

TANZANIA / JUDGMENT

SON TA FOUNDATION ANOTH VS

COURT
TANZLIIDECIDED
24 February 2025

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA ARUSHA SUB REGISTRY AT
ARUSHA CIVIL APPEAL No. 14960 OF 2024 (Originating from the District Court of Arusha at
Arusha, in Civil Case No. 57 of 2022) SON TA
FOUNDATION..... 1st APPELLANT REGISTERED TRUSTEES
OF SON TA FOUNDATION..... 2nd APPELLANT VERSUS BUILDING
CONTRACTOR AND ELECTRICAL CONTRACTORS MECCHILLY TECHNOLOGIE (T)
LTD..... RESPONDENT

JUDGMENT

12th December & 24th February, 2025 KAINDA, J.: The respondent herein successfully sued the appellants in the trial District Court for a breach of a contract to build a school. According to paragraph 5 and 6 of the Plaint, the respondent who was the plaintiff in the lower court, had an agreement with the appellants for the respondent to build a school for the appellants at their land situated at Plot No. 01, Manyire Village- Arusha at the consideration of TZS. 325,791,211/= to be settled in full after the completion of the work as agreed. The respondent further 1 | Page averred that, at first, the appellants honored the agreement by making payments timely and precisely but the problem started to arise after the claim for the payment in respect of additional works. According to the plaint filed in the trial court on 21st November, 2022, the respondent claimed for the following reliefs; one, payment of TZS. 32,579,121/= being unpaid amount after accomplishing the construction of the school; two, payment of TZS. 58,642,417.8/= being Value Added Tax (VAT); three, payment of TZS. 5,100,510/= being cost of addition work done; four, payment of TZS. 20,253,025.66/= being an increased price of materials; five, payment of TZS. 4,030,000/= being reimbursement for water supply connection. The total claim is Tanzanian Shillings One Hundred Twenty Million, Six Hundred Five Thousand and Seventy-four (TZS. 120,605,074/=). The appellants vehemently refuted the claim. In their joint written statement of defense filed on 13th December, 2022, it was averred that the second appellant does not exist by the operation of law. It was further averred that all the agreed amount was successfully paid. On the other hand, the appellant stated at paragraph 2 (ii) of the written statement of defense that; the agreement dated 27th December, 2021 is unclear as it shows the investor is Hoang Son Food Processing Joint Stock Company and not Son Ta 2 | Page Foundation Tanzania. On 8th June, 2023, when the matter was called on for Final Pre-trial Conference, the following issues for determination of the matter was framed; one, whether the defendant is indebted to pay the

plaintiff TZS. 120,605,074/=; two, whether there was any contract between the parties that amounted to the claim sought and three, to what relief (s) parties are entitled to pay. To prove the claim, the respondents tendered exhibit P1 which is a construction contract dated 27th December, 2021. In addition, the respondent summoned two witnesses PW1 Zafany Shaban and PW2 Asaf Mulimbula Kalesho. PW1 testified that she is the respondent's director and that the respondent entered in the contractual agreement with the appellants for building of a six-room hostel, septic tanks, raising tanks, six classrooms, residential house, dining hall bike parking and guard house and that, the whole construction worth is TZS. 325,791,211/= She further stated that the agreement was for the appellants to be responsible for payment of Value Added Tax to the Government in which the appellants did not honor the promise hence they decided to pay it subject for the refund from the appellants. She testified further that during the progress of the work, the building materials costs increased due to Covid-19 Pandemic which 3 | Page amounted to TZS. 35,253,025.66 while the appellants paid only TZS. 15,000,000/= leaving unpaid balance of TZS. 20,253,023.66/=. As to the settled and unsettled amount, PW1 stated that, according to the bank statement, the amount paid was TZS. 293,211,000 out of 325,791,211/=. PW2 supported PW1's version that there was addition work and increase on the building materials price. On their part, the appellants fielded only DW1, Natasha Mallya who is the first appellant's Foundation Chairperson. In essence, her testimony mainly centered on the allegation that exhibit P1 shows that the agreement for building construction was between Hoang Food Processing Joint Stock who is an investor and the respondent as provided in exhibit P1. She alleged that all the monies under the agreement was paid as per the agreement. Having considered the evidence adduced before it, the trial district court decided the case in favor of the respondent. In her considered judgement, the trial magistrate ordered the appellants to pay to the respondent TZS. 105,000,000/= with interest thereof. In addition, the appellants were also condemned to pay TZS. 5,000,000/= being general damages. Aggrieved, the appellants preferred the appeal before the court on the following eight grounds; 4 | Page

1. That, the trial magistrate erred in law and in fact by adjudicating and entertaining the suit against non-existing entities in law.
2. That, the trial magistrate grossly erred in law and in fact by holding that Son Ta Foundation and the Registered Trustees of Son Ta Foundation were liable for breach of contract while they lacked locus standi to be sued in the purported suit in the trial court.
3. That, the trial magistrate erred in law and in fact by holding that there was a contractual relationship between the respondent (plaintiff) and Son Ta Foundation and the Registered Trustees of Son Ta Foundation (defendants)
4. That, the trial magistrate miserably failed to evaluate the evidence on record which occasioned a miscarriage of justice.
5. That, the admission of documentary exhibits into court record did not take away the powers of the court to scrutinize and evaluate the evidence in accordance with the provisions of the law.

