

IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF SUMBAWANGA)

AT SUMBAWANGA

CIVIL APPEAL NO 4 OF 2018

(Originated Civil Case No. 8 of 2016 from Sumbawanga District Court)

SUMBAWANGA DISTRICT COUNCIL APPELLANT

VERSUS

ADOSTA INVESTMENT COMPANY LIMITED RESPONDENT

JUDGMENT

09/08/2020 & 08/09/2020

W. R. MASHAURI, J.:

This is a Civil Appeal No. 4 of 2018. It is emanating from civil Case No. 8 of 2016 delivered by the District Court of Sumbawanga at Sumbawanga whereby the appellant in this appeal Sumbawanga District Council was plaintiff and the respondent in this appeal Adosta Investment Company Limited was Defendant.

In the trial court, the Appellant had sued the respondent for reliefs to wit:-

- (i) Settlement of the debt of Tshs. 129,732,400/=.
- (ii) Interest of 12% annum from the date of filing this suit until judgment, interest at 7% per annum until final certification of the debt.

- (iii) Costs of the suit to be borne by defendant.
- (iv) Any other relief that the court deem fit to grant.

The defendant denied the whole claims and filed counter-claim against the plaintiff.

Wherefore: The plaintiff in the counter-claim prays for judgment and Decree against the defendant in counter-claims as follows:-

- (a) Payment of the principal of sum of Shs. 120,777,250% as pleaded in the counter claim.
- (b) Interest on (a) at 25% per annum from 01.01.2015 to the date of judgment.
- (c) General damages to be assessed by the court.
- (d) Interest on the decretal sum at the court rate of 12% per annum from the date of judgment till full and final payment.
- (e) Dismissal of the plaintiff suit [main suit].
- (f) Costs of this suit.
- (g) Any or further relief(s) this court may find fit and equitable to grant.

When the suit came up for determination before Hon. R. M. Mugissa – SRM on 21/03/2018, in presence of both parties, the court ordered thus:-

- (i) Dismissal of the plaintiff's suit [main suit] for lack of merit.
- (ii) Payment of principal of Shs. 120,577,250/=.
- (iii) Interest on (ii) above at 25% per annum from 01.01.2015 to date of judgment.
- (iv) General damages of Tshs. 50,000,000/= be paid by defendant in counter-claim.

- (v) Costs of the suit to be borne by the defendant in counter-claim.

Having been so decreed against, the Sumbawanga District council [plaintiff] has now come to this court wielding five grounds of Appeal namely:-

1. That, the Hon. Trial Magistrate erred in law and in fact for not considering the contractual Penalty of 2% for late remittance of Monthly collections as provided in the contract documents the trial court admitted as exhibit.
2. That, the Hon. Trial Magistrate erred in law and in fact by awarding damages to the respondent at the tune of Shs. 50,000,000/= the assessment criteria and formula of which is uncertain.
3. That, the Hon. Trial Magistrate erred in law and in fact by awarding interest of the tune of 25% per annum from 1st January, 2015 without considering the reception date of the purported payment of the sum of 212,577,250/= from NFRA [NATIONAL FOOD RESERVE AGENCY].
4. That, the Hon. Trial court Magistrate erred in law and in fact to award Shs. 120,577,250/= without considering the fact that the debt was supposed to be calculated by using levy amount put forth in the Appellant's by law and contractual terms adduced and admitted before the trial court.
5. The Hon. Trial Magistrate erred in law and fact by disbelieving evidence adduced by the appellant during trial of the case.

Both parties sought to argue their submissions by way of written submissions and were granted by the court.

In his submission in support of the appeal, Mr. Herbert J. Mbise the district Solicitor for Sumbawanga district council [The Appellant] submitted that, the appellant has preferred this appeal after being dissatisfied with the decision of Sumbawanga District Court delivered on 21/03/2018 against the appellant in this court and plaintiff in the trial court.

That, on 05/05/2019, the appellant in this appeal instituted Civil Case No. 8 of 2016 under order XXXV [summary suit/ procedure] in the Sumbawanga District Court claiming against Adosta Investment Co. Ltd [Respondent] for recovery of Tshs. 129,732,400/= as an outstanding amount of collected levy.

The appellant and the Respondent had earlier through three different contracts entered into agreement on the 1st of April, 2014 for collection of produce levy 1st contract was for Mtowisa, Muze, Mfinga worth 264,000,000/= 2nd contract for Lusaka, Mpui, Kalambazile worth 75,000,000/= and the 3rd for Mangalua worth 65,000,000/=.

