

IN THE HIGH COURT OF TANZANIA

AT DODOMA

DC CIVIL APPEAL NO. 16 OF 2015

(Arising from RM Civil Case No. 06 of 2012 of Dodoma)

1. KONDOA DISTRICT COUNCIL

2. MSAKWALO SEC. SCHOOL CONSTRUCTION

COMMITTEE APPELLANTS

VERSUS

STANSLAUS JOACHIM JOHN..... RESPONDENT

JUDGMENT

29/08/2016 & 16/01/2017

A. MOHAMED, J.

This appeal arises from the decision of RM Civil Appeal No. 16 of 2015 wherein judgment was given for the respondent. The 2nd appellant had entered into entered into four contracts with the respondent for the latter to construct two classrooms, a teacher's house, a library and offices for its school. The respondent had successfully sued the appellants in the trial court which awarded him the outstanding balance of 9,600,000/= as well as general damages of 6 million shillings.

Against that decision the appellants appeal on the following grounds of appeal:

1. That the trial court erred in law to order the appellants to pay the respondent the outstanding sum of 9,600,000/= shillings irrespective of the defects of the executed works.
2. That the trial court erred in law to hold that rejecting to pay the respondent on the basis of defectiveness of the executed works was not a condition which the parties were bound to adhere.
3. That the trial court erred in law in awarding the respondent the sum of 6,000,000/= shillings allegedly being general damages.
4. That the evidence relied upon by learned trial Magistrate was insufficient and inadequate to enter judgment in favour of the respondent.

The appeal was argued by way of written submissions. In support of their 1st and 2nd grounds of appeal, the appellant submitted that the respondent did not perform the work to the required standard as per Exhibits P1, P2 and P3 to wit construction contracts which provided as follows;

***“KIFUNGU CHA III: WAJIBU WA MWAJIRI mwajiri
atasimimia shughuli nzima kuhakikisha kuwa mkandarasi
anatekeleza kazi zilizotajwa hapo juu kwa ubora
unaokusudiwa na kwa mud uliopangwa. Mwajiri***

atahakikisha kuwa mkandarasi analipwa kulingana na makubaliano na kazi zilizotekelezwa.

KIFUNGU CHA IV: WAJIBU WA MKANDARASI mkandarasi atasimamia na kutekeleza kazi zote kulingana na mkataba na kuhakikisha kuwa anakamilisha kwa muda ulioangwa, aidha atahakikisha kuwa ubora wa kazi unafuatwa"

The appellants argued, in order for the respondent to be paid the outstanding balance, he was obliged to finish the work and be awarded the **"final competition certificate"** as is required by law.

In support of thereof, they cited Regulations 123 (5) (a) of the Public Procurement Regulations of 2005, GN No. 97 of 2005 (**"the Regulation"**) that reads;

"In the event the service provider or the contractor fails to provide services at the required standard, to remedy faults or to complete the works to the satisfaction of the procuring entity, that procurement entity may either;

- (a) Withhold payment of any moneys retained.**
- (b) Call any performance security if such has been furnished by the service provider of contraction".**

The appellants had written to the respondent to rectify defects in the construction (Exhibit P5) but he neither disputed it nor

responded to it. It was the appellant's view the learned trial magistrate did not adhere to the regulation stated hereinabove. Finally, the appellants maintained they were right in withholding the outstanding sum pursuant to the said regulation.

The appellants then submitted at length on the rules governing award of damages with supporting authorities which I need not reproduce.

Finally they maintained that the respondent failed to prove how he handed over the work as in fact it has not been handed over. In support they cited Regulation 123 (1), (2), (3) and (4) of the Regulations which stipulates:

“123 (1) in case of contracts for non-consultant services or works, a procurement entity shall monitor the service provider or contractor's performance against the statement of requirements or schedule of works stated in the contract, by means of daily, weekly or monthly report from the procuring entity's supervisor responsible for the services or works.

(2) provided that the service provider's or contractors performance is satisfactory, the procuring entity shall authorize payments by measurement and certification, at the intervals or stages stated in the contract provided further that percentage of each such

payment may be retained as retention money, if so stated in the contract.

(3) if a service provider's or contractor's performance does not meet the requirements stated in the contract, the procuring entity shall draw the service provider's or contractor's attention to any short-comings, and may refuse to authorize further payments until these are remedied.

(4) if agreement cannot be reached with the service provider or contractor so as to remedy the situation, the procuring entity shall notify the service provider or contractor formally that he is in breach of the terms of the contract, and may invoke the procedure for the terms of the contracts, and may invoke the procedure for disputes further to the provisions of the contract".

In regard to the 1st and 2nd grounds of appeal, the respondent submitted he proved his case at the required standard and established the appellants owe him the outstanding balance of 9,600,000/=.

As to the 2nd ground, he submitted the appellants failed to prove the said buildings had any defects apart from the allegation in their letter (exhibit P5). Furthermore, he submitted that the said defective buildings have been used by the 2nd appellant since 2007.

It was the respondent's submission on the 3rd ground of appeal that the general damages awarded for the loss he suffered from 2009 to the date of judgment was based on the court's discretion and he cited **Bamprass Star Services Station Ltd Vs. Fatuma Mwale [2000] TLR 155** where the court said:

“... as far as general damages are concerned, the plaintiff only need to aver that such damage has been suffered and the quantum to be awarded are for the court to decide”.

He resisted the 4th ground by submitting that there was no evidence by the appellant that there were defects in the built houses a part from the letter (exhibit P5). And that the issue of the Final Completion Certificate and the Public Service Regulations were afterthoughts that were not raised at the lower court and no evidence to that effect.

After hearing the parties' contentions and upon reviewing the lower court's record, I state from the outset that the appellants' arguments merit my acceptance.

It is clear both appellants are public institutions and are therefore governed by the Public Procurement Act and its Regulations in procurement of goods works or services.

It is also uncontested that the 2nd appellant entered into four separate contracts with the respondent for construction of the said

buildings which had two relevant conditions; the first "**KIFUNGU CHA III: WAJIBU WA MWAJIRI**" expressly stated the procurement entity would pay to the contractor according to the works that have been completed; and secondly "**KIFUNGU CHA IV: WAJIBU WA MKANDARASI**", clearly spells out that the contractor would ensure the required standard of works is performed.

Having said so, the 1st appellant had power under Regulation 123 (5) (a) of the Public Procurement Regulation of 2005, GN No. 97 of 2005 to withhold monies until the contractor or service provider rectified defects pointed out to the satisfaction of that procurement entity.

Undoubtedly, the law requires an official handing over once works are completed evidenced by a "Final Completion Certificate. In this case, the respondent has not proved he was availed of one. I am alive to the respondent's claim the 2nd appellant has been using the building since 2007. Nevertheless there is no official handing over to date.

After the foregoing, I allow the appeal as I find it has merit. I accordingly quash the trial court's decision and set aside any orders emanating therefrom. I make no order as to costs in the circumstances of the case.

It is so ordered.

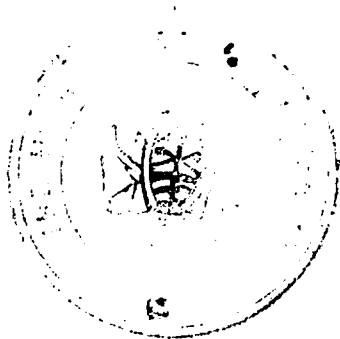


A. MOHAMED

JUDGE

16/12/2016

The right of appeal explained.



A. MOHAMED

JUDGE

16/12/2016