

TANZANIA / JUDGMENT

serengeti district council vs monica alex 2020 tzhc 2463 24 august 2020

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY OF MUSOMA AT MUSOMA CONSOLIDATED APPEAL NO. 4 AND 5 OF 2020 (Arising from the decision of the District Court of Serengeti at Mugumu (R.S. Mushi-RM) dated 27th day of August, 2019 in Civil Case No. 1 of 2017) SERENGETI DISTRICT COUNCIL..... APPELLANT VERSUS MONICA ALEX.....RESPONDENT

JUDGEMENT

KISANYA, J.: This is a consolidated appeal. It merges two appeals. The first appeal was filed by Serengeti District Council against Monica Alex. It was admitted and registered as Civil Appeal No. 4 of 2020. The second appeal is by Monica Alex against Serengeti District Council and was registered as Civil Appeal No. 5 of 2020. Since both appeals originate from the decision of the District Court of Serengeti at Mugumu in Civil Case No. 1 of 2017, they were consolidated by order of this Court. Before the trial court, Monica Alex sued Serengeti District Council basing on the contract. She claimed for specific damages (Tshs 5,600,000), general damages (Tshs. 50,000,000), punitive damages (Tshs. 10,000,000), interest of 15% on the specific damages per annum from June 2013 to the date of judgement, interest of 15% on decretal sum from the date of decree to the date the decree is honoured in full and costs of the case; and costs of the suit. I think it is pertinent albeit in brief, to give the facts giving rise to the dispute which resulted to the disputed decision. Sometimes in 2012, Monica Alex (hereinafter referred to as “Monica”) won a tender advertised by Serengeti District Council (hence force referred to as “the Council”), for collection of levy from guest houses located in rural areas within Serengeti District. Thus, a one year contract was signed by the parties on 3rd July, 2012. It was agreed that, Monica would collect the levy, remit Tshs.400, 000 every month and retain any balance from the levy collected. In the course of executing the contract, Monica paid a total of Tshs. 5,600,000, out of which, Tshs. 800,000 was security for the performance of the agreement. The remaining amount of Tshs. 4, 800,000 was monthly remittance for the duration of the contract. However, the hotel levy could not be collected as agreed. The main reason was that, the levy had been repealed by Tourism Act, 2008. In that regard, Monica instituted the suit on the above stated claims. After hearing both parties, the trial court held in favour Monica. The Council was ordered to pay her special damages (Tshs. 5,600,000) together with interest of 12% per year from 2013; general damages

(Tshs. 10,000,000); and punitive damages (Tshs. 5,000,000). In addition, the Council was ordered to pay interest of 12% on the decretal sum from the date of the decree to the date the decree is honored in full. Dissatisfied, both parties appealed to this Court thereby leading to the consolidated appeal as stated above. The grounds advanced in the appeal by the Council can be summarized as follows: 2

1. The trial court erred in law in ordering the Council to pay interest of 12% on special damage (Tshs 5,600,000) without lawful justification.
2. The trial court erred in law in pronouncing judgement against the weight of evidence on record.
3. That, the trial court erred in law in ordering the Council to pay general damages of Tshs. 10,000,000) without any lawful justification and consideration and that the said amount is too excessive.
4. That, the trial court erred in law in ordering the Council to pay punitive damage of Tshs. 5,000,000 which was not claimed nor prayed for.
5. That, trial court erred in law in ordering the Council to pay interest of 12% on the decretal sum while the same was not prayed for. On her part, Monica raised the following grounds of appeal:
 1. The trial court erred in awarding her general damage of Tshs. 10,000,000 instead of Tshs 50,000,000 and punitive damages of Tshs 5,000,000 instead of Tshs 10,000,000 without justification.
 2. The trial court erred in and fact in awarding 12% interest on specific damage and decretal sum instead of 15% without legal justification.
 3. The the trial court court's order is ambiguous for failure to state whether the interest of 12% on the decretal sum is per month or per year When this matter was called on for hearing, the learned counsel for both parties, requested the appeal to be disposed of by way of written submissions. In addition to above grounds, parties were asked to address 3 the Court on whether there was a valid contract to warrant the damages or compensation. Both parties filed their submission in accordance with the schedule fixed by the Court. The Council's submission was filed by her solicitor one, Mr. Magananiko Msabi, while Mr. Ostack Mligo, learned advocate, filed submission on behalf of Monica. I would wish to thank the counsel for the research and time to prepare their submissions. Having considered the evidence on record, the petition of appeal and the submission by the parties, I find that the sticking point for determination is whether the contract was valid for one party to claim damages on it; and whether the reliefs granted by the trial court were lawful. Although the issue whether the contract was valid for one to claim damages was raised by the Court, suo motu, it was based on the general ground raised by the Council that, the court erred in law in pronouncing judgement against the weight of evidence on record. In his submission, Mr. Msabi argued that, the contract was void ab initio as its object was to collect hotely levy