The Sumbawanga District court dismissed the plaintiff's/Appellant's case and uphold the counter claim case against the Appellant. Dissatisfied with the court's decision, the appellant has now come to this court.

In support of the appeal Mr. Mbise Solicitor for the appellant submitted that, the trial magistrate erred in law and fact for not considering the contractual penalty of 20% as provided in the contract documents admitted as exhibits during trial.

That, according to clause 14 of the contract No. LGA/097/2013-2014/A.20/01 which is "*Mutatis Mutandis*" to clause 14 in all the three contract documents they do not form part of the records of this appeal as they were tendered as exhibit in the trial court] the parties agreed that in case of any delay on remission of the collected revenue, the Respondent herein would be subject to a penalty amounting to 2% of the agent's monthly payment.

That, the Hon. Trial Magistrate did not consider the fact that, in the course of execution of the contract the respondent could have severally not remit on time the collected money which went contrary to the agreement under clause 14 of the contract. The trial magistrate disregarded and went on to disbelieve the evidence produced on the subject which if taken would have been meritorious on the part of the appellant as would have reduced on merit the amount on the Appellant was ordered to pay.

The Trial Magistrate awarded the Respondent damages at the tune of Shs. 50,000,000/= the award of which was alleged to have being tainted with uncertainties.

To buttress his submission he referred this court to the case of **Trade Union congress of Tanzania [TUCTA] v/s Engineering Systems Consultants Ltd & 2 others** Civil Appeal No. 51 of 2016 DSM Registry [unreported] in which the court of Appeal of Tanzania held that:

"...the law is settled that, general damages are awarded by the trial court after consternation and deliberation on the evidence on record able to justify the award. The judge has

discretion in awarding general damages although the judge has to assign reasons in awarding the same"

Furthers till, counsel for the appellant referred this court again to the case of **Rock Beach Hotel v/s Tanzania Revenue Authority** Civil Case No. 52 of 2002 [unreported] where the CAT held that:-

"...Whether the assessment of damages by a judge or jury, the appellate court is not justified in substituting a figure of its own for that award, simply because it would have awarded a different figure if it had tried the case.... Before the appellate court can properly intervene, it must be satisfied either that, the judge, in assessing the damages, applied a wrong principle of law [as taking into account some irrelevant factor or leaving out of account some relevant one] or short of this, the amount awarded is so inordinately low or so inordinately high that it must be wholly erroneously estate of the damages.

Having cited the **Rock Breach Hotel** [supra], solicitor for the appellant prayed this court to perceive that, the damages in this case were awarded basing on wrong principal of law.

That, the trial magistrate ordered interest of 25% accruing from January 2015 without regard to the fact that till January, 2015 payment of Shs. 215,577,250/= from **National Food Reserve Agency** was yet effected.

That, clause 11.2 of the three contracts clearly provides that, the respondent had to collect and remit levies basing on the amounts set down in the appellant's by law which was tendered in evidence during trial of the case.

When calculating the debt, the trial court misled itself for failure to consider the fact that, the amount had to be calculated basing on the quantities set in the By – Law. Payment of the amount from the National

Food Reserve Agency was not in abidance to the By law but to the Local Government finance Act, 1982 the provisions from which acquires payment of produce case at the rate within 2-5% of the marked price at a particular moment in time.

In this case, the trial magistrate dismissed the plaintiff's case for lack of merit without regard and consideration of triable issues in the plaintiff's case.

The trial magistrate erred in law and fact altering that requirement of the law under order XX rule 4 which provides thus:-

"Judgment shall contain concise statement of the case, the points for determination, the decision thereon and the reasons for such decision."

Having so submitted, counsel for the appellant prayed the court to quash the decision and the order of the District court with costs.

In his written submission against the appeal, counsel for the respondent started with the brief statement by saying that, the appellant instituted Civil Case No. 8 of 2016 at the District court of Sumbawanga under summary procedure praying to be paid the sum of Shs. 129,732,400/= as an outstanding amount collected as levies by the respondent.

After obtaining leave to defend, the respondent denied the appellant's claims and by way of counter claim prayed to be paid the sum of Shs. 120,277,250/= being the balance as way of set off after deducting the amount owed to the appellant.

After hearing evidence of both parties, the District court dismissed the appellant's claims and sustained the counter claim. Hence this appeal by the appellant.

In response to the appellant's five grounds of appeal, counsel for the respondent opted to deal with them seriatim.

