IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 109 OF 2009

SINCON ENVIRO LIMITED ..... PLAINTIFF

VERSUS

THE DIRECTOR,
ILALA MUNICIPAL COUNCIL.....1ST DEFENDANT

MOTTO INVESTMENTS LIMITED.....2ND DEFENDANT

JUDGMENT.

I. ARUFANI, J.

The plaintiff instituted the instant suit in this court against the defendants seeking for the following reliefs:-

a) Declaration that the contract between the first and second defendant be declared null and void.
b) Payment of Tshs. 10,062,940,500/= as outstanding charges before second defendant takes over.
c) Payment of Tshs. 140,000,000/= as costs to be incurred for re-modification of vehicles.
d) Payment of interest to (b) and (c) above at the rate of 32% from the date of filing the suit till judgment.
e) Payment of interest to the decretal sum at the court rate from the date of judgment to the date of payment in full.
f) Costs of this suit.

g) Any other relief as the court may deem fit.

After the defendants being served with the copy of the plaint they disputed the plaintiff's claims by filing in the court their written statement of defence. The second defendant raised a counter claims against the plaintiff's claim in the written statement of defence and claim for the following reliefs:-

(a) The plaintiff's suit be dismissed in its entirety.
(b) The plaintiff pay the second defendant the sum of Tshs. 500,000,000/=as per paragraph 20 of their written statement of defence.
(c) The plaintiff to pay the second defendant interest on the decretal amount at the rate of 11% per annum from the date of judgment till when the decree is fully satisfied.
(d) The plaintiff pay the second defendant's costs and incidental to the suit and the counter claim.
(e) Any other relief(s) that the court may deem fit to grant.

On 15th day of April, 2015 the court ordered that, as there is no written statement of defence filed by the plaintiff in response to the counter claim raised by the second defendant the same should be heard ex parte. The issues framed for determination of the plaintiff's claim are as follows:-

1. Whether there was a valid contract for solid waste collection and disposal between the plaintiff and the first defendant.
2. If the answer to the first issue is in affirmative, whether the first defendant terminated the said contract in favour of a new contract between the first and second defendants.
3. To what relief (s) are the parties entitled.

During the hearing of the suit the plaintiff was represented at the beginning by Mr. Benitho L. Mandele, learned advocate who later on was succeeded by Mr. Mohamed Mkali, learned advocate. On the other side while the first defendant was represented by Mr. Bonaventura Pardon Mwambaja, learned counsel the second defendant was represented by Mr. Roman Selasini Lamwai, learned advocate. The trial of this matter commenced before Hon. Mgetta, J whereby he heard part of the evidence of Peter Siniga, who testified alone for the plaintiff as PW1 and after being transferred to another station the matter was re-assigned to me for continuation. While the plaintiff called only one witness mentioned above the first defendant called two witnesses and the second defendant called one witness.

Peter Siniga, PW1 told the court that, he is the Managing Director of the plaintiff. He told the court that, their company deals with the business of collecting and disposing of solid waste and tendered in court the copy of business license issued for the said work for Temeke and the same was admitted in the case as an exhibit P1. PW1 told the court that, the plaintiff started work of collecting

and disposing of sold west from 1999 when Dar es Salaam Region was under the defunct Dar es Salaam City Council. He said that, after the Dar es Salaam City Council being divided into Temeke, Ilala and Kinondoni Municipal Councils the plaintiff started business with Ilala Municipal council from 2002. He told the court that, the plaintiff entered into a tender agreement with the first defendant to collect sold waste within Kariakoo and Gerezani Wards and dispose them of in the dumps of Vingunguti, Tabata and Mtoni.

He said the agreement was for three years commencing from 2002 up to 2005. The Franchise Agreement for the said work which was signed on 23rd day of November, 2002 was admitted in the case as an exhibit P2. He said the plaintiff used to collect waste from residential houses, restaurants, hotels, shops and different institutions which are within the mention Wards. He stated that, after expiration of the agreement period, as they had done a good job, there was no other tender which was published but were given letters of extending the agreement. He said they continued with the work while be given letters of extending the agreement up to 2009. He said that, the last agreement was supposed to come to an end on 31st day of May, 2009. He said that, after the last agreement come to an end and as there was no tender which had been published for the work they were doing they proceeded with the work.

