

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL CASE NO. 176 OF 2011

JOHN TIMOTHY NYASANGA

T/A JUST DEAR INVESTMENT.....PLAINTIFF

VERSUS

MINISTRY OF DEFENCE AND NATIONAL SERVICE1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

29/12/2017&2/03/2018

JUDGMENT

MWANDAMBO, J:-

This is a suit for specific and general damages arising from the failure to pay for the goods the Plaintiff alleges to have supplied the 1st Defendant in the year 2009. The Defendants deny that the Plaintiff supplied the goods in the manner claimed in the amended plaint and pray for the dismissal of the suit.

The background to the suit can be stated briefly as follows. Sometime in 2009 the 1st Defendant invited tenders for the supply of sundry goods to the Tanzania People Defence Force (known by its acronym as TPDF) for the peace keeping mission in Darfur. The Plaintiff of trading as just Dear Investment was one of the business persons who bid for the tender. On 27th April, 2009 the 1st Defendant wrote to the Plaintiff informing him of the award for the supply of carpentry items and electrical installation contained into two separate letters both bearing Ref. No. CFA 41/379/02 dated 27th April 2009. The former had 15

carpentry items worth Tshs. 36,766,800/= and the latter had three electrical installation items worth Tshs. 174,400/=.

The two letters of award were admitted during the trial as exhibit P1A and P1B respectively. Each of the letters directed the addressee to liaise with the Chief of Logistics & Engineering at TPDF Head Quarters for contract formalities and other elaborations on how to accomplish the assignment. Subsequently, by a letters dated on 30th April, 2009, TPDF Head Quarters instructed Just Dear Investment of Post Office P.o. Box No. 35496 Dar es Salaam to supply and deliver 15 carpentry items and three electrical installation items on an urgent basis at 511 KJ (New Hangar Lugalo). The two letters (exhibits P2A and P2B) asked the addressee to deliver the items pending issue of Local Purchase Orders (L.P.Os). It is instructive to note at this juncture a few distinguishing features between exhibits P1A and P1B on the one hand and P2A and P2B on the other. The postal address in the former is 8353 Dar es Salaam whilst in the latter exhibits the address is shown as P.O Box 35496 Dar es Salaam in exhibit P2B. No postal address is indicated in exhibit P2A. Secondly, unlike in the former, the prices of the items are not indicated in the latter. Thirdly and perhaps the most significant one is that the number of band saw machines in exhibit P1A is six pieces whereas exhibit P2A shows that the pieces to be supplied were 21. Upon receipt of the two letters from TPDF Head Quarters, the Plaintiff claims that he supplied the items per exhibits P2A and P2B and had them delivered on 2 May, 2009 at 511 KJ at which place staff Sergeant Malale Nkinga Maganga (DW3) acknowledged receipt of the items for reasons not very clear from the record, no delivery notes were signed on the date the Plaintiff delivered the items.

According to para 8 of the amended plaint, the Plaintiff supplied the items on 16 June, 2009 worth 33,509,400/= vide invoice No. 070 and other items supplied on the same date per invoice No. 072 were worth Tshs. 2,998,800/=.

months later, the Plaintiff supplied other items worth Tshs. 58,500,000/= per invoice No. 073 of the same date. It is the Plaintiff's case that out of the total value of the items supplied, the 1st Defendant managed to pay Tshs. 5,610,008/= only leaving an unpaid balance of Tshs. 95,008,200/= which is a subject of the suit. According to the Plaintiff, he obtained a temporary credit facility from CRDB Bank Limited which he spent in procuring the items supplied to the 1st Defendant and that he had his residential house at Makorongoni Iringa Town mortgaged to secure the facility. By reason of the un payment of the full price of the items supplied, the Plaintiff is said to have defaulted to repay the amount borrowed which resulted in the bank exercising its right of sale of the said house through an auctioneer who sold the house by public auction in March 2012 per PW3's testimony. Upon the sale, the Plaintiff alleges that he was compelled to seek alternative accommodation in rented houses in Dar es salaam which caused him loss.

