

TANZANIA / JUDGMENT

julius mwamlima vs lukani development association 2020 tzhc 4527 27 november 2020

COURT
TZHCDECIDED
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MOSHI DISTRICT REGISTRY AT
MOSHI CIVIL APPEAL NO. 09 OF 2020 (Arising from Civil Appeal No. 02 of 2020 of the District
Court of Hai at Hai. Originates from Civil Case No. 01 of 2020 at Bomang'ombe Primary Court)
JULIUS MWAMLIMA.....APPELLANT VERSUS LUKANI DEVELOPMENT
ASSOCIATION..... RESPONDENT

JUDGMENT

MUTUNGI ,J. This appeal originates from the Bomang'ombe Primary Court where the appellant successfully sued the respondent over a total claim of Tshs. 5,874,000/= being Tshs. 3,874,000/= as the costs incurred to collect materials to the site and Tshs. 2,000,000/= was for leveling the land. The respondent was dissatisfied and filed her appeal to the District Court where his appeal was partly allowed to the extent that she was ordered to pay only Tshs. 2,000,000/= for the costs incurred to level the site and in i addition was ordered to pay general damage to a tune of Tshs. 1,000,000/= and costs of the suit. The appellant was dissatisfied and mounted his appeal to this court which comprised of the following grounds:-

1. That the District Court grossly erred in law and fact in holding that Tshs. 3,874,000/= was paid as part of the main contract while the same was from a separate agreement.
2. That the District Court grossly erred in fact by holding that a duty to build up a foundation included the duty to scratch the cite to remove the hill.
3. That the District Court erred in law and fact by reducing the amount awarded by the Primary Court which was proved by the appellant to the required standard. At the hearing, this appeal was ordered to be argued by way of written submissions of which both parties complied with. In the appellant's written submission, he consolidated ground one and two of the appeal and submitted that, according to the contract he entered into with the respondent, the task of scratching the site was not included in the construction of the foundation. He 2 contended that the site agreed upon was changed and the contract was now to be performed on another location. He explained the new site was not leveled which

required very serious scratching and excavation to level the same, at least to look like the site they had entered into in the contract. He submitted further that, they had an agreement with the respondent that he will be paid Tshs. 2,000,000/= for the additional cost of leveling. He further submitted that they had an agreement of Tshs. 3,874,000/= for earthwork and an additional Tshs. 2,000,000/= which brings the total of Tshs. 5,874,000/=. He submitted that the claim is reflected on the bill of quantity where item 1 is for earthwork and item 2 is for foundation and structure which are different items and contain different figures. He maintained that the task of scratching and excavating was agreed on after a different site was earmarked which led to the additional tasks and costs. On the third ground, the appellant submitted that at the trial the appellant successfully proved his claim as per evidence adduced and exhibit tendered and the first appellate court was wrong to reduce the amount awarded. He prays his appeal be allowed and the 3 decision of the trial court be upheld and to order the respondent to pay general damages and costs of this suit. In response, Mr. Engelberth Boniphace, Advocate for the respondent submitted that, it is the principle of the law that whoever alleges must prove. He contended that the appellant never proved before the trial court the alleged oral agreement between him and the respondent. The counsel submitted that in construction works let it be building construction or road construction which involves contractors, there must be a site engineer and the main function of the site engineer is to instruct the contractor to adhere to the supplied Bill of Quantity (BOQ) and in case there is extra work to be performed by the contractor then instruction should come from the site engineer to the contractor and should be in writing. He submitted that in this case no such instruction was issued by the site engineer to the contractor and the appellant never bothered to adduce such evidence. Submitting on the first and second ground of appeal, Mr. Boniphace submitted that item 1 of BOQ shows the claim of Tshs. 3,874,000/= is a community work of which the same was supposed to be performed by the community as it was one of the conditions of acquiring the grant from 4 the Embassy of Japan. The counsel submitted that it was none of the respondent's duties to make a follow-up on the terms and conditions being set by the appellant and the community. The counsel submitted that clause 4 of the agreement of constructing a multipurpose building makes it clear that, the appellant had to seek consent from the building committee or district engineer before performing additional works. The counsel submitted that according to the letter dated 22nd May 2016 with reference No. LCD/15/06 which stated the amount to be paid to the contractor/appellant was Tshs. 136,990,670.00 while Tshs. 3,874,000/= was to be paid up by the community of which the appellant entered into an oral contract with them. In that regard, Mr. Boniphace submitted, the respondent was not supposed to be sued alone in this matter but the appellant was supposed to have sued the community and not the respondent. The counsel submitted that the respondent did not change the construction site because had it been the situation, then the building committee had to approve the same in writing and the appellant would be informed. He contended that this fact is a new factor in this second 5 appeal as the same was not raised and discussed in the first appellate court nor the trial court. The counsel submitted that there was no evidence presented by the appellant to have entered into an oral agreement

