

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA (MWANZA REGISTRY) AT MWANZA HC.CIVIL APPEAL
NO.19 OF 2015 {Arising from District Court of Magu District at Magu in Civil Case No. 14 of ., 2013)
M/S MSUMA ENTERPRISES LTD APPELLANT VERSUS D.E.D
MAGU RESPONDENT LastOrder:07/06/2017
Judgment:28/07/2017

JUDGMENT

MAKARAMBA, J.: This is Judgment from the decision of the District Court of Magu in Civil Case No. 14 of 2013 dated 14th February, 2015 before Hon. R.S. Masige Esq RM. The background to this appeal briefly is .that, the D.E.D ·MAGU the Respondent herein, advertised a tender for the construction of a market and public toilet at the Badugu Villa~e. The Appellant, _M/S MSUMA ENTERPRISES LTD, was the successful bidder. The Respondent issued Notice of Intention to award the tender and the Appellant accepted it. The Respondent then signed a formal contract with the Appellant. However, the Respondent later discovered that, the Appellant had started construction by laying out a foundation, which upon inspection, it came to be discovered that, it was not in accordance with conditions for constructing

- ' Page 1 of 10 government buildings as per BOQs stipulated in the formal contract. This led to the Respondent issuing notice to the Appellant to stop construction of the said market and public toilet until further notice. The Appellant having received the stop order filed a suit at the Magu District Court in Civil Case No. 14 of 2013 alleging that the Respondent had breached the contract and that the Appellant had suffered loss of business. The trial Court dismissed the suit for want of merits. The Appellant having been aggrieved with the decision of the District Court, has appealed it before this Court on four grounds and hence this Judgment. In this appeal, the Appellant has raised the following grounds, namely:-
 1. That, the trial Magistrate erred in law and in fact by excluding relevant evidence and witnesses.
 2. That, the trial Magistrate erred in law and in fact by failing to follow word~ guideline of section 73(1) & (3) of the Law of Contract Act Cap 345 R.E 2002.

3. That, the trial Magistrate erred in law and fact by considering irrelevant evidence of DW2. The more important of this was DW2 went to visit the site without prior notice to the Appellant to be present
 4. That, the trial Magistrate erred in law and in fact by misunderstanding evidence by the Plaintiff; some important example of that documentary evidence and evidence of PW1, PW2 and PW3 of the case at the trial Court was clear and unchallenged. Page 2 of 10 The Appellant prayed before this Court to quash and set aside the Judgment and Order therein and to be paid the costs of this appeal and the Court bellow. In prosecuting the appeal, Mr. Ismail Dotto, the Operation Officer of the Appellant's Company represented the Appellant. M/s Lilian Kitembe, learned Counsel advocated for the Respondent. The appeal by consent of the parties was disposed of by way of written submissions. The Appellant duly filed his submissions as scheduled on the 13th day of June,
2017. The Respondent however, did not file his reply submissions on the scheduled date that is, by or on the 27th day of June 2017 as per the order of this Court dated Oih day of June 2017. Instead the Respondent filed his reply submissions on the 28 th day of June 2017 and through a letter dated 25 th of July 2017 addressed to the Judge-in-Charge of this Court who happens to be the presiding Judge in this matter, requested for the delivery of the Judgment in this matter to be put on hold for the reason that, the Counsel for the Respondent had proceeded to Dar es Salaam for medical treatment. In that letter the Respondent's Counsel, M/s Lilian. Eliaes Kilembe, also attached a copy of the reply submissions of the Respondent which she had filed in Court on the 28th of June 2017 with a caveat that her efforts to serve the Appellant with the submissions have proved futile and so she was requesting this Court to assist her in serving the Appellant with the reply submissions of the Respondent. It would seem that the reply submissions by the Respondent were filed out of time since the scheduled date for the submissions to be filed was set for the 27th of June 2017 and not 28th of June 2017. This being the case therefore Page 3 of 10 even if this Court was to accede to her request of assisting her to serve the Appellant with the written reply submissions of the Respondent, which it could not, still the submissions will be of no consequence as they were lodged out of time and without the leave of this Court. In the instance, since failure to file submissions within the prescribed period of time amounts to non submissions, this Court would not consider the reply submissions of the Respondent in this Judgment. In his submissions, Mr. Ismail Dotto representing the Appellant's Company stated that, the trial Court made a wrong decision by saying that the Plaintiff/Appellant had failed to establish his claim on a balance of probability, the consequence of which the claim failed and it was dismissed with costs. Mr. Dotto stated further that, the contractual agreement document titled 'Fomu ya Makubaliano/ Mkataba na Manunuzi' dated 04/08/2012, Exhibit PE1, and the Letter Ref. No. MDC.P.10.61/ VO.III/ 33 dated 05/01/2012, created a legally binding contract between the District Executive Director and the Appellant's Company. When the Appellant's Company had started work to the level of constructing the foundation, the Respondent served the Appellant with a letter with Ref. MDC/CW/2/34/35 dated 11.02.2013 ordering the Appellant' Company to stop construction of the market and public toilet at Badugu Village,