By reason of the foregoing, the Plaintiff prays for judgment and decree for:-

- a) payment of the remaining balance of Tshs. 95,008,200/= as the principal sum.*
- b) payment of an interest at (a) at the commercial bank rate of 20% from the 16th day of June, 2009 when the Plaintiff supplied the items requested by the Defendant to the date of judgment.*
- c) payment of Tshs. 504,000,000/= being the current market value of the Plaintiff's property which was caused to be disposed by the Defendants at a throw away price.*
- d) payment of Tshs. 28,000,200/= being money used by the Plaintiff to pay for rent, the said payment of rent being caused by the 1st Defendant from March, 2012 May, 2017 when the caused CRDB to auction the Plaintiff's house up to the date of filing this amended plaint.*

- e) *payment of any money used by the Plaintiff as rent likely to increase from the date of filing this amended suit up to the day of Judgment.*
- f) *general damages for the breach of contract to be assessed by this Court.*
- g) *decretal interest at a rate of 12% from the date of the Judgment till full satisfaction of the decree.*
- h) *costs of suit be borne by the Defendant hereof.*
- i) *any other relief(s) this honourable Court may deem fit and or equitable to grant.*

The Defendants have taken exception to the Plaintiff's claims and deny the Plaintiff supplied the items per letters of awards (exh.P1A and P1B) and on that basis they pray for the dismissal of the suit with costs.

From the foregoing the Court framed the following issues namely:-

1. *Whether the Plaintiff supplied to the 1st Defendant items worth the value of Tshs. 95,008,200/=.*
2. *Whether the items were supplied as per the tender awarded.*
3. *To what reliefs are the parties entitled.*

The Plaintiff prosecuted his case through Isaac Tasinga learned Advocate and called two more witnesses apart from himself. Apart from oral testimony, the Plaintiff (PW1) tendered a number of documentary exhibits namely; two letters of awards dated on 27th April, 2009 (exhibits P1A and P1B), letters from TPDF Head Quarters dated 30th April, 2009 for the supply of carpentry items and electrical installation items (exhibit P2A and P2B), two delivery notes with serial number 070 and 071 dated 16 June, 2009 (exhibit P3 collectively), and a letter with Ref. No. MMJ/1206-2(CLE) dated 21 January, 2010 to M/s Just Dear Investment titled ***kuthibitisha madai*** (exh. P4). Ms. Vivian Maro (PW2) whose

testimony was confined to proving that the Plaintiff had obtained a credit facility from the bank which he defaulted in repayment, tendered a letter from the TPDF Head Quarters dated on 09March, 2011 titled Kuthibitisha *madai (exhibit P5)*. That letter (exh. P5) was to confirm that the Plaintiff supplied the TPDF sundry carpentry goods worth Tshs. 95,008,200/= . The evidence of Issa Bendera (PW3) was meant to confirm that the Plaintiff's mortgaged house at Makorongoni Iringa was sold it at the instance of the bank upon default to repay the loan. However, documentary evidence to prove the credit facility obtained from the bank, the mortgage of a house at Makorongoni Iringa to secure the facility, the lease agreements and proof of payment of rent for leased premises in Dar es salaam were not tendered.

The Defendants produced three witnesses too Major Agnes Barnabas Majani (DW1) gave a general account of the procurement procedures but had no specific role in this case. For her part, Lieutenant Colonel Janet Charles Izengo (DW2) testified that she knew the Plaintiff as one of the bidders who won tenders for the supply of sundry items at the TPDF Head Quarters in 2009. DW2 confirmed that due to the urgency involved in the supply and delivery, bidders the Plaintiff included were instructed to make the supplier on the basis of the letters of award instead of **L.P.Os** whose process could take long. It was her evidence too that the TPDF asked bidders to submit invoices to the same office against the supplies made and the Plaintiff submitted his invoices which, upon examination reflected a variance in the amount of money between the letter of award in respect of band saw machines. For that reason, DW2 stated, payment of that invoice was stopped after unsatisfactory explanation from the Plaintiff. DW2 testified further that according to the letter of award (exh. P1A) the Plaintiff was required to supply six band saw machines but the invoice submitted showed 21 pieces. Except for the excess amount on the band saw machines, DW2 stated

that the rest were in order and the Plaintiff could be paid in accordance with exhibit P1A. Asked about the quantity shown in exhibit P2A in respect of the same item, DW2 admitted that there could have been a mistake in stating that quantity but that did not mean to vary the terms of the letter of award because the author of exhibit P2A had no authority to vary the award. The last witness was Staff Sergeant Malale Nkinga (DW3) was a store keeper with TPDF Head Quarters. DW3 admitted to have been involved in the receipt of carpentry items of different types from the Plaintiff on 2 May, 2009 and admitted to have received six band saw machines on that day and later on stuffed them along with other items in a container ready for shipment to Darfur.

