IN THE HIGH COURT OF TANZANIA

AT IRINGA

(DC) CIVIL APPEAL NO. 4 OF 2010

(Originating from the decision of the District Court of Iringa in Civil Case No. 16 of 2009)

ILULA ITUNDA VILLAGE COUNCIL ..... APPELLANT

VERSUS

JOHANESS JOHN SALUFU ..... RESPONDENT

8/5/2014 & 5/9/2014

JUDGEMENT

MADAM SHANGALI, J.

Before the District Court of Iringa, the respondent Johannes John Salum instituted a civil suit claiming that sometimes in 2001/2002 he contracted with the appellant, Ilula Itunda Village Council to build three classrooms at Ilula Itunda Primary School. That the respondent satisfactorily performed the contract as alleged, but was not paid some of the agreed amount that is T.Shs.1,650,000/=; the fact which compelled the respondent to institute a Civil Case No. 16 of 2009 before the District Court against the appellant. The

respondent won his suit. Being dissatisfied with the decision of the trial District Court, the appellant has filed this appeal based on five grounds.

In the conduct of this appeal the appellant was represented by Mr. Liwolelu Alto, learned advocate while the respondent was represented by Mr. Kingwe, learned advocate. Following the request from the learned advocates, this appeal was argued by way of written submission.

The said five grounds of appeal are as follows:-

1. That the trial Magistrate erred in law and fact in failure to observe provisions of laws and precedents.

2. That the trial Magistrate erred in law and fact in not considering the appellant's evidence regarding DW1, DW2, DW3 and PW4.

3. That the trial Magistrate erred in law and fact in failure to record the whole evidence delivered by PW4 and to record properly the evidence of DW3.

4. That the trial Magistrate erred in law and fact in considering Exhibits P1, P2 and P3.

5. That the trial Magistrate erred in law and fact in taking into consideration the weak evidence of PW1, PW2, PW3 and PW4 to reach judgement.

In support of the first ground of appeal the appellant argued at length to establish that there was no binding oral or written contract between the parties to construct the alleged three classrooms. He cited Section 10 of the Law of Contract Act which provide that all agreement are contract when they are made by free consent of the parties. He stressed that the respondent was involved in the project due to his position as a Chairman of Ilula Itunda Primary School Committee performing his duties under the Education Act, Act No. 25 of 1978 as amended by Act No. 10/1995 and Government Order No. 14 dated 7th June, 2002 which provide for the duties of the Chairman of Primary School Committees to supervise construction and rehabilitation of school buildings and conservation of school compound.

The appellant contended that at that time it was not possible for the appellant to have contracted the respondent to build the alleged three classrooms because he was an interested person who was supervising the same communal work as a Chairman of Ilula Itunda Primary School Committee. He argued that even the evidence of PW4, the Chairman of the Village Council in 2004 failed to prove that

there was any type of contract between the respondent and appellant to construct the classes.

The appellant further submitted that according to the Public Procurement Act (*Act No. 3 of 2004*) and its regulations as amended by the Public Procurement Act (*Act No. 21 of 2004*) and its regulation specifically G.N. No. 97 of 2005 requires such contracts by the appellant to be in written form as procurement contracts.

The appellant argued that it was after the completion of the construction of the three classes under Communal Development work when the respondent started the process of demanding payments for constructing the alleged classrooms through the District Executive Director and Members of the Parliament who were not party to the alleged contract. He contended that in normal circumstances agreements are made before the execution of the anticipated work but in this matter the respondent started to create agreement and demand payments after completion of work. He further argued that, the Ilula Itunda Village Council is a legal entity under Section 26 of the Local Government (District Authorities) Act, thus it is only liable for its own decision and not by orders of District Council Authority or a Member of Parliament. He asked this court to refer to the decision in the case of **T. H. Patel Vs. Lawrenson and another (1957) EA 249**.

On the second ground of appeal, the appellant revisited the evidence of DW1, DW2, DW3 and PW4 showing that all of them denied the existence of any contract between the Ilula Itunda Village Council or any person on ,that behalf with the respondent to construct the alleged three classrooms. He stated that DW3 who was the Village Executive Officer denied to have engaged the respondent in communal work as a constructor while DW2 stated categorically that the work was voluntarily done and no payments were made to the volunteers who were villagers. The appellant insisted that there was no evidence whatsoever to suggest that the Ilula Itunda Village leaders had an intention at any time to create legal relation with the respondent regarding the construction of the said three classrooms.

