

IN THE HIGH COURT OF TANZANIA  
AT TABORA

PC CIVIL APPEAL NO. 44 OF 2010

(Arising from Tabora District Civil Appeal No 4 of 2009 and Original Tabora Urban Primary Court  
Civil Case No 68 of 2008 )

BETWEEN

JUMANNE MALIMA .....APPELLANT

VERSUS

MWENYEKITI KAMATI YA SHULE AND ANOTHER .....RESPONDENTS

**JUDGMENT**

Date of the Last Order; 7/2/2012

Date of the Judgment: 26/7/2013

**SONGORO, J.**

This is the second appeal instituted by Jumanne Malima, the appellant against, the decision of Tabora District Court Civil Appeal No 4 of 2009 dated on the 20/7/2009.

In its decision, the District Court, rejected the appellant claim of shs 1,071,000/= on the basis that, there is evidence that, he was paid the entire contract sum of shs 2,600,000/= and he claiming nothing from the respondents. Respondents are the Chairman of Cheyo 'B' of Construction Committee and the Secretary.

In his petition of appeal, the appellant presented two (2) grounds of appeal which were;

- 1) That, in view of the signed Agreement, District Court erred in law by holding that,, the appellant was paid shs 1,071,000/=
- 2) That, on the evidence on record, the trial Resident Magistrate erred in law in dismissing the Appellant's appeal.

In view of the above-mentioned grounds of appeal, the appellant prayed that, his appeal be allowed with costs.

During the hearing of the appeal, the appellant appeared and argued his appeal himself whereas Mr. Mr. Senyadumi appeared for the respondents.

In pursuing his appeal the appellant contended that, from the evidence on record, there is no proof, if the claimed amount was paid to him. Regarding payments which he received from the respondents, the appellant agreed that, he was paid shs 714,000/= only.

Thus the appellant contested that,, on the basis of the evidence on record, District Courts erred in law and facts when it found that,, he was already paid the entire contractual sum while the evidence shows that,, he only received a cheque of shs 714,000/=.

On payment made to him by cheque No 108482 of 2,600.000/= the appellant explained that, those payments were not part of

contractual sum, but for other services, which he rendered to the respondent, which were agreed upon orally. He maintained that, he still claim a balance of shs 1,071,000/=.

Finally, the appellant prayed to the court to review the evidence on record, considers and allows the appeal, with costs in his favour.

In reply to the appellant's grounds of appeal, Mr. Senyadumi for the respondent, explained to the court that, the appellant was assigned to carry construction work was paid the entire contractual sum

On the payments made by them, the respondent states that, appellant was paid a first installment of shs 714,000/=. Further, he was appellant was paid a sum of shs 2,600.000/= by cheque No 108482. The respondent maintained that, the second payment covered the remaining balance of shs 1,071,000/=.

Explaining further on the 2<sup>nd</sup> payment to the appellant, Mr. Senyadumi submitted that,, it consolidated several payments and included the remaining contractual sum of shs 1,071,000/= He then briefed the court that,, the only problem, is that, the appellant is mixing payments of shs 2,600,000 which were duly effected by cheque to him.

Finally, respondents pray that, since the appellant was paid the entire contractual sum and claiming nothing, they pray that, the appellant appeal be dismissed with costs in their favour.

I have duly considered the evidence from both side which was submitted to the Primary Court, and Tabora District Court , appellant grounds of appeal, submissions from the parties, and find that,, the key issue for determination in the instant appeal, is whether the District Court erred in law, when it decided that,, the appellant was paid the remaining contractual sum of shs1,071,000/= and claims nothing.

Going by the appellant explanation and submission, it is well established that,, on 30/11/2006 appellant and respondents signed an Agreement for construction of 3 class rooms of Cheyo B Secondary School at a costs of shs 2,600,000/= .

Further, appellant admitted that, he received shs 714,000/= as part of the contractual sum, from the respondents as first installment, and the balance was only Shs 1,071,000.

Next, the appellant admitted that, he was paid a sum of shs 2, 600, 000/= through cheque No 108482. Thus on the 2<sup>nd</sup> payment, the crucial question to be determined is whether or not the 2<sup>nd</sup> payment included the remaining balance.

The court find that, in the above-mention second payment which was done by the cheque, that, is were there is double interpretation on payments made.

On his part the appellant took a position that, the second payment done by cheque does not include the remaining balance of contractual sum, whereas respondent maintained that, it included the remaining balance.

In view of the two conflicting position on the second payment, I carefully examined the cheque and payment vouchers which supported the payment in order to ascertain if it had a component payment of the remaining contractual sum shs 1,071,000. Further , I also revisited the testimonies of Gregory Marco Kipalapala who was PW2 before the Primary Court.