DW3 denied having signed any delivery note on 2 May, 2009 and that the delivery notes by way of exhibit P3 showing 21 band saw machines were signed on 16 June, 2009 by a different person, who did not receive the items on 02 May, 2009. DW3's testimony marked the end of the trial after which the learned counsel filed final submissions.

Having heard evidence from the witnesses for and against the Plaintiff's claims it is obvious the dispute revolves around only one item that is to say; the band saw machines. There is no dispute in relation to the rest of the items some of which have been paid for. According to PW1's testimony who acknowledged payment of Tshs. 5,610,900/= there is still a balance of Tshs. 95,008,200/= the subject of the suit.

Mr. Daniel Nyakiha learned State Attorney invited me to dismiss the suit because there was no evidence of supply and delivery of items worth Tshs. 95,008,200/= more so when exhibit P3 signed long after the delivery acknowledged by DW3 has no correlation with the relevant letter of award (exh. P1A) on the number of band saw machines. The learned State Attorney

submitted that in the absence of any evidence to prove supply of the items higher than those shown in exh. P1A through delivery notes duly signed on the date on which DW3 received the items from the Plaintiff, the Court should answer the first issue in the negative.

Mr. Isaac Tasinga learned Advocate for the Plaintiff took a different view. The essence of his submission was to the effect that proof of delivery was by way of exhibit P3 but did not account for the delay in issuing the said delivery notes. The learned Advocate submitted further that DW3 who was not responsible for receipt of goods from suppliers had no power to challenge the validity of exh. P3 and in any event he has not tendered any documentary evidence to prove receipt of items less than those shown in exh. P3. The learned Advocate went further and submitted that the supply of more items were acknowledged by DW2 who was a much more senior officer than DW3 and so there was no basis upon which the Defendants could disown that evidence and ask the court to find that the Plaintiff did not supply the items worth Tshs. 95,008,200/= . On the contrary, the learned Advocate urged the court to find that the urgency and circumstances under which the Plaintiff was required to supply the items justified the Plaintiff complying with the instructions as he did.

As I highlighted earlier the scope of the dispute revolves around the variance in the number of band saw machines between exhibit P1A and P2A. It is common ground that exhibit P1A was an award to the Plaintiff following bids invited by the 1st Defendant following which the Military Tender Board awarded the Plaintiff a tender to supply specified items with corresponding quantities and prices for each item.

Before I discuss the first issue, I find it apposite to make a determination of the status of exhibits P1A and P1B in the eyes of the law. This is so because that appears to be the crux of the dispute in this suit. Did they constitute a legally binding contracts?. The learned counsel did not address this aspect in their submissions but I think the answer to that question must be in the affirmative. It is clear from the pleadings and evidence that before issuing exhibits P1A and P1B, the 1st Defendant had advertised tenders for the supply of specified items. From the legal point of view, the Plaintiff's response to the tenders amounted to an offer which was accepted by the 1st Defendant through letters of award (exhibits P1A and P1B). Each of the letters of award constituted an agreement within the meaning of section 2(h) of Law of Contract Act Cap 345 [RE 2002]. The requirement to the Plaintiff to liaise with the Chief of Logistics and Engineering at TPDF Head Quarters was only restricted to formalities of the contract and elaborations on how to accomplish the assignment. In other words, the bargain was completed with the letters of award made by a competent authority and as stated by DW1, the competent authority to award tender for the TPDF was the Ministry's Tender Board which had the power to alter or cancel any award. Accordingly, once the Ministry's Tender Board had made the awards through exhibit P1A and P1B, they could not have been altered through exhibit P2A as contended by the Plaintiff in his evidence and his counsel's submissions. In my judgment, apart from the instructions communicated through the said exhibit for the urgent supply of the items per the letter of award any alteration of the quantities was of no legal affect. Such alteration did not change the contract already concluded through Exhibit P1A in relation to the number of band saw machines which is the bone of contention in this suit.

