

TANZANIA / JUDGMENT

Judgment KWIMBA

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (IN THE SUB-REGISTRY OF
MWANZA) AT MWANZA CIVIL CASE NO. 12 OF 2023 KWIMBA DISTRICT
COUNCIL.....1ST PLAINTIFF ATTORNEY
GENERAL.....2ND PLAINTIFF VERSUS CHINA CIVIL
ENGINEERING CONSTRUCTION CORPORATION..... DEFENDANT

JUDGMENT

27 June & 30 July 2024 th th CHUMA, J. In this suit, Kwimba District Council (the 1st Plaintiff) knocked on the doors of this court claiming for unpaid service levy worth Tshs. 1,288,569,915.09/ = (Tanzania shillings one Billion, two hundred Eighty- Eight Million, Five Hundred Sixty-Nine thousand, Nine Hundred fifteen shilling and cent zero nine) and other ancillary reliefs against China Civil Engineering Construction Corporation (to be referred to as the defendant). The Attorney General (the 2nd plaintiff) was added as a necessary party under the Government Proceedings Act, Cap 5 R.E 2019 for being a chief Legal adviser of the Government of the United Republic of Tanzania. pg. 1 The facts of this case are such that, the 1st plaintiff being a local Government authority established under the Local Government (District Authorities) Act, Cap 287 R.E 2019, has the power to collect service levy from corporate entities or any person conducting business within its territory. The defendant is constructing the Standard Gauge Railway (SGR Rot 5) that crosses in Kwimba District (hereinafter the project). According to the 1st Plaintiff, the defendant, despite several remands has neglected to pay the Service levy of 0.3% of his turnover net of the value-added tax and excise duty in accordance to law. It was further alleged by the plaintiffs that, the defendant on 10th October 2022 wrote to the 1st plaintiff a letter requesting to pay service levy at the rate of 0.1% which was refused by the 1 st defendant for lacking reasonable justification. Further, on 14th March 2023, the defendant wrote another letter requesting to pay the same at the rate of 0.15% again the offer was refused by the 1st plaintiff. It was also alleged that, on 13th day of February 2023 the 1st plaintiff informed the defendant that the amount had been deducted to Tshs. 1,000,0000,000/= (one Billion shillings) to be paid by installment, however the defendant refused to pay too. pg. 2 The suit by the plaintiffs was brought under summary procedure as per Order XXXV of the Civil Procedure Code, Cap 33 R.E 2019. On their party, the defendant vides Misc. Civil Application No 87 of 2023 secured leave to defend the suit. According to their Written Statement of Defence, the defendant is ready to pay the service levy but with reservation that, the 1st defendant is claiming the service levy at the