For the 1st ground of appeal, counsel for the respondent declared it to have been devoid of merit on the reason that, in his plaint, the appellant claimed Shs. 129,732,400/=, THAT IS, Shs. 92,666,000/= being principal and Shs. 37,066,400/= being interest. The respondent did not in its defence and counter-claim dispute the principal amount but contended that, the same were paid by way of set off after National food Reserve Agency [MFRA] paid the total sum of Shs. 212,577,250/= to the appellant of which the latter was legally bound to chop the said Shs. 92,666,000/= and remit the balance of Shs. 120,577,250/= to the respondent. The appellant refused to remit the balance or any part without assigning any reason either in their pleadings.

During the hearing of the case, the appellant did not lead any evidence to prove the allegation. No single witness testified on which date remittance was done and the number of days or months of the alleged delay.

That, the Audit report [exh. "p5"] which was tendered by the appellant to substantiate their claims says nothing on the alleged penalty. There were also no evidence tendered to show how the claimed interest was arrived at. By so doing, the trial magistrate cannot be faulted on the matter not pleaded by the appellant and proved it.

Even if it can be said that, there was such late remittance the trial court was right not to invoke the 2% penalty clause due to the evidence that was tendered by the respondent in trial of the case.

That, the respondent was not advised and/or informed by the appellant, at the date of entering into the contracts [exh. P2 and P3] that NFRA or any other party will interfere in the process of forming the respective contracts.

That, when the respondent complained to the appellant, the appellant wrote to MFRA and copied the respondent [exh. D4] introduced NFRA to the respondent and assured that they will paid; and vide exh. D"7" NFRA wrote the respondent copy to the appellant to the effect that they would pay at the end of the season upon received Funds from the Treasury. The appellant did not dispute, and vide exhibit D"5" NFRA provided details to the respondent the amount to be paid and the respondent was in the know that, already Shs. 212,577,500/= had been paid to the appellant exhibits D"6" and D"9".

For the second ground of appeal that the trial magistrate erred in law and fact by awarding damages to the respondent to the tune of Shs. 50,000,000/=, the assessment criteria being tainted with uncertainties; counsel for the respondent submitted that, the award of damages awarded to the respondent is attacked by the appellant on two fronts namely:-

- (a) That damages was awarded to the respondent without consideration and deliberation on evidence in record, and

- (b) Loss, to the respondent if any was not out of any proximate wrongful conduct of the appellant rather an interference by a third party which both parties to the contract could not primarily see.

For the first limb of contention, the appellant did not state or pointed out which evidence in record was disregarded.

That alone makes a ground of appeal devoid of merit.

However, counsel for the respondent referred this case to the case of Cooper Motor corporation Ltd v/s Moshi/Arusha Occupation Health Service [1990] TLR 96 where the Court of Appeal of Tanzania held that:-

"Whether the assessment of damages by judge or jury, the appellate court is not justified in substituting its figure of its own for that awarded simply because it would have awarded a different figure if it had tried case.... Before appellate court can properly interfere, it must be satisfied that, the judge in assessing the damages applied a wrong principle of law [as taking into account some irrelevant factors or leaving out of some relevant one] or short of that, the amount so awarded is so inordinate low or so high that it must be wholly erroneous estimate,"

He also cited the case of **Tanganyika standard [N] Ltd & another v/s Rugarabamu, Archard Mwombeki** [1987] TLR 40

Where the court held that:-

"The quantum where the trial judge takes into account all pertinent and relevant consideration."

That, in the **Tanganyika Standard [M] Ltd**, case [supra], the court further held that:-

"Where the judge has not based an award on the value of shillings in a year, he must be properly taken to have based the award on the shilling value at the time he was making the award."

That, in this case, the respondent has been denied Shs. 120,577,250/= for consecutive three years at the date of filing this suit. If the amount is apportioned to each year, it is Shs. 16,600,000/= loss per year.

It is possible for Shs. 120,577,250/= to generate 16.0 million even through normal deposit to the bank.

Counsel for the respondent further stated that, from the totality of what has been submitted in this application, he did not see any reason for the appellate court to interfere with the award of Shs. 50,000,000/= as general damage.

For the 3rd ground of appeal that, the trial magistrate erred in law and fact by awarding interest at the tune of 25% per annum from 1st January, 2015 without considering the reception date of the purported payment of the sum of Shs. 212,577,500/= from NERA [National food Reserve Agency], counsel for the respondent challenged the 3rd ground that the trial magistrate erred in law and fact by awarding interest at the rate of 25% per annum from 1st January, 2015 without consideration the reception of the purported payment of the sum of Shs. 212,577,500/= from NFRA was not a purported payment. It was really payment as evidenced from exh. D"6" and D"9" where

the respondent demanded to be paid their dues and the appellant did not deny reception of the amount from NFRA but opted to mum, and in counter claim at paragraph 20 the respondent had alleged that NFRA had already paid the sum of Shs. 212,577,250/= to the appellant. In defence to counter claim, at paragraph 18 the appellant admitted reception of the payment but evasively contended not to be produce less without stating it was for what purposes.