On the third ground of appeal the appellant re-emphasized what was stated in the testimonies of DW3 and PW4 claiming that both testified to the effect that there was no agreement between the respondent and the appellant to construct the alleged three classrooms as it was a communal development work organized by the Village Government and its School Committee. He went further and showed how the respondent failed totally to reveal the agreed contractual amount of money between the parties as consideration of the whole work. He stated that the respondent has only shown the unpaid balance of T.Shs.1,650,000/= in 2004 as if he was paid some amount and what he is claiming is the remaining sum. The appellant argued that it is the duty of the

respondent to prove his claim by adducing sufficient evidence. He cited the case of **Genroza Ndimbo Vs. Blasidus Yohanes Kapesi (1998) TLR 74**.

On the fourth ground of appeal the appellant complained that exhibit P1 was tendered by the respondent during trial to the effect that the District Executive Officer of Iringa agreed for the payments but the appellant refused to comply. He contended that the District Executive Officer have no mandate to direct the appellant on such issues. He submitted that the Village Council is a legal entity under Section 26 of the Local Government (*District Authorities*) Act with its own officials. Secondly Exhibit P1 was signed by unknown person who was not called as a witness to testify and produce the letter. The appellant also challenged Exhibit P3, a cheque which was issued to the respondent by PW2 in consideration of work done by the respondent to the appellant. He stated that the appellant refused the transaction because there was no contract between the appellant and respondent to build the classes and secondly there was no evidence showing that the village council intended to sell any land to PW2. The appellant insisted that the alleged land is the public playing ground used for village meetings and children games. On Exhibit P2, the appellant stated that the letter did not prove that there was a contract between the parties. The appellant concludes that exhibits P1, P2 and P3 do not suggest or prove the existence of a commercial agreement between the parties to

the construction of the alleged classes, rather they only show the efforts of the respondent to benefit from communal work illegally.

On the fifth ground of appeal, it was submitted that the trial court was wrong to rely on the weak evidence of PW1, PW2, PW3 and PW4. That, these witnesses did not establish that they were witnesses during the formation of the alleged contract but rather they said they participated in the construction of the classrooms and the respondent was among the supervisors and also the School Committee Chairperson. He concluded that it was wrong for the trial Magistrate to rely on the evidence of witnesses who never witnessed any contractual arrangements between the appellant and respondent.

In response, the respondent through his advocate submitted to the effect that there was an oral agreement between the parties. That such fact can be inferred from the conducts of both parties namely that the respondent was shown the site to build the three classrooms by the appellant; the work done was valued by the District Executive Director to be T.Shs.3,000,000/=; the appellant requested the respondent to pay a lesser amount; that PW4 adduced evidence to show that the respondent paid some people who were constructing the classrooms and that the said classrooms were handed to the appellant. The respondent

argued that there is also the evidence of PW2 who was instructed by the appellant to effect payments of T.Shs.1,650,000/= to the respondent in exchange of a piece of land. That PW2 drew a postdated cheque in the name of the plaintiff but when he was not given the promised land he (*PW2*) stopped the transaction. The respondent argued that all above facts show that there was an oral contract and the allegation that the construction of the said classrooms was a Communal Development work in which the respondent participated as a villager is an afterthought.

On the second ground of appeal the respondent submitted to the effect that communal development scheme are not necessarily a physical performance, it can be by way of fund raising and use of the acquired fund to hire competent people. That it is not expected that all villagers are experts in all fields. Some technical works can only be performed by engaging skilled people with relevant tools of work. Therefore, the appellant had all rights to hire any person to do the works through their own sources of income. On the third ground of appeal the respondent argued that even if the respondent had argued that the appellant paid part of the costs of construction leaving a balance of T.Shs.1,650,000/= it was the duty of the appellant through cross examination during trial to question about such payments. He argued that the act of the appellant to remain silent means he agreed with the facts made by the respondent.