but the letter was not addressed to the Appellant's Company but to the Village Executive Officer (VEO) at Badugu and copied to the Appellant's Company, Mr. Dotto further submitted, the unilateral cancellation of the construction vide a copy of the letter dated 11/02/2013 was therefore illegal and in ~ Page 4 of 10 breach of the contract which already existed between the Appellant's Company and the Respondent, Mr. Dotto further submitted. Mr. Dotto stated further that, the tender had been awarded to the Appellant's Company on the basis of a terms and conditions stipulated in the document titled "Fomu ya Makubaliano/Mkataba na Manunuzr/ dated 04/08/2012 (Exhibit PE1) that, the work ought to have been completed within ninety (90) days, but the construction had been carried out to the level of the foundation then it was stopped. Mr. Dotto noted further that, as DW1 and DW2 conceded, the construction work ended at the level of the foundation. Mr. Dotto stated further that, when the Respondent decided to terminate the work of the Appellant, the Respondent failed to take into account the fact that, in the construction work at Badugu, the Appellant's Company had hired eight (8) masons, fifteen (15) labourers, and had made several trips of stones, sands, and building materials. Emphasizing on the legal principle of entitlement for payment for lawful work following breach of contract, Mr. Dotto referred this Court to the provisions of section 70 of the Law of Contract Act; Cap. 345 R.E. 2002, under which the Appellant's Company is entitled to payment for lawful work following breach of contract because the Appellant's Company had done lawful work for the Respondent and the Appellant's Company did not intend to do so gratuitously for the Respondent to enjoy the benefit thereof without paying for the work done by the Appellant's Company. In this appeal, the main issue for determination is whether there was a valid and legally binding contract between the Appellant and the Magu Page 5 of 10 District Council. On the evidence on record, this Court finds that, there existed a valid and legally binding contract between the Appellant and the Magu District Council for the construction of a public market and toilet. The contractual Agreement Document titled "Fomu ya Makubaliano/Mkataba wa Manunuzl' dated 04/08/2012, which was admitted in evidence at the trial Court as Exhibit P1, and the Acceptance Letter dated 01/08/2012, which was also admitted in evidence at the trial Court as Exhibit P3, created a legally binding and valid contract between the Appellant and the Magu District Council. The letter by the Magu District Council dated 05/07/2012 (Exhibit P2) appointing and awarding the construction tender to the Appellant, and also the Stop Order vide the letter by the Magu District Council dated 11/02/2013 (Exhibit P4) shows that, the Appellant had entered into a valid and binding contract with the Magu District Council. I have also carefully examined the contractual Agreement Document titled "Fomu ya Makubaliano/Mkataba wa Manunuzl' on record. It seems to me that, the contract was signed by the Appellant as "Se/lei' and the "Kamati ya Jamii Mpango wa DADPs CPC "as the "Buyer." However, it was not established by evidence under which law the "Kamati ya Jamii Mpango wa DADPs CPC' had been established. It is also not established under which authority, be it the District Council or the Village Council, the "Kamati ya Jamii Mpango wa DADPS CPC" was being controlled. However, looking at the Court record, it was the Magu District Council, which awarded the Appellant with the tender and also stopped the Appellant from proceeding with the construction work. It is