maximum rate of 0.3%. That the defendant is carrying out a Government Strategic Project. They have been engaged in discussions with the 1st plaintiff regarding the rate of payment but the 1st plaintiff has been persistent and wants to dictate the terms of payment without justification, reasons, or considering the reasons advanced by the defendant. The defendant has smoothly paid service levy in all other Districts where the same construction of the project was except for the 1st defendant who unreasonably exaggerates the service levy without business justification or basis of law. When the matter was placed before me for hearing the plaintiffs were represented by Felician Daniel, Paul Ditto, and Mugisha Kasa Learned state attorneys whereas the Defendant had the legal service of Mr. Akida Majenga Learned Advocate. In their efforts to prove the case on the standard required in civil litigations, the Plaintiffs called two witnesses PW1 Mugisha pg. 3 Philemon Kassa and PW2, Barnabas Kulwa Yawanga. The plaintiff's witnesses tendered a total of ten (10) documentary exhibits, a letter dated 13/05/2022; letter dated 10/10/2022; a letter dated 12/10/2022; Letter dated 25/1/2023; letter dated 13/02/2023; letter dated 14/3/2023; Demand Notice dated 31/03/2023; letter dated 9/11/2023; letter dated 9/11/2023; and letter dated 16/4/2024 all admitted as Exhibits PE1, PE2, PE3, PE4, PE5, PE6, PE7, PE8, PE9, and PE10 respectively. On the other hand, the defendants managed to summon Gasper Andrew Matumbi and Simon Miyumo Obote as DW1 and DW2 respectively. The plaintiffs' case commenced with PW1, Mugisha Philemon Kassa, who testified that, the amount of service levy worth Tshs. 1,288,569,915.09. was derived from the document brought to them by the defendant dated 10/10/2022. That, on 13/5/2022 the 1st plaintiff wrote a letter dated 13/5/2022 (P1) to the defendant to convene a meeting to discuss the issue of service levy. That, the meeting was convened on 16/5/2022. The defendants were ordered to submit documents regarding the claims instead they wrote to the 1st plaintiff a letter dated 10/10/2022 (P2) requesting to pay a service levy to a tune of Tshs. 429,523,305.03 which is 0.1%. that, according to The Local Government Finance Act, Cap 290 R.E 2019 and pg. 4 the By-law of the 1st plaintiff (Sheria Ndogo za (kodi ya Huduma) za Halmashauri ya Wilaya za Halmashauri ya Wilaya ya Kwimba 2009) requires payment of service levy to be done at 0.3% and not 0.1% as submitted and requested by the defendant. PW1 further testified that by the letter dated 12/10/2022 (PE3), the 1st plaintiff directed the defendant to pay service levy at a rate of 0.3% in line with the law. After that letter, they convened a meeting on 9/2/2023 with the defendants and agreed upon them to pay Tshs one billion but later on, they again requested to pay the debt for the rate of 0.15% via a letter dated 25/01/2023(PE4). That, by a letter dated 13/2/2022 (PE5) the 1st defendant reminded the defendant to pay One Billion as agreed and not their proposed figure. That, the defendant failed to pay the debt instead they requested paying the debt by 0.15% by a letter dated 14/3/2023 (PE6). They wrote a 21-day statutory Notice (PE7) informing the defendant that they intend to take legal action against them. That, the defendant never complied with demand notice hence this case. PW2, Barnabas Kulwa Yawanga testified that by a letter dated 9/11/2023 (PE8), they asked for the Interim Payment Certificate (IPC) of the defendants from the Tanzania Revenue Authority (TRA) of Kwimba. TRA pg. 5 Kwimba responded by a letter dated 9/11/2023 (PE9) notifying the 1st plaintiff that they were not in the position to give those details. They requested the defendant's business turnover from TRA Headquarters via a letter dated 16/4/2023 (PE10) but up to now they have not yet received a response from TRA Headquarters. That, they opted to proceed with the case claiming the amount

reflected in the plaint. On his side DW1, Gasper Andrew testified that they submitted a proposal to the 1st plaintiffs requesting to pay the service levy at a rate of 0.1% then at the rate of 0.15%. that, they negotiated with the involvement of the officers from Tanzania Railway Corporation (TRC), the Consultant, and the 1st plaintiff. The project involves Misungwi, Kwimba, Nyamagana, Kishapu, Msalala, and Shinyanga Municipal. That, in all those other places service levy is payable at the rate of 0.15, unlike Kwimba. An Interim Payment Certificate (IPC) is a payment paid by TRC after the completion of a work via a certificate. He prayed for the case to be dismissed and the service levy to be paid as in other areas of the project. DW2, Simon Miyumo Obote said, the law allows negotiations by the parties on the issue of payment of the rate of payment of service levy. That, seven district counsels out of 8 accepted payment of service levy at a rate of pg. 6 0.15%, and the payment was readily effected. He prayed for the court to dismiss the case for want of the justifiable cause of action as the 1st plaintiff ought first to exhaust all internal remedies of settling the matter amicably. I have dispassionately considered the evidence adduced for and against both parties and their final submissions. Before starting on determining the framed issues by the court it is not irrelevant to state the well-known position of law that, whoever alleges a fact must prove on the balance of probability. This position was emphasized in several cases including the case of Attorney General & Two Others Versus Eligi Edward Massawe and 104 Others, Civil Appeal No. 86 of 2002, and the case of Walfong Dourado Vs Tito Da Costa ZNZ Civil Appeal No. 102 of 2002 where the Court held that whoever alleges a fact, unless it is unequivocally admitted by the adversary, he has to prove it albeit, on the balance of probability. In this suit then the plaintiffs are duty-bound to establish their claims on the balance of probabilities. In this suit the framed issues on 19th day of February 2024 for determination by this court are as here under;