under the Hotel Act which had been repealed by section 63 of the Tourism Act, 2008. Citing section 23 of the Law of Contract Act, Cap. 345, R.E. 2019 (hereinafter referred to as “the LCA”), he went on to argue that, illegal contract cannot attract damages unless it is established that the plaintiff was ignorant of the illegality or his the consent was induced by fraud, misrepresentation, coercion or undue influence. Mr. Msabi submitted that, Monica had advanced misrepresentation on the part of the Council. However, he was of the firm view that, pursuant to sections 18 and 19 of the LCA, misrepresentation could not stand. His 4 argument was based on the fact that, Monica had means to discover the truth with ordinary diligence and through cases instituted against her on 27.08.2012 on the same issue but continued to collect the hotel levy up to 30.06.2013. Mr. Msabi argued further that, Monica did not prove that, she was ignorant of the illegality of contract at the time of paying the money. He contended that, she was entitled to Tshs.1, 600,000 collected or paid by 27/08/2012. Mr. Msabi went on to argue that an action cannot arise out of an illegal act and that, everyone is presumed to know the law as stated by Prof. Nicholas N.N. Nditi in his book titled “General Principles of Law of Contract in East Africa”. On the other side, Mr. Mligo submitted that, Monica’s claim was based on the loss suffered due to the misrepresentation made by the Council by inviting her to enter into un-executable agreement or perform the impossible contract made under repealed law. The learned counsel conceded that, the contract made under illegal law was void and that no suit can brought under it save for circumstances specified under section 22(2)(a) of the LCA which include, ignorance of illegality on the part of the plaintiff. He argued that, Monica was not aware of the illegality of the law because she is a lay person. The learned counsel reiterated that, there was misrepresentation on the part of the Council and that, remedies available in such circumstances is compensation for the loss suffered and expenses incurred under sections 56 and 65 of the LCA respectively. In the light of the above submissions on the first, the Court notes that parties do not dispute that, the contract between Monica and the Council was illegal and hence void ab initio. Their arguments were based on the 5 ground that, Monica was engaged to collect levy under the Hotels Act {supra} which had been repealed. On my part, I wish to state that lawful object is one of the ingredients of a valid contract specified under section 10 of the LCA. Other ingredients are free consent of parties, competence of the parties and lawful consideration. Now, pursuant to section 23(1) of the Act, consideration or object of the contract is unlawful, inter alia, if it is forbidden by law or if permitted, would contravene the provisions of any law. The said section reads as follows: “The consideration or object of an agreement is lawful, unless-

- (a) it is forbidden by law;
- (b) it is of such a nature that, if permitted, it would defeat the provisions of any law;
- (c) it is fraudulent;
- (d) it involves or implies injury to the person or property of another; or