Even assuming the alteration had any legal affect, I uphold the learned State Attorney's submission that there is no evidence to prove that the Plaintiff

supplied quantities beyond what is indicated in exhibit P1A. DW3 who was responsible for the receipt of the items from the Plaintiff acknowledged to have received six band saw machines and stuffed them along with other items in a container ready for shipment to Darfur but did not sign any delivery notes on 2 May 2009 or any subsequent date. Mr. Tasinga would have the Court hold that the duty to prove delivery of 21 band saw machines shown in exhibit P2A was on PW3 rather than the Plaintiff. With due respect there is no substance in that argument because the duty to prove that 21 band saw machines were supplied and delivered to the 1st Defendant on 2 May, 2009 in accordance with exhibit P2A lies in no other person than the Plaintiff who alleges so. That burden is cast on the Plaintiff by section 110 of the Evidence Act Cap 6 [RE 2002]. The Defendant let alone DW3 had no such burden until such time the Plaintiff discharges his which is not the case.

Interestingly, whereas it is common ground that the items not in dispute were supplied and acknowledged by DW3 on 02 May, 2009, the Plaintiff did not do so against delivery notes. He did so on 16 June 2009 through exhibit P3 long after the delivery. Mr. Tasinga learned Advocate attempted to criticize DW3 for challenging the validity of such documents but I see nothing of assistance in his argument to prove delivery of band saw machines more than the number indicated in exhibit P1A. This is so simply because there was nothing to deliver on that date and in any event a look at exhibit P3 does not tell what it is other than the list of items. But to cap it all, exhibit P3 does not match with annexure JN3 of the same date. An examination at the documents shows that they cannot be the same because annex JN-3 with serial No. 071 shows the price for each item total price and the value of the items plus 20% VAT, the total amount is shown to be Tshs. 33,509,440/= . Specifically the unit price for band saw machines is the same as shown in exhibit P1A of Tshs. 3,250,000/= and the total

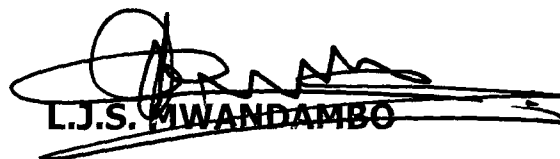
amount shown for the pieces is Tshs. 19,500,000/= which tallies with the price of six band saw machines shown in exhibit P1A. Annex JN-3 like all other annexes are shown to be part of the pleadings and going by the trite law that parties are bound by their own pleadings, exhibit P3 could not have been part of the amended plaint and find its way in the record to prove delivery of 21 band saw machines made on 02 May, 2009. One wonders if PW1 tells nothing but the truth about the delivery/supply of 21 band saw machines made on 02 May, 2009 it defeats logic that one and half months later the Plaintiff issued delivery notes showing 6 pieces of the same item.

To make matters worse the Plaintiff avoided producing in evidence annex JN-3 in preference for exhibit P3 bearing the same serial number addressed to the same person, no explanation has been offered for the failure to produce such a document and the only irresistible conclusion one can safely make is that such a document if produced would have spoken against the Plaintiff's interest in respect of the excess band saw machines.

In the same vein I find no merit in Mr. Tasinga's submission that DW2 admitted receipt of 21 band saw machines because the said witness was not responsible for receipt thereof. In the event, I answer issue number one in the negative and hold that the Plaintiff did not supply items worth the value of Tshs. 95,008,200/= to the 1st Defendant. Having answered the first issue against the Plaintiff my answer to the second issue will be simple and that is to say; on the evidence on record it is clear that the items supplied by the Plaintiff to the 1st Defendant in terms of quantities were as per the tender awarded through exhibits P1A and P1B. That means that the claim for the supply 21 band saw machines in excess of the quantity shown in exhibit P1A has no basis and is rejected.

Lastly on the reliefs. I have already held that the Plaintiff supplied items per letter of award worth Tshs. 36,766,400/= per exhibit P1A plus Tshs. 174,400/= per exhibit P1B which works out to Tshs. 36,941,200/= less Tshs. 5,610,900/= already paid leaving a balance of Tshs. 31,330,300/= which DW1 acknowledged to be payable. I therefore enter judgment in favour of the Plaintiff on that sum and reject the claim for Tshs. 95,008,200/=. That sum shall attract interest at the rate of 20% per annum from the date of institution of the suit till the date of judgment and thereafter interest of 7% per annum shall be charged on the decretal sum from the date of judgment till full satisfaction thereof. Since the Plaintiff has not proved the rest of the claims I reject them in their entirety.

In fine judgment is entered for the Plaintiff to the extent indicated. Since the bulk of the claims have been dismissed I make no order as to costs. Order accordingly.



L.J.S. MWANDAMBO

JUDGE

02.03.2018