with the respondent. He cited section 62(1) of the Evidence Act (Cap. 06 R.E 2019) and the case of Achutananda Baidva vs. Prafullva Kumar Gaven, A.I.R 1997 S.C 2077 at page 2086 to show that failure to present a witness to witness the same, then the allegation on the existence of oral agreement remains hearsay and should not form part of the agreement. On the last ground of appeal, Mr. Boniphace submitted that, it is not true that the appellant proved his case on the balance of probability as the appellant claimed to have an oral agreement with the respondent in performing additional works but not even a single witness was brought in the trial court to testify. It is his humble prayer that the appellant's appeal is unfounded as the agreement which existed between the appellant and the respondent was well executed and prayed the appeal be dismissed with costs. I have taken into consideration the submissions of both parties as well as the record of the lower courts. As per 6 record, it is not disputed that the appellant as a contractor agreed with the respondent to construct a multipurpose building at Lukani Primary School as reflected by exhibits (KI and KD1). It was agreed that the contract amount for the work to be completed will cost Tshs. 140,000,000/= and the same shall be paid by installment of four phases. That project was funded by the Embassy of Japan. According to the evidence in the trial court record, the main dispute is on the amount of Tshs. 3,874,000/= for earthworks and Tshs. 2,000,000/= for leveling the ground. Therefore all the grounds of appeal are boiled down to one ground whether the claim was proved to the required standard. It is trite law and a well established maxim that, whoever alleges must prove and the burden of proof in civil cases is on the balance of probability. Starting with the claim of Tshs. 3,874,000/=, it is my understanding that contractor tenders are governed by bill of quantity (BOQ) which shows the breakdown of the contract amount in terms of quantity and rate. The appellant testified that he had an oral agreement with the respondent to perform that task. The respondent witness (SU3) admitted that the earthwork was done by 7 the appellant and he was not paid but he didn't know their agreement. Based on the chronological evidence, it is clear that the earthwork was done by the appellant and was to be payable by the community (KDF). There is no evidence that there was an oral contract between the appellant and respondent to perform such a task to meet the dead line of the project. Since the earthwork was clearly stated in BOQ and it was performed by the appellant and approved by the inspection report (exhibit KD5) then it is my finding that the appellant is entitled to such payment but not payable by the respondent since it was not part and parcel of their agreement to perform such work. Turning to the claim of Tshs. 2,000,000/=, that claim is not supported by any documentary evidence other than a mere allegation. The same was not reflected in the BOQ either in any other exhibits tendered in court during trial. In my view such an amount was covered within item 1 of BOQ which comprises site clearance, excavate vegetable soil, column footing, foundation trenches, backfilling, excavated material, imported sand, removing surplus excavated material, and general water. If there were any additional costs incurred the appellant ought to have consulted the building committee to negotiate on the same as provided in clause 4 of the agreement. More so there was no evidence on record to prove there was a change of site location from the previous one entered into in the contract. In that regard, I find such a claim baseless. Lastly, I have observed the first Appellate Court

granted general damages of Tshs. 1,000,000/= while the same was not pleaded in the complainant form nor framed as among the issue at the trial court. It is trite law that parties are bound by their pleadings. This is also the position in the case of Peter Nq'homanqo vs. The Attorney General, Civil Appeal No. 114 of 2011, Court of Appeal of Tanzania at Mwanza registry (unreported) where the Court held that:- 11 We think it is clear that a Judge is duty bound to decide a case on the issues on record and that if there are other questions they must be placed on record. The decision of the court should be based on the issues which are agreed upon by the parties, and if this is not done it results in miscarriage of justice. The situation becomes worse if it departs from the issues agreed upon." 9 Also in the case of Fatma Idha Salum vs. Khalifa Khamis Said (2004) TLR 423 the Court of appeal was faced with a similar situation and held:- "(i) The question of compensation was not pleaded before the Trial Court either in the plaint or in the counterclaim and could not therefore be introduced on appeal." On the basis of the above authorities, I find the general damage awarded to the appellant had no legal basis and the same is set aside. In that regard, the appeal is dismissed, the judgment of both lower decrees, and orders thereto are quashed and party to bear own costs. ----- . B. R. MUTUNGI JUDGE 27/11/2020 Judgment read this day of 27/11/2020 in presence of the Appellant and in absence of the Respondent. B. R. MUTUNGI JUDGE 27/11/2020 io

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