He stated that, when they were proceeding with the work, misunderstanding between the plaintiff and the Director of the first

defendant ensued and on September, 2009 the first defendant gave the second defendant work of collecting and disposing of solid waste in the area where they were doing the work on allegation that, the second defendant had won the tender of doing the said work. PW1 said that, on the 2nd day of December, 2010 were given stop order for stopping them to proceed with the work and informed that, if they will be seeing proceeding with the work or collecting any money from the customers they were serving he would have been taken to Police Station. The letter of giving the work to the second defendant was tendered and admitted in the case as an exhibit P3.

He said further that, the tender which awarded the work to the second defendant published on May, 2009 was for the financial year 2008/2009, a period which the plaintiff was still in the site doing the work. Two copies of the alleged tender documents were admitted in the case as an exhibit P4 collectively. PW1 said that, the plaintiff stopped to continue with the work on 2nd day of December, 2010. The letter of stopping the plaintiff to continue with the work was admitted in the case as an exhibit P5. He said further that, the last period for their contract started from July, 2009 and was supposed to come to an end on the 30th day of June, 2010. He added that, when he was given the stop order letter there were some refuse charges which they had not collected from the customers they had served by collecting sold waste from their premises.

PW1 said that, they used to collect sold waste from one house to another and the Municipal council had gave them the schedule containing the rate of money they were supposed to charge from the customers they were serving. He said they used to collect sold waste every day and took the same to the dumps area and they used to collect the payment of the work they had done from the customer at the end of each month. He said that, the stop order letter informed them the reason for being stopped to continue with the work is that, the people were complaining they were not getting good service. He said when were stopped to continue with the work they were still claiming some money from the customers they had served but were stopped to claim any money from the customers they had served.

He said further that, they have joined the second defendant in the instant case because they were given work in the area they were working and they did so to prevent them to work in their area. He said the second defendant started the work in the financial year of 2008/2009 while their contract was ending in 2009. He added that, the plaintiff has suffered loss because he had worked for more than ten years and there were some customers they had served but they had not collected from them the refuse charges for service they had rendered to them. He prayed the court to declare the contract between the defendants null and void because there is no tender published for the work given to the second defendant. He also prayed to be given any other relief the court may deem fit to grant and the costs of the suit.

When he was cross examined by Mr. Mwambaja he said they used to charge payment for the service rendered to customers depending on the type of the business of a customer and they used to pay Tshs. 5,000/= for each trip of waste they took to the dumps. He stated further that, his first contract ended in 2005 and there was no any other tender which was published but they were given letters of extending the contract. He said the tender was published in 2008/2009 and they bid for the same by purchasing the tender documents. He said the second defendant started the work on 31st day of May, 2009 while they were still in contract and said to have proceeded with the work up to 2nd day of October, 2010 when were required to stop doing the work.

He said they are claiming for more than ten billion shillings from the customers they had served at Kariakoo and Gerezani Wards. He said the receipts to support his claims are annexed to the plaint and some of them have been admitted in the case as exhibits. He said that, though they were given the stop order letter but they proceeded with the work as they get the order to proceed with the work from the court. He said in the tender of 2008/2009 which the plaintiff also participated the winner was not announced on the date of opening the tender and the second defendant was given the work while their contract was still in existence.

When he was cross examined by Mr. Roman Lamwai he said exhibit P1 is a business license given for collecting waste in Temeke

District. He said in exhibit P2 there is nowhere stated they would have renewed the contract by using a letter. He said if the first defendant erred in extending the contract by using letters that is not his fault. He stated his claim is against the first defendant and said they have joined the second defendant in the case to prevent him to proceed with the work. He stated further that, the amount of money he was paid by the customers they served is smaller than what they are claiming from the first defendant. He stated further that, although he prayed to be reinstated in the work but now he has no ability of doing the work. He said to have come to court after seeing the tender which gave the second defendant work was not conducted properly.

Vicent Leonard Odero, DW1 told the court that, he know the plaintiff as he was their service provider who was collecting sold waste within the Wards of Kariakoo and Gerezani. He said the contract of doing the work was a contract of three years which commenced from 2002 and ended on 2005. He said that, apart from exhibit P2 he has not seeing any other contract entered by the plaintiff and the first defendant. He said the procedure used in their office in awarding tender is the one provided under the Public Procurement Act. He said he know exhibit P4 which are the tender documents for collecting waste in the Wards of Kariakoo and Gerezani for the year 2008/2009 and was issued on 26th day of March, 2009.