1. Whether the plaintiff is entitled to be paid service levy by the defendant. pg. 7
2. Whether the amount of Tshs. 1,288,569,915.09, claimed by the plaintiff is reasonable.
3. Whether the service levy rate charged by the plaintiff is in accordance with the law.
4. What reliefs are the parties entitled to? The first issue for determination need not detain me for long. Both parties are in consensus that the 1st plaintiff has the power and right to collect service levy from the defendant. Parties are only not in terms with regards to the rate and the amount to be paid which I will deal with while determining the 2nd and 3rd issues for determination. The mandate to collect service levy as the revenue of the 1st plaintiff is derived from the Local Government Finance Act, Cap 290 R.E 2019 (hereinafter the Act). and the By-law of the 1st plaintiff (Sheria Ndogo za (Kodi ya Huduma) za Halmashauri ya Wilaya ya Kwimba, GN No. 76 of 2009). Section 6(u) of the Act reads; 6.-(1) The revenues, funds, and resources of an urban authority shall consist of-
 - (u) all monies derived from the service levy payable by corporate entities or any person conducting business with business licence at the rate not pg. 8 exceeding 0.3 percent of the turnover net of the value added tax and excise duty: Provided that, the branches of corporate entities shall pay services levy to the urban authorities in whose areas of jurisdiction they are located. (emphasis added) Also, regulation 11(1) and (2) of the By-Law

reads; “(1) Kiwango cha kodi kitakuwa ni asilimia 0.3% ya hesabu ya shughuli zote baada ya kuondoa kodi ya ongezeko la thamani na kodi ya Mlaji. (2) Mkusanya kodi au mlipa kodi yeyote akishindwa kuwasilisha kodi yake au kulipa kodi, atachukuliwa kama hajalipa kodi na anastahili kuwajibika kulipa kodi hiyo kama vile ndiye mlipa ushuru wa Halmashauri, na njia zote za kukusanya madeni zitatumika dhidi yake kama vile ndiye mlipa kodi husika. Having considered these two laws, the first issue is answered in the affirmative that the plaintiff is entitled to be paid service levy by the defendant. The 2nd and 3rd issues for determination interrelate, I will therefore determine them together on what is a reasonable amount of service levy which the defendant ought to pay to the 1st plaintiff and whether the rate of 0.3% is in line with the law. The above-quoted provisions of the law are to pg. 9 the effect that the 1st plaintiff will collect service levy from the defendant of the turnover net of the value-added tax and excise duty. According to the Principle Act, the rate shall not exceed 0.3%. According to the 1st plaintiff’s By-Law, they collect the same at the maximum rate of 0.3%. The matter before me is not an application for judicial review hence I am not invited to challenge the legality or reasonability of By-Law which charges the maximum rate. In the case of Morogoro Municipal Council Vs. Orxy Mwananchi, Civil Case No. 80 Of 2018 (unreported), this court stated that; “In circumstances that this court agrees with the Defendant that the rate of 0.3% is too excessive and not manageable. However, I am of the humble opinion that this court in this particular suit is not a proper avenue to determine the legality of the Morogoro Municipal Council (Service Levy) By-law of 1999.” In the case of Legal and Human Rights Centre vs The Minister for Finance and Planning and 2 others, Misc. Cause No. 11 of 2021 (unreported) my Brother Mgetta J observed on page 11 that; “If delegated legislation has any problem where should one go to fix such a problem. It is my conviction that, if I may recall my administrative law lectures, there should be judicial control over delegated legislation.” pg. 10 Being guided by these authorities, I will not comment anything concerning the legality of the 1st plaintiff’s By-Law. That notwithstanding; going through the testimonies made by DW1 and DW2 the defendant finds the 1st plaintiff not entitled to strictly collect 0.3% I will therefore scrutinize the evidence to see if they are legally justified. According to a letter dated 10/10/2022 (PE2), the defendant wrote to the 1st plaintiff praying to pay service levy at the rate of 0.1%. it partly read; “...in accordance with the previous meetings with your office on the discussion of service levy (not exceeding 0.3% of the turnover of the project) of SGR Lot 5 for Kwimba District, the contractor clarified that in our contract of Interim Payment Certificate (IPC) there was no any information or data indicated service levy issue specifically for Kwimba district or any other district because our contract BOQ is based on the whole project which is passing through 4 regions and 9 districts in Tanzania and IPC document is calculated by completion percentage of site works instead of specific quantity. However, the contractor suggests using the percentage of engineering quantity in different District pursuant to pg. 11 our current design and contract base price (tax exclusive) to get the estimated total amount of service levy of the project for each district.... kindly understand that at present we run the project out of budget due to huge variation of cost in the project. Moreover, our project is a non-profit making project and it’s a public serving project. Even so, the contractor has no