without doubt Page 6 of 10 ~ and as revealed by the facts on record, that the construction project was to a very large extent being controlled by the Magu District Council. It is for the above reasons this Court finds that, the Appellant did enter into a valid and binding contract with the Magu District Council. On the uncontroverted facts as to the existence of the contract, the Magu District Council cannot escape or be excluded from contractual obligations arising from the valid and legally binding construction contract the subject of the dispute which gave rise to the instant appeal. Considering further and taking into account the fact that, a District Executive Director, is the accounting officer for a District Council, who actually authorizes payment of debts arising from Court decrees issued against local authorities, there is no escape of the obligation on the part of the District Executive Officer to pay monies in the event a local authority is adjudged to have breached a validly concluded and legally binding contract as momentarily is the case. The issue of the contractual obligation of a local authority aside, this Court has discovered that, some of the vital documents in the contract at the centre of the dispute before the trial Court were not tendered in evidence. For instance, the "Fomu ya Makubaliano/Mkataba wa Manunuzi" {Exhibit P1} shows to be Appendix No. 3; which means that there were two other documents which formed part and parcel of the contract, but these other two annextures were not tendered in evidence before the trial Court. Furthermore, Exhibit P1 shows that, the "Mnunuzi" (Buyer) (the Appellant herein) "amekubali gharama zilitolewa na mtoa huduma au muuzaji vifaa au kama ilivyoonyeshwa katika mchanganuo wa bei (BOQs) au hadidu za rejea za huduma." Literary Page 7 of 10 j meaning that, the Buyer has accepted the services rendered by the Seller or as shown in the Bill of Quantities (BOQs). Unfortunately, the BOQs to the contract, which in my considered view were central to the dispute, were also never tendered in evidence before the trial Court. According to the testimony of DW2 before the trial Court, he (DW2) had advised the Magu District Council to stop the Appellant from proceeding with the construction works under the contract because the construction was not in accordance to the BOQs of the contract. Given the fact that, the main reason for the Appellant to be stopped from proceeding with the construction works arising under the contract was failure by the Appellant to comply with the BOQs of the contract, it was therefore crucial for the Appellant to produce in evidence at the trial Court the BOQs set out in the contract, failure of which made it rather difficult for the trial Court to determine the respective rights of the parties to the controversial construction contract. It was the duty of the Appellant, being the one who was alleging breach of contract on the part of the Respondent, and the one who had brought the suit against the Respondent, to produce in evidence the BOQs in the contract. The Appellant being the one who was alleging the fact of breach of terms of the construction contract on the part of the Respondent, had the single and important of duty of establishing his case against the Respondent on a balance of probabilities. Due to failure by the Appellant to produce in evidence the "Kiambatanisho Na.1 na 2 {annextures No. 1 and 2) to the "Fomu ya Makubaliano/Mkataba wa Manunuzi" {Exhibit P1}, this Court finds that, the Appellant failed to l prove his case against the Respondent on a balance of probabilities. Page 8 of 10 I . On the proceedings of the trial Court on record, there appears no single witness who had been

excluded by the trial Court from testifying. The record of the proceedings of the trial Court shows that, all the witnesses who appeared before the trial Court to testify, were accorded the right to do so in accordance to the law. As to the provisions of section 73(1) and (3) of the Law of Contract Act; Cap.345 R.E. 2002 they apply only where there is a breach of contract. As I intimated to earlier in this Judgment, the Appellant having failed to establish the fact of breach of contract on part of the Respondent given that the construction contract was never terminated rather it was the construction works under the contract which were stopped until further instructions. In such circumstances, the provisions of Section 73(1) and (3) of the Law of Contract Act; Cap.345 R.E. 2002 cited by Appellant are inapplicable. The Appellant instituted the suit giving which gave rise to the instant appeal against the Director of the Magu District Council instead of the Magu District Council. In the eyes of the law, the Magu District Council and the Director of the Magu District Council are two distinct and autonomous persons. This means therefore that, the Magu District Council is capable of suing or being sued in its own name while the Director of Magu District Council is not. As per the relevant provisions of the local government laws, and particularly section 12(1)(b) of the Local Government {District Authorities} Act; [Cap.287 R.E 2002], the Magu District Council being a local government district authority has separate legal existence but the Director of the Magu District Council does not. Since the District Executive Page 9 of 10 ~ Director is an employee of the Magu District Council, among other administrative duties, he is its accounting officer. Since in the suit before the trial Court it was not the Magu District Council which had been sued but the Director of Magu District Council, who as I have pointed out in this Judgment, has no legal existence of its own and thus lacks the capacity to sue and be sued, the suit giving rise to the instant appeal which was brought by the Appellant before the trial Court had been wrongly instituted. The Appellant by suing the District Executive Director of Magu in lieu of the Magu District Council, this clearly had offended the provisions of section 12(1)(b) of the Local Government {District Authorities} Act; [Cap.287 R.E. 2002]. In the premise, all the proceedings and the decision by the trial Court are a nullity and must accordingly be quashed and set aside as I hereby do. In the whole and for the foregoing reasons, the appeal fails. It is hereby dismissed with costs. The Judgment, Decree and Proceedings of the District Court of Magu in Civil Case No. 14 of 2013 are hereby quashed and accordingly set aside. It is so ordered. R.V. MAKARAMBA JUDGE 28/07/2017 Page 10 of 10),

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