He told the court that, according to the procedure of tender the work intended to be done under these tender documents was supposed to be for the period of 2009/2010 financial year. He said the Rules used to govern the said tender process was GN No. 97 of 2005 and specifically its Rule 87 (3) which states the bidding process would have been concluded within 120 days. DW1 said that, the plaintiff participated in the said tender process but they didn't win the tender. He said there was a procedure for lodging a complaint in relation to the tender process for whoever aggrieved and the same was supposed to be lodged to the Tender Board as provided under clause 45 up to 50 of the tender documents.

The witness said that, exhibits P4 contain a clause which provides that, if a bidder has any problem he can seek clarification from the Head of the Procurement Unit and there is no any bidder sought any clarification in relation to the tender process. He said the tender process went well up to the end and the second defendant who became the highest bidder was declared the winner of the tender. DW1 said that, if there was any bidder aggrieved by the tender process was supposed to take his complaint to the Municipal Director who would have stayed the process and investigate the claim and make his decision within thirty days and notify the complaint. He said the procedure of dealing with the complaint is provided under the Public Procurement Act, Act No. 21 of 2004. He said the plaintiff did not lodge any complaint against the tender process to the Municipal Director.

He testified further that, he know exhibit P5 which is a stop order to stop the plaintiff from continuing to provide service of collecting sold waste in Kariakoo and Gerezani Wards. He said they have never stopped any service provider to collect refuse charges for the solid waste collected from the premises of the customers. He said that, the duty to collect refuse charge was of the service provider or contractor and the same was supposed to be collected within a specific period of time as provided in their agreement and he was supposed to file a return of the fees collected to the Municipal Council.

When DW1 was cross examined by the counsel for the second defendant he said that, the person won the tender was the second defendant and he was supposed to start providing service in the financial of 2009/2010. He said he had not seeing any contract entered by the plaintiff to provide the service. He said a person cannot get extension of time to provide service by letter but the letter can be used to amend the terms of the contract. He said the plaintiff's agreement has never being extended.

When DW1 was cross examined by the counsel for the plaintiff he said that, his employment with the first defendant started in 2015. He said he didn't participate in the tender process of 2002 which awarded the work of collecting and disposing of solid waste in Kariakoo and Gerezani Ward to the plaintiff but he read the same in the report available in their office. He said the agreement of the

plaintiff and the first defendant to provide service of collecting and disposing of the waste at Kariakoo and Gerezani Wards was for three years commencing from 2002 up to 2005. He said another tender for providing the service of collecting and disposing of the solid waste within Kariakoo and Gerezani Ward was announced in 2015/2016.

He stated further that, exhibit P3 is a contract of one year commencing from 1st day of July, 2009 up to 30th day of June, 2010 and it shows the plaintiff was stopped to continue to provide service in Kariakoo Ward and charging the fees for the service of collecting sold waste in the mentioned Ward. He said to his understanding after expiration of the agreement of three years of 2002 up to 2005 there was no any other agreement entered by the plaintiff and the first defendant. He said the reason for stopping the plaintiff to continue with work is that they were not doing their work properly and the temporary injunction issued by the court had already expired. He said he didn't participate in the tender published on 26th day of March, 2009 which was for 2008/2009 financial year.

He said the charging of fees for the waste collected was supposed to be done within one month and if a customer failed to pay the fees the contractor is supposed to give him or her a seven day notice. He said he had not seeing any return filed in the council by the plaintiff. When DW1 was re-examined by the council for the first defendant he said that, he has come to court to testify on how the tender is processed. He said he don't know why the date of

commencement of the agreement was not inserted in the agreement. He said by now the plaintiff has no contractual relationship with the first defendant. He stated further that, the letter to stop the plaintiff to continue with the work was written on 30th day of June, 2010 and said it did not stop the plaintiff to claim for his previous debt from the customers they had served.

Abdon Mapunda, DW2 told the court that, he is the Head of Department of Environment Conservation and Waste Management of the first defendant. He said he know the plaintiff as he was their service provider in collection of solid waste in Kariakoo and Gerezani Wards from 2002 up to 2005. He said exhibit P2 is the Franchise Agreement entered by the plaintiff and the first defendant and the same was being governed by Municipal Laws. He said that, By-Law 14 of the Municipal By-Law states that, fees collected may be debt to the Municipal Council and it can be claimed as any other claim. He also said that, By-Law 15 of the same By-Laws states that, any debt relating to the collection of waste is supposed to be paid within seven days and if not paid the person responsible with the debt can be taken to court.