In his testimony before the Primary Court, Gregory Marco Kipalala PW2 , the Ward Executive Officer of the area, told the Primary Court that,, the construction contract between the appellant and respondents was being financed from two sources. The first source of fund was from TASAF fund which was supposed to pay 80 % of the total construction costs, and the 2<sup>nd</sup> source of fund was from the community which was supposed to contribute 20% of the construction costs.

Then the court noted that,, there is a testimony of Senyandum which was reviewed by District Court, it realized that,, payment voucher in support of the second payment of shs 2,600,000/, indicated appellant payments were for;

- 1) Shs 1,071,000/= for outstanding balance from contractual sum of shs1,785,000/=;
- 2) Shs 929,000/= for other minor works; and
- 3) Shs 600,000/= to Ward Executive Officer

Next, from what is stated in payment voucher, the District Court found that,, by the description given in the payment voucher the appellant liability of shs 1,012,000/= was inclusive paid in the cheque.

I also revisited the details of cheque and payment voucher, and noted that, shs, 2,600,000/= paid by cheque on the 1/3/2007. Further I noted that, the payment included, the appellant outstanding claim of shs 1, 012,000 was inclusive.

Indeed the Payment Voucher No 1/3 dated 28/2/2007 which supported the 2<sup>nd</sup> payment of 2,600,000/= done by cheque from - TASAF 11 TABORA DISTRICT COUNCIL had several clusters which described (1) (Mradi) the name of the Project; Ujenzi wa Madarasa 3 Cheyo B Sekondari, (2) Jina la Mlipwaji (Payee) (Jina la Mlipwaji) : Jumanne Malima Cheyo (3) (Kiasi) Malipo ; shs 2,600,000/= (4)

Maelezo ya Malipo- Reason for payment : Malipo hayo yanatolewa kulipia madeni ya nyuma na kulipia mafundi wasaidizi na vibarua (2) Kukopesha Tshs 600,000/= kwa jamii kukamilisha jingo la jamii kwa fedha hizo (Tshs 2,600,000).

Thus going by the explanation available in column titled Maelezo ya Malipo on the payment voucher No 1/3 cited above, the purpose of the payment were stated as "Malipo haya yanatolewa kulipa Madeni ya Nyuma na kulipia mafundi wasaidizi na Vibarua"(2) Kukopesha Tshs 600,000/= kwa jamii kukamilisha Jengo la Jamii kwa fedha hizo (Tshs 2,600,000). I find explanation contained in payment vouchers tallies with the testimonies of Issa Kimolo and Senyadumbimka who were DW1 and DW2 respectively before the Primary Court. The two witnesses being the ones who process and effected payments to the appellant , there were firm that, payment done covered the remaining contractual sum.

While still on this point it is important to emphasis that, were payment is made by cheque, and supported by payment voucher, the common sense dictates that, the one who makes payment by cheque which is supported by payment voucher, is the one who gives the purpose and description of payment. Also is the one who account for the payment. Thus in the payment voucher, respondent has clearly stated that, the payments made covered previous liability. In other word the recipient of the cheque supported by

payment voucher like the appellant may not dictate the purposes and description of payments made to him. In short description and purposes of paid cheque, originates from the one paid the cheque and not vice versa.

Thus in view of what is stated in the payment voucher on previous liability this court like the two courts below is convinced that, the appellant previous liability were paid.

Thus on basis of the testimonies of DW1 DW2 before the Primary Court and descriptions contained in payment voucher which supported the cheque, like the two courts below, I find that, there is overwhelming evidence that, appellant was paid the outstanding balance of shs 1,071,000/= and claims nothing from the respondent. In view of that finding the court find that appellant grounds of appeal No 1 and 2 have not basis .

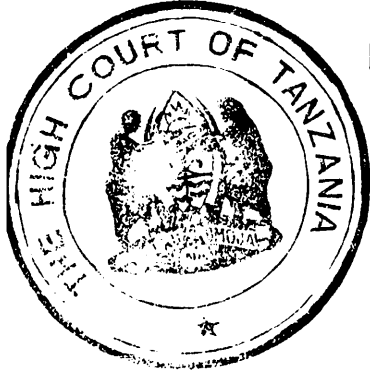
For reasons explained above, I find the appellant appeal has no merit and dismiss it with costs in favour of the respondent.

The right of appeal is explained to the parties.

Dated at Tabora this 26<sup>th</sup> July 2013



  
H.T.SONGORO  
JUDGE



Delivered at Tabora this 26<sup>th</sup> of July 2013

  
H.T.SONGORO  
JUDGE

The Judgment was delivered in the presence of the Appellant and Senyandumi Mika Swai, for the Respondent