

TANZANIA / JUDGMENT

rahisi general merchant co ltd vs turkanya co ltd 3 others 2023 tzhccomd 182 23 june 2023

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TZHCCOMDDECIDED
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT
PAR ES SALAAM COMMERCIAL CASE NO, 50 OF 2022 BETWEEN RAHISI GENERAL MERCHANT
COMPANY LTD..... PLAINTIFF VERSUS TURKANYA COMPANY

LIMITED..... 1stDEFENDANT ERCAN

OZDEMIR..... 2ndDEFENDANT YAHAYA HAMAD

KHAMIS..... 3rdDEFENDANT CHRISTINA ALOYCE

SENYA..... 4thDEFENDANT DEFAULT JUDGEMENT A.A. MBAGWA, J.

The plaintiff, Rahisi General Merchant Company Limited, by way of a plaint, instituted this suit
against the defendants jointly and severally praying for judgment and decree as follows;

- i. Declaration order that, the first defendant is in breach of construction contract dated 15th day of September 2021 the first defendant had with the plaintiff. ii. Declaration order that, the first defendants is in breach of two construction contracts dated 25th day of September 2021 the first defendant had with the plaintiff. i iii. Declarations order that, the defendants, jointly and severally are in breach of all three construction contracts they had with the plaintiff. iv. The defendants, jointly and severally, be ordered to pay the plaintiff sum of Tshs. 123,962,000/= being the costs of material purchased and utilized by the defendants and advanced payments made by the plaintiff to the defendants.
- v. An order for payment of interest at the bank rate of 25% per annum from November 2021 to the date of judgment till date of full payment. vi. General damages as will be assessed by this court for loss of income and business caused by the defendants to the plaintiff business. vii. Costs of this action. viii. Any other relief(s) as the court may deem fit to grant in the circumstances of this action. Upon service, all the defendants, on 14th day of July, 2022, filed a joint written statement of defence disputing the plaintiff's claim. However, after filing the written statement of defence, the defendants did not appear in court as such, after several adjournments on the ground of defendants' absence, the plaintiff's counsel one Mr. Gwakisa Sambo, on 6th March, 2 2023 sought and obtained an order striking out the defence in terms of rule 31(l)(b) of the High Court (Commercial Division) Procedure Rules hereinafter to be

referred as the Rules. Consequently, this Court ordered the plaintiff to prove its case as per rule 22(2) of the Rules. On account of the Court order, the plaintiff, on 10th March, 2023 filed in this Court an application for default judgment and affidavit sworn by Erica Thomas in proof of the claims contained in the plaint. The affidavit was accompanied by a number of documents including three construction contracts between the plaintiff, Rahisi General Merchant Company Limited and 1st defendant, Turkanya Company Limited, payment receipts issued by the 1st defendant, bank transfer printouts transferring money from the plaintiff to Emirate Builders CO. LTD for purchase of aluminum, email correspondence printouts between Turkish Embassy in Dar es Salaam and the plaintiff, arbitration proceedings and demand notice. According to the pleadings, the plaintiff is a limited liability company dealing with provision of hotel services and sale of hardware materials, among other things. On the other hand, the 1st defendant is a company incorporated under the laws of Tanzania and it deals with UPVC, aluminum works and fittings of windows and doors whereas the 2nd defendant, Ercan Ozdemir is a Managing Director of the 1st defendant company. Besides, 3 the 3rd and 4th defendants namely, Yahaya Hamad Khamis and Christina Aloyce Senya are employees of the 1st defendant. The plaintiff claims from the defendants jointly and severally a sum of Tshs. 123,962,000/= being an amount paid to the defendants for work of finishing of the kitchen cabinets, dining tables and chairs of the four storey building built in Plot No. 711/17, Block 'M' at Rau area within Moshi Municipality and the three storey building located at Plot No. 463, Block 'J' within Himo Urban area. It was contended that on the 15th September, 2021 and 25th September 2021, the plaintiff and the first defendant herein entered into three construction contracts and all works were worth a sum of Tshs. 194,000,000/=. The plaintiff produced the three construction contracts which were attached to affidavit and marked as annex (R-1). The plaintiff further stated that for immediate completion of the work, it was agreed between the duo that the plaintiff would purchase material for the defendants in order to fast track the performance of the assigned works under the construction contracts which were to finish fitting of the aluminum and other fitting works. The said works were to be completed by the end of November, 2021 so that both buildings could start to be used for the hotel businesses. Hardly had the signing of contracts been done than the two buildings were handed over to the defendants for start of the agreed works. The plaintiff continued that until 27th September 4 2021, the plaintiff provided the defendants with all the materials they asked which were worth Tshs. 49,962,000/=. The said materials were purchased from Emirate Builders Co. Ltd and were collected by the 4th defendant at Emirate Builders Co. Ltd premises on behalf of the 1st defendant. Furthermore, the plaintiff stated that in fulfilling her part to the contracts, under the instructions of the defendants, she deposited total sum of Tshs. 26,000,000/= with the 3rd defendant's bank account No. 40303300002 maintained at NMB bank as advance payments for the works soon after signing the contracts. She lamented that despite providing all the materials and advance payments, the defendants failed completely to heed to the agreed contract terms and no work had been done by the defendants in respect of the building on Plot No. 711/17, Block 'M' at Rau area within Moshi Municipality and the building on Plot No. 463 Block 'J' within Himo Urban Area. More so, the plaintiff stated that after the defendants'