He said further that, the plaintiff was doing the work at kariakoo in a very poor condition as while he was required to collect about six trips of waste per day he was collecting only two trips. He said after seeing the collection of waste at Kariakoo was not good they advertised a tender for provision of solid waste collection and disposal

for the Ward of Kariakoo. He said that, after the said advertisement the plaintiff instituted a civil suit in the District Court of Ilala and secured temporary injunction which allowed him to proceed with work and charging the fees for the solid waste collected. He said the type of the agreement between the plaintiff and the first defendant was an enfranchisement agreement whereby the contractor was collecting waste and charging fees.

He said that, after seeing the working standard of the plaintiff was poor the first defendant decided to hire vehicles and found laborers to assist the area which were seeing to be dirty. He said they spent about Tshs. 228,541,000/= for hiring the vehicles and paying laborers to clean the Kariakoo area. He said they didn't claim refund of the said money from the plaintiff as he had already gone to court.

When DW2 was cross examined by the learned counsel for the second defendant he said that, in the tender advertised in 2009 the winner was the second defendant and exhibit P3 was the letter of informing him he had won the tender. He said he don't know what is the dispute between the plaintiff and second defendant. When he was cross examined by the plaintiff's counsel he stated that, he was employed by the first defendant on 1st day of June, 2001. He said to have seeing the agreement between the plaintiff and the first defendant in 2004. He said after seeing the plaintiff was not doing the work properly they used their own vehicles to do the work.

He stated further that, after exhibit P5 which was written on 2nd day of December, 2010 being served to the plaintiff they stopped the work of collecting solid waste and charging the fees. He said there is no limitation of time for taking a person who has failed to pay the fees to the court. DW2 said he is a member of the management of the first defendant hence he know the tender advertised in 2008/2009. He said the highest bidder of the tender advertised in that year would have been required to work for three years. He said the contract had a clause of being renewed by the authority but the contract had never being renewed.

Salutary Joseph Kiria, DW3 told the court is the Director of the second defendant. He said he don't know the basis of the plaintiff's claim of one billion shillings. He said he don't know if the plaintiff had an agreement with the first defendant as he had not seeing the same. He said the second defendant won a tender advertised by the first defendant in 2009 and he was supposed to start the work on July, 2009. He identified exhibit P4 as the documents for the tender advertised by the first defendant and won in 2009. He said exhibit PW3 is the award of tender given to him and was written on 16th day of June, 2009. DW3 tendered to the court the form of agreement between them and the first defendant and the same was admitted in the as an exhibit D1.

DW3 said that, the agreement admitted in the case as an exhibit D1 was for one year commencing from 1st day of July, 2009 and was

for collecting solid waste in Kariakoo Ward. He said he didn't perform the said agreement as on 9th day of July, 2009 he received an order from the Ilala District Court requiring him to stop doing the work. He tendered to the court an interim order from Ilala District Court given in Misc. Civil Application No. 21 of 2009 and the same was admitted in the case as an exhibit D2. After receiving the court order and communicated with the Director of the first defendant he stopped doing the work.

He said as he had started the work he had bought equipment for doing the work which include Lorries and employed laborers hence the total loss he incurred is about Tshs. 508,000,000/=. He tendered four certified copies of the motor vehicle registration cards and were admitted in the case as an exhibit D3 collectively. He also tender to the court the sale agreement of the four motor vehicles which were admitted in the case as an exhibit D4 collectively. He said the total cost of purchasing the motor vehicle was Tshs. 320,000,000/= DW3 listed the items he purchased for the work and document for payment the laborers and all of them were admitted in the case as exhibit D5 and D6.

He prayed the plaintiff's case to be dismissed with costs and the plaintiff to be ordered to pay the second defendant the sum of Tshs. 508,000,000/= as the loss incurred, interest at the rate of 11% up to the date of judgment and the costs of the case in the main case and the counter claim. Upon being cross examined by the counsel for the

plaintiff he said that, exhibit P3 shows the tender was for Kariakoo Ward and exhibit D1 shows the commencement of the contract was 1st day of July, 2009. He said that, when he was bidding for the work he had motor vehicles and trailers and other equipment. He said to have purchased all the motor vehicles on 20th day of April, 2009 and all of them are in his possession up to now. He said the agreement of purchasing the motor vehicle was witnessed by Dr. Masumbuko Lamwai, learned advocate.