That during hearing PW2 admitted that NFRA paid that amount to the appellant and was seen in their books of account.

That, in their submissions, the appellant is no longer calling the same purported payment but lamenting charging interest from the date which is deferent from the date the appellant received payment. Hence it is no longer any issue, shillings 212,577,250/= was paid and received by the appellant from NFRA.

For the 4th ground of appeal that the trial magistrate erred in law and fact to award shs. 120,577,250/= without considering the fact that the debt was supposed to be calculated by using levy amount put forth in the appellant's By law and contractual terms adduced and admitted before the trial, with due respect, counsel for the respondent denied it to be an issue before the trial court. It was neither pleaded in the plaint nor in a defence to counter claim. All along during trial, the appellant denied to have received payment from NFRA.

That, in his memorandum of appeal, the appellant has abandoned the 5th ground of appeal which reads that.

The Hon. Trial magistrate erred in law and fact by disbelieving evidence adduced by the appellant during trial of the case.

That, in her submission at page 4 last but one paragraph the appellant is faulting the trial magistrate that, the judgment does not contain concise statement of the case, the point for determination, the decision thereon and the reason for such decision in accordance with order XX rule 4 of unnamed law. This new ground of appeal is not contained in the memorandum of appeal lodged in court on 15/05/2018 hence contrary to the provisions of order XXXIX Rule I(2) of the CPC Cap 33 RE: 2002 which bars the appellant from introducing a new ground of appeal without leave of the court.

Counsel for the respondent therefore prayed this court to dismiss this new ground of appeal.

The issues are whether the appellant Sumbawanga District Council and the respondent Adosta Investment Company Ltd have entered into a contract of collecting revenue of which the respondent was duty bound to remit the collected revenue money to the appellant in an agreed span of time, and two, whether the respondent delayed remission of the collected revenue money contrary to the agreement in the contract.

Secured at center in the original case file, there is a contract document namely **MKATABA NO. LGA/097/2013 - 2014/A.20/05** entered between the appellant Sumbawanga District council and the respondent Adosta Investment co. Ltd on 01st January, 2014 for collecting revenue for crops in the wards namely:- Lusaka, Mpui and Kalambanzile.

The time for the contract's duration was from 1st January, 2014 to 31st December, 2014. It was a one year contract.

Some of the terms of contract are as follows:-

- (i) The Agent was duty bound to pay the appellant [District Council] a total sum of Shs. 75,000,000/= in 12 months equals to Shs. 6,250,000/= per month and the money to be paid at the beginning of a month.
- (ii) That, upon the agent's completion of the agreed amount, the surplus would be profit to the agent.
- (iii) Other terms of the contract include:-
- (iv) Agents were urged to use receipts issued by Sumbawanga District and would be given another receipt book in case the former is finished.
- (vi.2) That, once the employer gathered that the agent collects revenue without using receipts issued by the council [HW5], the employer should take action against the agent.

Those are some of the terms of the contract relevant at this stage of the case. The term concerning UKAGUZI is also inclusive.

On that regard, the first issue whether the appellant Sumbawanga District and the Respondent Adosta Investment Co. Ltd did enter into the contract of Collecting Revenue money of which the respondent was duty bound to remit the collected revenue money to the appellant in an agreed time span is answered in the affirmative.

The 2nd issue whether the respondent delayed remission of the collected revenue money contrary to the agreement in the contract.

It is clearly stated at item 3 **THAMANI YA MKATABA** 3.1 that, the Agent should pay the council the tune of Shs. 75,000,000/= in 12 months equivalent to Shs 6,250,000/= per month to be paid at the beginning of the month. It is however stated by the appellant/plaintiff that, to date, the respondent/defendant has not remitted to the plaintiff the outstanding amount of Shs. 127,666,000/= to date.

That, following the non-remission of the outstanding of Shs. 127,666,000/= the plaintiff/appellant claims from the agent a total sum of Shs. 178,732,000/= calculated from the 127,666,000/= as principal debt plus 0.02 percent for 20 months plus the interest which is Shs. 51,066,400/=.

