M Legal shall remunerate Soulted River Auction Mart for different assignment as follows:-

- 4.1 Auctioneer Services -----5% of the total amount*
- 4.2. Debt Collection Services -----5% of the total amount*
- 4.3 Commission Agent -----5% of the total Value*

4.4 Eviction Services -----5% of the amount.

Now reverting back to the plaintiff claim, it appears from paragraph 11 of the plaint, that, he is claiming to be paid a commission of shs 50,000,000 which emanates from auction and purchase price. The basis of his claimed "commission" is that, the alleged property was sold over One Billion Tanzanian shillings.

The court has assessed the plaintiff claim for payment of commission as per plaint and find in the Memorandum of Understanding Exhibit P1 which was tendered by the plaintiff himself realized that, there is no "word" or "sentence" or "term" in Exhibit P1 which is a Memorandum of Understanding which suggest or state that, the plaintiff will be paid" a commission" in even the property is sold.

It seems to me from paragraphs 4 and 5 the plaintiff's claims originates from auctioneer services and clause 4.1 of Memorandum of Understanding provides such services once rendered it merely attract a fee of 5 % of the total amount of sale, and not a commission.

It is in public domain that, a "commission" and "fees" are two distinct payments and are not related and may not be interchanged. To clarify that, pointed I noted from "Judicial Dictionary" by Justice Singh P.K. Majmudar 2nd Edition, Orient Publish Company at page 511 it defines "commission" as

"An amount settled before hand which goes to the person who brings the business for the company"

And according to Black's Law Dictionary 10th Edition, by Bryan A. Gardner at page 732 defines "Fees" as

"Charge or payment for labour or services or services especially professional services"

So upon reading the two definitions of "commission is payable beforehand to a person who bring business" and "fees is payable for services to be rendered." So any reasonable man will come to the conclusions that, the two remunerations are "different".

Next I find clause 4 of Exhibit P1 which is a contractual framework signed by plaintiff and defendant's company what was agreed upon is payment of fees for services to be rendered. So to conclude I find what was agreed upon between two parties is payment of fees and not payment of the commission. The plaintiff claim for commission would have been valid and legally maintainable if such term of payment of commission was inserted in the Memorandum of Understanding.

Also going by clause 4 of Exhibit P1, I dare to say that, the 1st defendant's contractual obligation of payment fees to the plaintiff arises in case of auctioneers services, in the event the auctioneers services have been fully rendered and purchase price has been paid. . A mere portion or part of the work where purchase price was not paid will not suffice to raise a successful claim of 5% of the total sum paid.

I therefore decline to entertain a claim of commission at this juncture because the court will be introducing a new term on the Memorandum of Understanding which was not agreed upon at the time of signing the agreement. It is important to note courts of law in several decisions including in the case between Osman v Mulangwa [1995–1998] 2 EA 275 (SCU) and Jiwaji v Jiwaji [1968] EA 547 have stated that, a court will not make contracts for the parties, but will give effect to the clear intentions of the parties.

Taking into decision in two cited cases I find since Clause 4 of the Memorandum of Understanding Exhibit P1 do not contemplate the payment of the commission on auctioneer services, it follow therefore the plaintiff claim for payment of the commission of shs 50,000,000/= is not legally and contractually maintainable because was not provided for in Exhibit P1. So the plaintiff's claim of commission fails.

However, for sake of justice the court went a step further and consider whether the plaintiff is entitled to payment fees. I have considered a claim of payment of fees with the weight it deserve and in line with evidence and easily find there is no proof which established that, the plaintiff organized or conducted auction and the property was sold .

The plaintiff evidence did not establish when he conducted the auction, who bought the property in his auction, what was purchase price realized from his auction. In the absence of credible evidence on when the auction took place that, give credence and support to the testimony of DW1 that, the plaintiff did not conduct or organize any auction and sale of property which would have entitled the plaintiff payment of fees as per clause 4 of the Memorandum of Understanding.

A mere fact that, the plaintiff put an advert of auction in the newspaper, was not a criteria set out in clause 4 of the Exhibit P1 as a basis of payment of auctioneers fees... The intention of both parties which may be captured from Clause 4 of Exhibit P1 is that, payment of fees is pegged on rendered auctioneer services not just a mere advertisement in the newspaper.

Turning to the point whether the 1st defendant breached the terms of the agreement by appointing R & R Auction Mart to undertake the auctioneer service of property situated at Plot No 97 the court find that, alone may not support a claim for breach of Memorandum of Understanding between the plaintiff and 1st defendant because their agreement did not provide that, the plaintiff will be the sole service provider of auctioneer services.

More I find there is DW1 testimony and evidence which was not challenged by the plaintiff that, by the moment fresh auction was being organized the plaintiff did not have a valid licence appear to be true and convinces the court that, plaintiff was in a position to conduct auction. Bearing in mind that, the plaintiff did not have a valid licence all what was agreed between the plaintiff and defendant was indeed frustrated and it was no possible for the plaintiff to organize an auction.

The court was expecting that, the plaintiff in proving his claims as auctioneer he a would have even tendered as Exhibits all his valid auctioneer business s license's, sale agreement of the property, or copy of transfer of property arising of sale organized from his auction . In the absence of such license's and other documents which shows the property was sold by him, his claims for payment of fees and there was a breach committed by the 1st defendant remains to be unsubstantiated. To conclude on the 1st agreed issue I find there was no evidence of breach of terms of the Memorandum of Understanding.

Turning to the second agreed issue of whether or not the plaintiff is entitled to shs 50,000,000 as commissions, I have already address that, point by stating there was no agreement that, the plaintiff would be paid a commission.

Moving to the point of what relief are parties entitled too, the court find since the plaintiff evidence did not prove that, he conducted auction or sold the property and purchase price was paid to warrant the payment of commission or fees as per clause 4 of Memorandum of Understanding Exhibit P1, also there is no proof of breach of contract, honestly the court find plaintiff claims in the plaint were not proved on the balance of probability. Consequently, I hereby dismiss the plaintiff suit with cost in favour of defendants.

Dated and Delivered at Dar es Salaam this 25th day of June, 2018




H.T.SONGORO
JUDGE

The judgment was delivered in the presence of. Mr. Ally Moshi, the Director of the plaintiff company and in the absence of the defendant and his counsel.