He said he is not selling the motor vehicle to the plaintiff but is claiming for costs of purchasing them. He said that, exhibit DW5 is the summary of the costs he incurred himself which has not been refunded to them. When he was re-examined by the counsel for the second defendant he said that, the date of starting the contract was not indicated in the agreement as it was the date of commencing the work. He said he has not benefited from the equipment he purchased for the work and said the motor vehicle are not roadworthy. He prayed to be paid Tshs. 508,000,000/= and interest of 26% per year and the costs of the suit.

After hearing the evidence from both sides the counsel for the parties prayed and allowed to file their final written submission in this matter. However, up to the time of composing the judgment the court had received the submissions from the counsel for the defendants only and there is no submission from the plaintiff filed in this court. Therefore in the course of determining the issues framed

for determination in this matter the court will be referring to the submissions of the counsel for the defendants filed in this court. Starting with the first issue which is asking whether there was a valid contract for collecting and disposing of solid waste in the Wards of Kariakoo and Gerezani between the plaintiff and the first defendant the court has found that, PW1 testified without being disputed by the defendants' witnesses that, there was a contract of doing the work of collecting and disposing of the solid waste between the plaintiff and the defendant at Kariakoo and Gerezani Wards. The contract commenced in the year 2002 up to 2005 as exhibited by the copy of Franchise Agreement admitted in this case as an exhibit P2.

According to the evidence of PW1 from 2005 there was no tender proceedings which was advertised for the work in the mentioned Wards and he said as they were doing a good job their agreement was extended by being given letters which caused them to continue with the work up to 2009. Now the question is whether from 2005 up to when the first defendant entered into a new agreement with the second defendant in 2009 to provide service of collecting and disposing of solid waste at the Wards of Kariakoo and Gerezani the plaintiff had a valid contract with the first defendant allowing them to continue with the work in the same area.

As rightly argued by the learned counsel for the first defendant in order to be able to say there was a valid contract the court must be satisfied the essential elements of a valid contract as provided

under section 10 of the **Law of Contract Act**, Cap 345 R.E 2002 have been established in the case. The said provision of the law states that:-

> *"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to b*

From the above provision of the law it is obvious that the court is supposed to be satisfied the agreement between the plaintiff and the first defendant for the plaintiff to do the work of collecting and disposing of waste in the Wards of Kariakoo and Gerezani had all the elements mention in the referred provision of the law to make their agreement to be valid. Now while DW1 and DW2 testified the plaintiff had no valid contract with the first defendant allowing them to provide service of collecting and disposing of the solid waste at the mentioned Wards, PW1 said the plaintiff had a valid contract with the first defendant.

The court has found the evidence of PW1 is to the effect that, after the first agreement which commenced in 1999 and ended in 2002 the plaintiff entered into an agreement of three years with the first defendant which commenced from 2002 and ended in 2005. This second agreement was recognized by DW1 and DW2 as the only valid agreement between the plaintiff and the first defendant and the same was supported by exhibit P2. For the period from 2005 up to 2009

when is stated the first defendant entered into a new agreement with the second defendant is the period which DW1 and DW2 are maintaining there was no valid agreement between the plaintiff and the first defendant.

The court has considered the evidence of DW1 and DW2 together with the submission of the learned counsel for the first defendant in relation to their stance that the only valid agreement entered by the plaintiff and the first defendant is that of 2002 up to 2005 but failed to comprehend if the contract was for that period of three years only how the plaintiff managed to continue with the work up to 30th day of June, 2009 if there was no any other agreement or some arrangement between the parties for the plaintiff to proceed with the work. This question make the court to come to the view that, even if there was no tender which was advertised for the said work for the stated period of time and awarded the plaintiff contract of to proceeding with the work but as testified by PW1 there was some arrangement which allowed the plaintiff to continue with the work up to when the first defendant decided to advertise a tender for the said work.

The court has arrived to the above finding after seeing there is no material evidence or any reason which can make it to disbelief the evidence of PW1 that, after the agreement of 2002 up to 2005 come to end were given letters requiring them to continue with the work up to 2009 when the first defendant entered into an agreement with the

second defendant to do the said work. The court has also arrived to the above view after seeing there is no way it can be explained that, the plaintiff was continuing with the work from 2005 up to 2009 without any agreement or arrangement and the first defendant kept quite without taking any action against the plaintiff who was proceeding with the work for all that period without valid agreement of doing the said work.