7. ... k... ■? 'j. - - ■■, ' . r • • X-s ■ ' < < U ■: ... - . . - - 6 | Page ■ ■ 1 ■ 7 , /77;£ , > 7 ■/ . A//. 7: '! 7. // > /> , > 7.7.7/77. 7 >7.7> // 7 . ■/ . ' . . ' 7' as 1 7/. ' ■' > . -> 7 : 7> (7'7/ , 77 7/ 7- 777? 7. / 7/. Notably, through paragraph 7 (i) (ii) (iii) (iv) and (v) of the plaintiff's claim that initiated the respondent's claim against the appellant's, the respondent is on ■'. I * record as having pleaded some payments which were not paid to the respondent contrary to the agreement. On the other hand, the appellants, through paragraph 4 Of their joint written statement of defense filed on 13th December, 2022, refuted the claim alleging that they paid all the claim as per the agreement and that the agreement indicated that the investor is one Hoang Son Food Processing Joint Stock Company. For clarity, I reproduce paragraph 4 of the appellant's written statement of defense in the trial court; " 4. That, the contents of paragraph 7 (i) (ii) (iii) (iv) and (v) of the plaintiff is disputed and the plaintiff is subjected to strict proof thereof. The defendants further avers that;
- i. AH payments were done accordingly and no agreement to variation of works as contemplated by the plaintiff. ii. The agreement dated 27th December, 2021 is unclear as it shows the investor is Hoang Son Food Processing Joint Stock Company and not Son Ta Foundation Tanzania; reference to page 3 part 2 of the agreement is made." At this juncture,

the immediate questions for consideration are; one, who is a necessary party to a suit; two, whether or not, Hoang Son Food Processing Joint Stock Company was a necessary party in the circumstances of this matter, and three, what is the effect of non-joinder of parties in the suit. In *Abdullatif Mohamed Hamis v. Mehboob Yusuf Osman and Another*, Civil Revision No. 6 of 2017, the Court of Appeal had this to say on who is a necessary party; "The determination as to who is a necessary party to a suit would vary from a case to a case depending upon the facts and circumstances of each particular case. Among the relevant factors such determination includes the particulars of the non-joined party, the nature of relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed" Guided by the holding in the above authority and based on what was Pleaded by the respondent in his plaint and also the written defense by the appellants, it is my considered opinion that, Hoang Son Food Processing Joint Stock Company was a necessary party for effective decision on the issues involved in the suit. My reading of the written statement of defense shows clear that Hoang Son Food Processing Joint Stock Company was indispensable party to this matter. I now come to the last question that, 8 | Page what is the effect of not joining Hoang Son Food Processing Joint Stock Company in this case. Mr. Mwale submitted that the trial court ought to have ordered for a joinder of a necessary party failure of which its proceedings conducted in absence of the necessary party is liable to be struck out. I entirely agree with him that the trial court ought to have ordered joinder of / Hoang Son Food Processing Joint Stock Company as a necessary party. In the cited case of *Juliana Francis Mkwabi v. Lawrent Chimwaga* (supra) the Court of Appeal held at page 111 quote; "It is our considered view that, upon making a determination that, a necessary party was not joined in the suit, the learned High Court Judge was required to refer back the matter to the trial court with a direction that a necessary party be joined and the suit proceed from there." To this end, I reject the position suggested by the counsel for the respondent that courts are not clothed with powers to order joinder of parties. Under Order 1 rule 10 (2) of the Civil Procedure Code, [Cap 33 R.E. 2019], the courts have powers to order addition of a necessary party. It provides; 9 | Page "(2) The Court may, at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added." For the reasons hereinabove explained, therefore, and without consideration to the remaining grounds of appeal, the determination of which would be an academic exercise, I find merit in the seventh ground of appeal. Consequently, I quash the proceedings of the trial District Court and set aside the judgement and the subsequent orders thereto. The case is remitted back to the trial court for a retrial of the case after full compliance to the mandatory provisions of Order 1 rule 10 (2), (4) of the Civil Procedure Code. I make no order as to costs 10 | Page S. J. KAINDA JUDGE 24.2.2025 Judgement delivered in chambers under my hand and seal of this court this 24th February, 2025 in the presence of Mr. George Kivuyo, learned counsel holding brief for both

Mr. Medium Mwale and Mr. Fridolin Bwemelo, learned advocates for the appellants and the respondent respectively. Right of appeal to the Court of Appeal fully explained 24.2.2025 11 |
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