objection to the service levy payment with respect to the Local Laws. What the contractor sincerely requests for is only the reduction of the rate for service levy until (sic) 0.1% which at least favor the project for public interest with reference of agreement on our contract...” (emphasis added) By this letter, the defendant requested to pay Tshs. 429,523,305.03 which is at the rate of 0.1%. The 1st plaintiff wrote another letter on 12/10/2022 (PE3) to the defendant inter alia claiming payment of Tshs. 1,288,569,915.09 which is at the rate of 0.3%. On 25/1/2023 the defendant wrote another letter (PE4) clarifying the amount they requested to pay at the rate of Tshs. 0.1% is pursuant to the then-current design times the rate of service levy times the turnover of accumulative IPC payment of the project. They further reiterate other facts stated in exhibit PE2. pg. 12 By a letter dated 13.03.2023(PE5), the plaintiff wrote to the defendant instructing them to Pay Tshs. 1,000,000,000/=. The defendant responded by a letter dated 14/3/2023 (PE6) that it is hard for the contractor to accept and be in a position to pay Tshs. 1,000,000,000/= as it is too huge against the actual amount of the IPC paid by TIC. The 1st plaintiff got tired of further negotiations he wrote a demand notice (PE 7) directing the defendant to pay a service levy of 0.3% and eventually filed this matter on 23/5/2023. On 9/11/2023 while the matter is pending in court, the 1st plaintiff by a letter (PE8) to TRA Kwimba requested for Turn Over of the defendant for Kwimba District. On the same date, TRA Kwimba responded with a letter (PE9) which partly read; “Uthibitisho wa taarifa za mapato (company turnover) ya kampuni ya ujenzi wa reli ya kisesa (SGR) ya CCECC katika kituo cha Kwimba tumeshindwa kupata taarifa hizo kwenye mfumo wetu” Further on 16/4/2024, the 1st plaintiff requested for the turnover of the Defendant from TRA Headquarters which is yet to be supplied. From the above evidence the following facts are clear; one, the project is undertaken as a whole by the defendant in 4 regions and 9 districts within Tanzania Mainland. Two; to ascertain the turnover of each District the pg. 13 defendant suggested using the percentage of engineering quantity pursuant to current design and accumulative IPC; Three; there is no record of the defendant’s turnover of Kwimba District in isolation with other Districts which the project passes (refer to exhibit PE9); Four; irrespective of By-Law which mandates the 1st plaintiff to collect service Levy at the maximum rate of 0.3, the 1st plaintiff considered the circumstance advanced by the Defendant in Exhibit PE4 and reduced the amount at Tshs 1,000,000,000/=; five, the defendant is aware with the obligation to pay service levy and is willing to pay subject to reduction of the rate. Six, the 1st plaintiff has conducted several meetings discussing the rate to be paid as a service levy irrespective of the By-Law which according to the 1st plaintiff is strictly applied. Considering these facts, I am of the view that, because the project is implemented as a whole without isolation of the respective district in which it passes through, payment of the service Levy ought to be at a uniform rate in all districts. This is because payment of service levy at high rates in a certain district might affect the project conducted in another District as the money used for a project of one district might be used to pay service levy in another District. According to Exhibit PE2 and PE4, the contractor runs the project out of budget due to the huge variation of cost in the project and the pg. 14 low price of the contract. I will be correct if I conclude that this fact was considered by the 1st plaintiff before its decision to reduce the rate to be paid Tshs.