To the view of this court though the letters for extension of the plaintiff's agreement to continue with the were not admitted in the case as exhibits but by the stated conduct of the work is enough to make this court to find there was an agreement between the plaintiff and the first defendant to do the said work. The above view of this court is getting support from what was stated by Hon. Massati, J (As he then was) in the case of **Prismo Universal Italiana s.r.1 V. Termacotank (T) Limited**, Commercial Case No. 42 of 2004, HC Com Division at DSM (Unreported) where after discussing at length the validity of agreement extended by letters he stated as follows:-

> *"So, I am certain in my mind that in law subject to certain statutory exceptions, a contract need not be in writing and can be inferred from a series of letters or telegrams or faxes or by conduct of the parties."*

It is from the above stated reasons and view of my learned brother which I have no reason to depart from the court has come to

the settled finding that, the act of the plaintiff to continue with the work and the first defendant keeping quite without taking any action *against the plaintiff shows by conduct there was a valid contract* between the parties for the parties to continue with the work. In the premises the court has found the first issue is supposed to be answered in affirmative that, the plaintiff and the first defendant had a valid contract for collecting and disposing of waste in the Wards of Kariakoo and Gerezani up to 2009 when the first defendant advertised tender for the said work and awarded the same to the second defendant.

Coming to the second issue which is asking whether the first defendant terminated the said contract in favour of a new contract between the first and second defendant the court has found the testimony of PW1 is to the effect that, the plaintiff's agreement with the first defendant was coming to an end on 30th day of June, 2009. The court has not seeing anywhere in the evidence of PW1 stated after the above mentioned date the plaintiff had any other agreement or arrangement with the first defendant which would have entitled the plaintiff to continue with the work after the mentioned date. Now the question is if the plaintiff's agreement or arrangement to continue with the work was coming to an end on 30th day of June, 2009 and there was no other agreement or arrangement for the plaintiff to continue with the work how can it be said the plaintiff contract was terminated in favour of the contract entered by the first and second defendants on 1st day of July, 2009.

The court has found the evidence of PW1 to justify the act of the plaintiff to continue with the work is to the effect that, the tender documents admitted in the case as an exhibit P4 which were used to give contract of doing the work to the second defendant were defective as though were issued on 26th day of March, 2009 but were advertising the tender of work for the period of financial year 2008/2009 when the plaintiff was still providing service in the advertised Wards of Karaikoo and Gerezani. After carefully going through the mentioned exhibit P4 the court has found it is true that the tender documents admitted in this case as an exhibit P4 are dated 26th day of March, 2009 and were advertising the work for the financial year 2008/2009.

As it is known a financial year 2008/2009 was supposed to commence from 1st July, 2008 and ended on 30th day of June, 2009. If they were for that period of time they could have not been issued on 26th day of March, 2009 and create an agreement for work to be done in a financial year 2008/2009 as that period of time had almost about to come to an end. If the intention of the first defendant was to advertise a tender for the work to be done from 1st July, 2009 as it was given to the second defendant those tender documents were supposed to indicate the financial year of the work is 2009/2010 and not 2008/2009. As appearing in the submission of the learned counsel for the first defendant, though is stating the advertisement of the tender are done before the beginning of a new financial year but he didn't state how the tender documents dated 26th day of

March, 2009 would have been used to create an agreement for the service to be provided in the financial year 2008/2009 which was about to come to an end.

The court has found PW1 testified on their side that, after seeing the said defect in the tender documents which they also purchased to bid for the work the plaintiff complained to the first defendant and no winner was announced in the said tender but letter on the second defendant was given the contract of doing the work in the area they were working. Although the plaintiff said he complained about the defect found in the tender documents but he didn't tell the court clearly as to how and to whom he reported his complaint.

There is no any evidence adduced by the plaintiff to show he pursued his complaint through the procedure provided under the provisions of the Public Procurement Act, 2004 cited in the submission of the learned counsel for the first defendant and Part G of the tender documents (Exhibit P4) which requires any dispute or complaint in relation to the procurement proceedings to be submitted in writing to the Head of the Procuring Entity within twenty eight days and copy to be given to the Public Procurement Regulatory Authority. As the plaintiff did not adduce any evidence to establish he referred his alleged complaints to the above mentioned relevant authority the court has found there is no way it can be said the plaintiff had anything substantial to give them validity of proceeding with the work.