- (e) the court regards it as immoral or opposed to public policy. ” (Emphasize added/ It follows that, a contract made under unlawful consideration or object is void. See section 23(2) of the LCA. Guided by the above position of law, it is on record that, the parties in the present appeal entered the Contract for Collection of Hotel Levy in the Villages (Mkataba wa Kukusanya Ushuru- Nyumba za Kulala Wageni Vijijini) dated 3rd July, 2012. The said contract was admitted as Exhibit P3. The recital clause read together with the acceptance letter which is part of the contract under clause 2 thereto implies that, the object of the contract was 6 to collect hotel levy. Further, the Power of Attorney {Exhibit P4) shows that the hotel levy was to be collected under the Hotels Act. It is important no note here that, hotel levy is one form of tax. Article 138(1) of the Constitution of the United Republic of Tanzania, 1977 (as amended), provides that, tax of any kind cannot be imposed unless it is prescribed in the law enacted by the Parliament. The said Article is reproduced hereunder: “Hakuna kodi ya aina yoyote itakayotozwa isipokuwa kwa mujibu wa sheria iliyotungwa na Bunge au kwa mujibu wa utaratibu uliowekwa kisheria na uliotiwa nguvu ya kisheria na iliyotungwa na Bunge. ” The position that tax cannot be levied unless it is prescribed in the statute was restated by the Court of Appeal in Bidco Oil and Soap Ltd vs Commissioner General Tanzania Revenue Authority, Civil Appeal No. 89 OF 2009, CAT at Dar es Salaam (unreported) when it held that: “We are of the view that there being no a specific legislation or order as required under the provisions of sections 1 (2) (2) of the Provisional Collection of Taxes and duties Act, 1963, the respondent had no mandate to impose suspended duty on the crude palm oil imported on the 12th August,
2002. No attempt was made by the respondent to rectify the omission by legislation to support the suspended duty in dispute. Thence, since there is no legislation to support the suspended duty on crude palm oil imported on the 12th August, 2002, the said suspended duty is not sustainable in law. ” (Emphasize is added,). In the present matter, the District Councils’ mandate to collect all moneys payable under the Hotels Act by the proprietor of guest houses within its 7 boundaries was provided under section 7(1) (u) of the Local Government Finance Act, Cap. 290, R.E. 2002. However, the Hotels Act was repealed by the Tourism Act, 2008 which came into force 1st July, 2009 through GN. No. 212 of 2009. The hotel levy was not retained by the Tourism Act,
2008. Thus, upon coming into force of the Tourism Act, 2008, the District Council had no mandate to collect hotel levy because it was not provided for under any law. The Councils’ power to collect the hotel levy was reintroduced by section 25 of the Finance Act, 2015 which amended section 7(1) (u) of the Local Government Finance Act (supra). The said amendment provided that, the revenues, funds and resources of the district council include “all monies derived payable as hotel levy equal to ten percentum of the guest charges payable by a guest.” It came into operation on 1st July, 2015. However, the contract subject to this appeal was entered in 2012. At that time, the Council had no mandate to collect hotel levy. Therefore, I find that the object to collect hotel levy which was not provided under any legislation was unlawful for contravening the provision of Article 138(1) of the Constitution. For that reasons, the contract entered by the parties was void

under section 23 (2) of the LCA. Having decided that the contract was void, the question that follows is whether damages could arise from it. It is well settled that an action on a contract which is prohibited by statute cannot be maintained. Thus, void contract cannot be enforced by law as provided for under section 23(2) of the LCA. Thus, it is not a contract at all because it is an agreement without legal effect. I associate myself to the decision in *Melliss v. Shirley Local 8 Board* (1885) 16 Q.B.D. 446 when Bowen, L.J. stated at page 454; "... no man can recover in an action founded on that which is a breach of the provisions of a statute" However, I am in agreement with the counsels for both parties that, in Tanzania, action founded on void contract with unlawful object can be maintained in the exceptions provided for under section 22(1) of the LCA, thus:

- (a) the court is satisfied that the plaintiff was ignorant of the illegality of the consideration or object of the agreement at the time he paid the money or delivered the thing sought to be recovered or did the thing in respect of which compensation is sought, and that the illegal consideration or object had not been effected at the time when the plaintiff became aware of the illegality and repudiated the agreement;
- (b) the court is satisfied that the consent of the plaintiff to the agreement was induced by fraud, misrepresentation, coercion or undue influence; or
- (c) the agreement is declared to be illegal by any written law with the object of protecting a particular class of persons of which the plaintiff is one. The trial court was of the considered view that, there was misrepresentation on the part of the Council. This is reflected in the trial court's judgement where it was stated: but looking at the contract between the two it was inexecutable (sic) one since it was made under wrong law and this was due to misrepresentation and negligence which means that the defendant failed to make proper care of the law to be used instead of using the Tourism Act contract was signed under the Hotel Act which did not even exist by then hence making the contract illegal... " 9 Such finding was also supported by Mr. Mligo in his submission before this Court. Was the action at hand based on section 23(2)(b) of the LCA? With respect, I have a different opinion. It is trite law that, every person is presumed to know the law and that, ignorance of the law is not a defence. In the circumstances, Monica and the Council were duty bound and duty bound to know whether the hotel levy was provided for under the law. Failure to discharge such duty cannot be termed as misrepresentation envisaged under section 18 of Act. It is my considered opinion that, there was no misrepresentation in the case at hand. And since any of the exceptions provided for under section 23(2) of the LCA was not proved, the suit for damages or compensation arising from the contract at hand could not stand. However, the trial court ordered the Council to pay special damage (Tshs, 5,600,000) together with interest of 12% per year from 2013, general damages (10,000,000), punitive damages (Tshs 5,000,000) and interest of 12% to decretal sum. This brings us to the second issue on whether the said reliefs or damages were lawful. Mr. Msabi was of the view that, Monica was not entitled to reliefs granted by the trial court. On the other hand, Mr Mligo argued that, the Court did not assign reasons for not granting the reliefs as pleaded in the pleadings. He contended that,

the said damages were based on section 56 of the Act. I have read section 56 of the LCA relied upon by Mr. Mligo. It provides that: “56.-(1)An agreement to do an act impossible in itself is void. 10

- (2) A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
- (3) Where one person has promised to do something which he knew or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non- performance of the promise. ” Reading from the provision of section 56 of the LCA, I find that compensation arises where there is a contract to do impossible act, or where the act is subsequently declared impossible or unlawful. In any case, it must be established that, the promisee was not aware of the act to be impossible or unlawful. The promisee (Monica) in the instant appeal was presumed and duty bound to know that, the hotel levy had been repealed at the time of entering into the contract. In my opinion, compensation cannot be claimed under section 56 of the LCA in the circumstance where the plaintiff had the duty to know the law. Furthermore, it is my firm view that, where the contract is void due to unlawful consideration or objects, compensation can only be claimed under section 56 of the LCA if the suit is filed under the exceptions provided under section 23(2) of the LCA. As shown herein, this case does not fall under any of the exceptions provided for under section 23(2) of the LCA. Hence, the action for “compensation for anything done” was not required to arise from the contract between the parties. Consequently, I find that Monica (the then plaintiff) was not entitled to the general damages, punitive damages and interest pleaded in the plaint or awarded by the trial court. However, it is in evidence that the Council through (DW1) admitted to have received Tshs. 5,600,000 from Monica. In the circumstances, I am of the considered view that, the Council should not benefit from the void contract. Therefore, basing on section 65 of the LCA, the Council has to return the money received from Monica Alex in course of executing the said contract. In view of the above, the Court hereby decides that:

1. The appeal by Serengeti District Council partly succeeds as shown above.
2. Serengeti District Council shall return Tshs. 5,600,000 received from Monica Alex.
3. The appeal by Monica Alex is dismissed for being meritless.
4. Each party shall bear its own costs due to the circumstances of this case. DATED at MUSOMA this 24th day of August, 2020. E.S. Kisanya JUDGE 24/8/2020 Court: Judgement delivered this 24th day of August, 2020 in the absence of the appellant and the respondent. Parties to be notified to collect copies E.S. Kisanya JUDGE 24/8/2020 12

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