IN THE HIGH COURT OF TANZANIA

AT SONGEA.

DC. CIVIL APPEAL NO. 15 OF 2007

RESIDENT COURT OF RUVUMA CIVIL CASE NO. 9 OF 2005

TRIACT EAST AFRICA LTD.----------APPELLANT

VERSUS

LEGELE CIVIL WORKS----------RESPONDENT

JUDGMENT

L.M.K. Uzia,J.

The appellant has appealed against the judgment and decree of the trial Magistrate. At the hearing of the appeal both counsels, Mr. Waryuba for the appellant and Mr. Mbogoro for the respondent applied for leave to argue the appeal by way of written submissions, the court granted leave and ordered to file the submissions on or before 28th /10/2008.

The facts unfurled at the trial were that the appellant hired ABG roller to the respondent at a rate of 120,000/= per ten days. The roller was for construction activities, the Respondent advanced him shs. 1,000,000/= and left with the balance of shs. 200,000/=. The agreement was oral and there was no any written document. Upon breach of the hire agreement, the appellant sued for the outstanding amount of shs. 200,000/=

and specific damages of shs. 120,000/= from 8th /1/2005 to the date of filing the suit i.e. on 24th /5/2005.

In his defence, the Respondent strongly disputed the claim and counter claimed the refund or return of shs. 880,000/= out of 1,000,000/= advanced to the plaintiff/Appellant because the ABG roller worked for one day i.e. 6 1/2 hours as per worksheet. The counter claim of shs. 1,600,000/= was for carrying the roller to and from the site at Lingusenguse about 268 km from Songea Municipality. The trial court decided in favour of the respondent or original defendant.

Mr. Mbogoro submitted that, the trial Court erred in law in putting undue weight to the worksheet, he further argued that by producing the worksheet, the respondent introduced written document in the oral contract.

From the evidence adduced in the trial court, it was put to light that the contract was to be qualified or supported by a written document (Exhibit DI), that ABG roller worked for a single day. It was not useful and therefore breach of the contract.

Mr. Waryuba, counsel for the respondent, submitted that the trial Court was right in deciding in favour of the respondent. The ABG roller, hired, became defective and did work only for a single day.

In giving weight to Exhibit DI the trial court was trying to clear the uncertainity which could or was enshrined in the whole entire agreement, by qualifying it with a worksheet which indicated that the roller worked for only a single day.

Having considered the arguments raised by both learned counsels, I find the appeal meritorious because the agreement was oral and being oral no document was to be allowed to qualify or support any fact in issue.

I am fortified by the rule in the case of **Smith v. Hughes (1871) LR 6 QB 597),** that if the contract is wholly by word of mouth its contents are a matter of evidence normally submitted to a judge sitting as a jury. It must be found as a fact exactly what it was that the parties said as for example, in **Smith vs. Hughes(Supra)** where the question was whether the subject matter of a contract of sale was described by the vendor as good oats or as good old oats."

In the instant appeal, the document (worksheet) was not part of "what the parties said."

For that reason, I allow the appeal and quash the District Court decision, and the final position is that shs. 200,000/= be paid to the Appellant being outstanding balance and I order specific damages of shs. 120,000/= from 8th/1/2005 to the filing of the suit in court, i.e 24/5/2005

The appellant should be paid costs of the appeal.

L.M.K. UZIA

JUDGE

28/10/2008

Right of appeal explained.

L.M.K. UZIA

JUDGE

28/10/2008

MMS/