It is also the view of this court that, even if it would have been found the plaintiff had referred his observation of the defectiveness of the tender documents to the relevant authority but still that defect would have not make the plaintiff to have a valid contract with the first defendant which would have been terminated on 1st day of July, 2009 when the first defendant awarded tender work to the second defendant. The plaintiff was supposed to establish there was a valid contract between them and the first defendant which was in writing or by conduct after the agreement which came to an end on 30th day of June, 2009. To the contrary the court has found the plaintiff continued with the work without having any valid contract or recognized arrangement with the first defendant allowing them to proceed with the work.

The court has found that, although there was an interim order issued by the District Court of Ilala on 3rd day of July, 2009 which restrained the second defendant to take over the work and allowed the plaintiff to proceed with the work which they did up to 2nd day of December, 2010 but that cannot be taken as a valid agreement for doing the work as that interim order was not creating a new contract between the plaintiff and the first defendant. In the light of all what has been stated hereinabove the court has found it cannot be said the plaintiff had a valid agreement with the first defendant for doing the work of collecting and disposing of waste in Karaikoo and Gerezani Wards after 30th day of June, 2009 which would have been terminated in favour of the contract entered by the defendants on 1st

day of July, 2009. In the premises the second issue is answered in negative.

As for the third issue which is about reliefs parties are entitled the court has found that, since the court has already find the valid contract between the plaintiff and the first defendant ended on 30th day of June, 2009 and there was no any other contract which allowed the plaintiff to continue with the work there is no way the court can declare the contract between the first and second defendant entered on 1st day of July 2009 null and void as prayed by the plaintiff. Coming to the claim of Tshs. 10,062,940,500/= which the plaintiff is claiming as an outstanding charges for service they rendered to the customers received their service before the second defendant takes over the work the court has found that, this being specific damages the plaintiff was supposed to prove the same strictly to enable the court to grant the same. This has been stated by this court and the Court of Appeal of Tanzania and one of them is the case of **Masolole General Agences V African Inland Church of Tanzania** [1994] TLR 192 where it was stated that, once a claim for a specific item is made, that claim must be strictly proved.

The evidence adduced by PW1 is to the effect that, the said claim arose from the refuse charges which were not collected form the customers received the service of the plaintiff before their contract come to an end. The court has found as testified by PW1 and supported by DW1 and DW2 the refuse charges was supposed to be

collected from the customers at the end of each month. Despite the fact the plaintiff attached some receipts to the plaint to support the debt is alleging was not collected from the customers before termination of their contract but there is no any receipt which was tendered and admitted in the case as evidence or any other evidence adduced by the plaintiff to establish the debt is being claimed from which customers and for how long and why the same was not claimed from the customers who received service and why the defendants are obliged to pay the same. To the contrary the court has found the learned counsel for the first defendant stated that, the Stop Order admitted in the case as an exhibit P5 which was served to the plaintiff to demand them to stop to do the work and charging refuse charges from the customers did not bar the plaintiff to collect the outstanding refuse charges from the defaulters of paying the refuse charges.

The court has found the learned counsel for the first defendant submitted clearly in his final submission that, the plaintiff was supposed to claim and recovered the said debt from the defaulters by using By-laws 14 and 15 of the first defendant By-Laws which is GN. No. 191 of 2001. These By-laws states as follows:-

> *"**By-law 14**. Any refuse collection charge payable under By-law shall be a debt due to the Authority or its agent and may be recovered from the debtor as a civil debt at the instance of the Authority or any person authorized by the Authority.*

By-law 15 (1). *Without prejudice to the method of recovery of refuse collection charge prescribed in By-law 14, where any amount of charge is due for payment and if upon a formal demand such person fails to pay within seven days, the Authority or agent may file in a court of a Resident Magistrate a form of summary warrant attachment and sale as specified in schedule "D" to these By-laws."*

Since the above law is very clear that the plaintiff being an agent of the first defendant who according to the work he was doing they were empowered to collect the refuse charges from the customers then they were supposed to use the above By-laws to claim for whatever outstanding debts from the defaulters of payment of the service rendered to them and there is no justification to claim the same from the defendants. In the premises this claim cannot be granted.