1,000,000,000/=. Moreover, I am of the settled view that, from the circumstances of this case, the 1st plaintiff, waived the strict application of its By-Law to collect service levy at the exact rate of 0.3% because after considering the reasoning explained by the defendant in Exhibit PE4 they reduced the rate and directed the defendant to pay Tshs. 1,000,000,000/= which according to the defendant is still unbearable. As I have stated herein, I will not question the legality of the 1st plaintiff's By-Law but from the circumstances of this matter, it is not strictly applicable I will therefore, in this matter, be guided by the Local Government Finance Act which under Section 6(u) and 7(y) provides service levy at the rate not exceeding 0.3%. According to the evidence of DW1 and DW2, eight Districts out of 9 on which the project passes have agreed and paid the Service levy at the rate of 0.15%. PW1 when cross-examined agreed that the amount payable as service levy is negotiable. He also said that he cannot tell if Kwimba is peculiar to other Districts. Therefore, with regards to the 2nd and 3rd issue the amount of Tshs. 1,288,569,915.09, claimed by the plaintiff is pg. 15 unreasonable considering the circumstance of this case although it does not exceed 0.3 % hence it is in accordance with the law. Reverting to the last issue as to what relief parties are entitled to I have stated herein that the 1st plaintiff is not peculiar to other districts which have been paid service levy at the rate of 0.15% in the same project. Considering the circumstances of the project and section 6(u) and 7(y) of the Act which permits payment not exceeding 0.3%, I am of the view that service Levy at the rate of 0.15% is within the parameters of the Law. Before I conclude, I must say that the plaintiff has failed to prove the exact amount from which the rate needs to be calculated. This matter was filed based on Exhibit PE4 which inter alia provides that; "Note:

1. The amount above-mentioned is a (sic) total estimation of service levy for Kwimba District pursuant to the Total Contract Base Price (Tax exclusive) for your reference.
2. The exact amount shall be based on the turnover of each IPC payment of the project." It was the evidence of PW2 that they failed to get the exact turnover of the defendant in respect of Kwimba District. Surprisingly, their efforts to require that information commenced after almost 6 months from the date pg. 16 they filed this suit. According to PW2, they decided to proceed with the amount stated in the plaint. In my view this move is incorrect, it does not only prejudice the defendant who is paid according to the IPC but also it denies the 1st plaintiffs the right to get exact revenue which is collated in accordance with the law. Service Levy needs to be paid according to the exact figure not from estimated figures. The plaintiff was duty bound to first ascertain the exact amount from which the levy was paid before filing this case. Nevertheless, it is my considered view that the anomaly can be vindicated by ordering payment of the said 0.15% to be paid from each IPC payment of the project by the TRC. In the final analysis and based on what I have endeavored to state herein above, the Court is satisfied that the Plaintiffs have managed partly to prove the case to the standard required in civil litigation, that on the balance of probabilities. All said and done, the consequence is obvious, the 1st Plaintiff is entitled to be paid service Levy at the rate of 0.15% of the turnover net of the value-added tax and excise duty from each IPC Paid by TRC. Considering the circumstances of this matter other reliefs sought in the plaint are denied for

want of justification and each party is ordered to bear its own costs. pg. 17 It is so ordered.
DATED at MWANZA this 30th day of July 2024. W. M. CHUMA JUDGE Court Judgment delivered in court in attendance of Ms. Benfrida Chodota State Attorney for the first plaintiff and holding brief of Felician Daniel for second plaintiff and Mr. Akida Majenga Learned advocate for defendant this 30th day of July 2024. W. M. CHUMA JUDGE Court Right of appeal explained. W. M. CHUMA JUDGE pg. 18

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