On its part, the respondent said in reply that, the whole evidence of the plaintiff are mere stories. All what has been testified were not pleaded in their defence against the defendant's claim. They are not party to the readings. That, the defendant has been host as in his testimony DW1 stated that, the plaintiff/appellant is not claiming the whole some which were paid by MRFA but the balance after deduction of the plaintiff's dues were delayed by MRFA's failure to pay the "*Ushuru wa Mazao*" in time.

Upon gone through the trial court record as well as the evidence adduced during trial of the case, I have gathered the following:

That, upon a complaint raised by the appellant against the respondent Adosta Investment Co. Ltd to auditors Sumbawanga, the respondent was

audited between 18/8/2015 to 30/09/2015 on source revenue collected and noted was Tsh. 92,666,000/= being outstanding from collecting agents. In the trial court there was a letter by Mr. Adam A. Missana with Ref. No. C. 40/5/20 dated 10/12/2015 to the Maneja, wakala wa Taifa Hifadhi ya Chakula" introducing Adosta Investment Co. Ltd to have been appointed by Sumbawanga District Council vijijini to be Agent of collecting revenue in the wards of Laela, Miangalua, Kilambanzite together with Lusaka, Muze, Mfinga and Mtowisa.

It appears that, upon invited Adosta Company as Agent of collecting revenue, the appellant did not take a careful follow-up to the company during collection and remitting of the revenue to the employer [appellant], the outcome of which, the appellant has wrongly sued the respondent claiming Shs. 129,732,400/= alleged to be a delayed amount of which the respondent had failed to effect remittance to the appellant to date.

When this case one filed in court against the respondent under a summary suit procedure and upon allowed by the court to defend its case, the respondent denied the appellant's claim and by way of counter-claim prayed to be paid the sum or Shs. 120,277,250/= being the balance as way of set off after deducting the amount owed to the appellant. During hearing of the case, the appellant did not lead any evidence to prove this allegation. No single witness testified on which date remittance was done and the number of days or months or the alleged day.

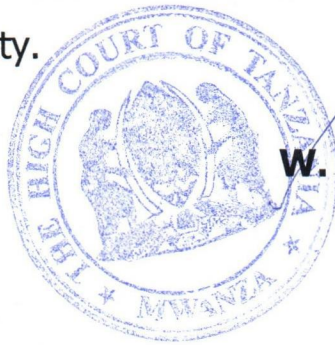
The audit report [exh. P"5"] tendered in court by the appellant to substantiate the appellant's claim said nothing on the alleged penalty. This is exactly as it appears in the audit report.

Lastly, I join hands to the respondent that, in its memorandum of appeal the appellant had filed five grounds of appeal and the 5th ground states that,

5. the Hon. Trial Magistrate erred in law and fact by disbelieving evidence adduced by the appellant during the trial case. However as indicated in the appellant's submission at page 4, the appellant has abandoned the 5th ground of appeal and introduced another ground of appeal to the effect that, the judgment does not contain concise statement of the case. This is a new ground of appeal not contained in the memorandum of appeal dated 15/5/2018. This is correct, and under order XXXIX [2] of the CPC. Cap. 33 RE: 2002 refrains any person, except by leave of the court from arguing or be support head any ground of objection not set forth in the memorandum of appeal. This was said in the case of **Laurent Adriano v/s Lameck Airo & 2 others** civil Appeal No. 18 of 2015 Mwanza High court Registry [unreported]. By so doing the appellant is hereby refrained from insetting new and unpleaded memorandum of appeal during hearing of the appeal.

On the bases of the foregoing and all said and done and without interfering of the trial court's award of Shs. 50,000,000/= to the respondent save other orders as indicated in the trial court's decree; I find the memorandum of appeal filed in this court by the appellant to be no more

than a mere ramblings with no head or tail. They are bankrupt of merits and therefore deserve no treatment by from this court. The appeal is dismissed in its entirety.




W. R. MASHAURI
JUDGE

Date: 08/09/2020

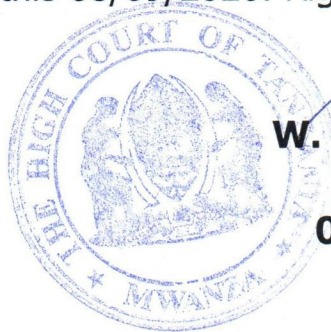
Coram: Hon. W. R. Mashauri, J


Appellant: } All absent

Respondent: }

B/c: Felister Mlolwa, RMA

Court: Judgment delivered in court in absence of all parties through video conference this 08/09/2020. Right of appeal explained.




W. R. MASHAURI
JUDGE
08/09/2020