As for the claim of Tshs. 140,000,000/= as a costs for re-modification of 14 vehicles the court has found there no any evidence adduced by the plaintiff to establish the basis of the said claim. The court has found there is no evidence adduced to establish not only the claimed costs has ever been incurred by the plaintiff but also there is no evidence adduced to establish how the defendants caused the plaintiff to incur the claimed costs so that the plaintiff can claim for the same. Since the said claim is a specific damages then as stated in the case of **Masolole General Agences** (Supra) was supposed to

be proved strictly. All these caused the court to find the plaintiff is not entitled to the claimed amount against the defendants.

With regards to the counter claim of the second defendant the court has found as stated at the outset of this judgment the same was ordered to be proved ex parte as the plaintiff did not file a written statement of defence to dispute the same. As it can be seeing from the evidence of DW3 he stated the second defendant purchased the tender which was advertised by the first defendant and he became the winner. After winning the tender and given the agreement he started work on 1st day of July, 2009 but he stopped doing the work on 9th day of July, 2009 after being served with interim order from Ilala District Court which was admitted in this case as an exhibit D2.

DW3 said when he was required to stop doing the work he had bought various working equipment like vehicles and other equipment for doing the work. He also said he had hired people to assist him and laborers of doing the work. Although in the counter claim it is indicated the second defendant is claiming for Tshs. 500,000,000/= but DW3 stated in his testimony that, the plaintiff is claiming for the sum of Tshs. 508,000,000/= as the total loss he has suffered for being stopped to continue with the work. This claim is supported by the list of the item purchased by the second defendant for the work which was admitted in the case as an exhibit D5 and D6.

After considering the claimed amount and the evidence adduced by DW3 the court has found the same can be categorized into three categories. First category is that of purchasing vehicles for doing the work which its costs is Tshs. 320,000,000/=. The second category relates to the working tools and uniforms and the last one covers the payment of salaries to the laborers and costs incurred in doing the work for nine days which carries the rest of the claimed amount. The court has found despite the fact that DW3 tendered to the court a document containing the list and costs of each item purchased or paid but to the view of this court it has not established the second defendant is entitled to the sum of the money is claiming against the plaintiff.

The reason for coming to the above finding is that, despite the fact that there is no dispute that the second defendant purchased some motor vehicles, equipment and wearing apparels for doing the work but it cannot be said the plaintiff is obliged to pay costs of all those items. The court has arrived to the above views after seeing some of the equipment like motor vehicles, standby trailers, Push/Pull Carts and other durable equipment cannot be said would have not been used in future or in any other work so that it can be said the same are supposed to be compensated as a total loss as claimed by the second defendant.

The court has also considered the claim of payment alleged to have been made to staffs, laborers and office rent which took the big

amount of the claimed amount was not supported by sufficient evidence to justify grant of the same. There is no any staff or laborer was called to prove they were paid the amount of money stated by DW3 and also the land lord was not called to testify in court and also no agreement for leasing the office was tendered to the court to support the claim of the office rent. Since the position of the law as stated in the case of **Masolole** refereed above requires specific claim like the one pleaded by the second defendant to be proved strictly and the court has found the claim of the second defendant has not proved as stated in the above case then it cannot be granted as claimed.

However, after the court being satisfied there are some costs incurred by the second defendant in commencing the work and the said costs would have not be recovered in a short period of nine days the second defendant had worked, the court has found the second defendant is entitled to be paid same amount of money as a compensation for whatever loss he might have incurred. This payment will be for the items which would have not been used in any other work like uniforms and whatever costs incurred in paying the staffs and laborers, renting office and stationaries for nine days of the work. In the premises the court has found payment of Tshs. 30,000,000/= will be enough to cover whatever costs or loss caused to the second defendant by the move of the plaintiff which stopped the second defendant to continue with the work.

In the final result the court has fund the plaintiff has failed to prove his claim against the defendants and the same is hereby dismissed in its entirety. However, the court has found the claim of the second defendant in the counter claim is partly proved and the plaintiff is ordered to pay the second defendant the sum of Tshs. 30,000,000/= as compensation for loss incurred by the second defendant after being stopped to continue with the work at the instance of the plaintiff. The awarded amount to carry interest at the court rate of 7% per annum form the date of judgement until payment in full and the plaintiff to bear the costs in the main suit and in the counter claim. It is so ordered.

Dated at Dar es Salaam this 18th day of May, 2018.

I. ARUFANI
JUDGE
18/05/2018