failure to perform their part, the managing director of the plaintiff reported the matter to the police for assistance and upon arrest, the 2nd defendant dumped the aluminum materials allegedly worth Tshs. 8,500,000/= and two idle, lazy and laxity workers at the site i.e., Plot No. 711/17 Block 'M' at Rau area within Moshi Municipality just to mock the plaintiff. 5 It was the plaintiff's contention that, at the instance of the defendants, she was forced to purchase another aluminum materials worth Tshs. 10,000,000/= as the dumped material at Rau project were not sufficient to complete the assigned works. She stated that until the date of filing this suit, the defendants have not completed the works as agreed in all three construction contracts nor have they handed over the completed work(s) to the plaintiff. She averred that the plaintiff was compelled to contract another person, WOODTECH 2008(T) LTD for work of finishing of rooms at the reception area, bar, store, and kitchen on the ground floor of the storey building on Plot No. 463, Bock'J', at Himo urban area, within Moshi district and paid her Tshs. 28,000,000/=. The plaintiff further claimed that until on the 30th day of April, 2022, the plaintiff had made total payment of Tshs. 123,962,000/= to the defendants jointly and severally in respect of all the construction contracts entered into between the plaintiff and the 1st defendant. The plaintiff further contended that on account of the defendants' failure to honour the terms of construction agreements, the plaintiff failed to start the hotel business in both buildings which had been scheduled to commence by early December 2021. On the above contentions, the plaintiff prayed for judgment and decree against all the defendants jointly and severally. 6 I have keenly scanned the plaint, affidavit in support of the claims as well as the exhibits (annexures to the affidavit). The relevant question for determination in this case is whether the plaintiff has proved the claims against all the defendants to the required standard (balance of probabilities). It is worthwhile to note that the plaintiff's claims are pegged on the alleged breach of the construction contracts (annexure R-1) to the affidavit. All the three contracts are very clear that the parties to the contract are the plaintiff, Rahisi General Merchant Company Limited and the 1st defendant, Turkanya Company Limited. There is no mention of the other person in the contracts apart from the two parties. Considering that the 1st defendant is a legal entity, which is a separate person from its directors and employees, it is my unfeigned view that, the plaintiff had no cause of action against the 2nd, 3rd and 4th defendants because the trio are not parties to the construction contracts from which the plaintiff's claims are gauged. Consequently, I dismiss the claims against the 2nd, 3rd and 4th defendants. With regard to the 1st defendant, there is evidence of the construction contracts (annexure R-1) that the payments were to be made in three installments. In the contract dated 15/09/2021, the first instalment was TZS12,000,000/= and the same was to be paid before the start of work. 7 The plaintiff has proved that the said sum was paid as per the agreement. This is evidenced via Receipt No. 0072 issued by the 1st defendant, Turkanya Company Limited (annexure R-2) and fund transfer request form (R-3). Further the contract dated 25/09/2021 indicates that the first instalment was TZS 49,979,000/= and, according to the contract, the said amount was paid before the signing date. The 1st defendant acknowledged receipt of the said sum via Receipt No.0104 dated 27th September, 2021 which was attached to the affidavit and marked (annexure R-2). The plaintiff claimed that she

purchased the aluminum from Emirate Builders and the same were collected by the 2nd defendant but he did not deliver them to the sites. In support of its assertion, the plaintiff produced CRDB bank transfers (R-2) evidencing that, at different occasions, the plaintiff made payments to Emirate Builder Co. Limited via account No. 0150370112600 maintained at CRDB being payments for purchase of aluminum. This tells it all that the plaintiff performed its contractual obligations but the 1st defendant failed to honour the agreed terms of finishing the buildings. Moreso, the plaintiff both in the plaint and affidavit affirms that the defendant sent only two workmen whom the plaintiff described as lazy and idle as such, no work was done as per the agreements. 8 All the above considered, I am of the findings that the plaintiff has proved his claims against the 1st defendants on balance of probabilities. I therefore enter judgment and decree against the 1st defendant as follows;

- i. It is hereby declared that the 1st defendant, TURKANYA COMPANY LIMITED is in breach of construction contract dated 15th day of September 2021 the first defendant had with the plaintiff. ii. It is hereby declared that the 1st defendant, TURKANYA COMPANY LIMITED is in breach of two construction contracts dated 25th day of September 2021 the first defendant had with the plaintiff. iii. The 1st defendant is ordered to pay the plaintiff a sum of Tshs. 123,962,000/= being the costs of material purchased and utilized by the defendant and advance payments made by the plaintiff to the 1st defendant. iv. The 1st defendant is hereby ordered to pay interest on the decretal amount under (iii) above at the court's rate of 7% from the date of judgment to the date of full payment.
- v. Costs of this suit. It is so ordered. 9 The right to appeal is explained In terms of Rule 22 (2) of the High Court (Commercial Division) Procedure Rules, the plaintiff is ordered to publish the decree at least in two newspapers of wide circulation in the country within ten (10) days from the date of this judgment. JUDGE 23/06/2023 io

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