

IN THE HIGH COURT OF TANZANIA

AT BUKOBA

CIVIL APPEAL NO. 2 OF 2017

(Arising from Civil Case No. 28 of 2013 of Bukoba Resident Magistrates' Court Bukoba)

THE INTERNATIONAL DIRECTOR

WORLD VISION TANZANIA

-----**APPELLANT**

VERSUS

BASINDA CONSTRUCTION CO. LTD-----RESPONDENT

JUDGMENT

06/03/ & 29/06/2018

BONGOLE, J.

At the Resident Magistrate's court of Bukoba the appellant was sued by the respondent for specific performance of the contract for construction of residential house worth Tshs. 44,444,362.35/= and its interest of 12%.

The trial court decided in favour of the respondent by ordering payment of Tshs. 22,222,181.18/= as specific performance and twelve million as general damages.

The appellant was dissatisfied so he appealed to this court on ten grounds. The gist of the said grounds is that the trial court erred in law and facts in several ways that is, failure to note that there was no new contract between the parties and that that the

parties had executed the contract and the payment there of effected. He also faulted the trial court for awarding twelve million shillings as general damages.

The briefs facts of the case as narrated in the plaint filed before the trial court are that on 23rd October, 2008 the respondent, construction Company entered into a contract with the appellant for construction of a duplex residential staff house for the appellant's staff at Misenyi District within Kagera Region. The size of the building was of 8m x 13.25m. The project was valued at Tshs. 29,505,966/=.

Before the construction of the building the appellant handed over a plan to the respondent with some changes with dimensions of 16.2m x 16.4m thereby increasing the costs to Tshs. 44,444,362.35/= whereby the same was mutually agreed by the parties.

Believing that it will be paid the respondent went on erecting the agreed building and completed the same on 14th December, 2009. After the completion and handing over of the project the appellant sought to discharge the contract by paying only Tshs. 29,505,955/= but the respondent demanded the remainder to be Tshs. 44,444,362.35 as a debt.

Upon several demands in vain, the respondent sued for breach of contract. As stated earlier on, the trial court decided in favour of the respondent hence the present appeal.

At the hearing of this appeal the appellant was represented by Mr. Mbuha learned counsel while the respondent was represented by Mr. Dismas, Principal Officer of the respondent company. The appeal was argued by way of written submission.

The appellant opted to argue the grounds of appeal jointly save grounds two and eight, on the reason that they are interrelated. He started by giving the background of this appeal that on 22nd November, 2013 the respondent filed a Civil Case No. 28 of 2013 in the Resident Magistrates Court of Bukoba claiming Tshs.44,444,362.35 being a consideration for the contract for erection of a duplex staff house of the appellant. He submitted that the agreed consideration was Tshs. 29,505,966/= as per the contract dated 23rd October, 2013 with dimensions of 8 metres x 13.25metres.

He went on submitting that due to the respondent's negligence he received unauthorized instructions from the third party and departed from the previous contract and altered the building's dimension to be 16.2m x 16.4m the result of which raised

consideration to Tshs. 44,444,362.35/=. He argued that the trial court erred in law to award the new amount which was not agreed on between the parties thus the respondent was not entitled to the same as well as the 12% thereof as specific performance and general damages.

He went on faulting the trial court's judgment in that the learned magistrate failed to evaluate the evidence before reaching the decision. He submitted that there was undisputed evidence adduced by DW1 at page 5 of the judgment to the effect Tshs. 29,505,966/= was paid to the plaintiff now the respondent as per the contract but the Magistrate did not put that into consideration in his judgment. He argued that since this evidence was not challenged, it was wrong for the Magistrate to award the amount not agreed by the parties to the contract. He substantiated his submission by citing the case of **Edwin Simon Mamuya Vadam Jonas Mbala [1983] TLR No. 410** where it was held that terms of the written contract should only be varied in writing not otherwise. If I correctly understood him, he meant that there was no written agreement to vary the previous contract. He was emphatic that there was no further instruction to vary the previous contract and that even if the alleged instructions existed,

the one who issued it was not a party to the contract thus the subsequent alterations could not bind the parties.

On ground two, he submitted that the learned trial magistrate erred in law and fact for failure to address each issue framed and as a result he reached to an unfair decision in holding that every party had contributed for breach of the contract without giving legal justification. He specified one of the issues which were not specifically addressed to be whether the charges on the building costs were mutually consented to by the parties. He buttressed his submission with the case of **Sheikh Ahmed Said V The Registered Trustee of Manyema Msjid [2005] TLR No. 610** where it was held that it is necessary for court to make specific finding on every framed issue.

In respect of ground 8, he faulted the trial Magistrate in that he erred in law and in fact for awarding twelve million shillings as general damages and Tshs. 22,222,181.18/= being specific performance without proving any loss suffered as well as terms of the contract there of.

He invited this court to allow this appeal with costs.

In reply, the respondent conceded to the fact that the parties entered into a contract on 23.10.2008 for erection of a house at

Misenyi District the consideration of which was Tshs. 29,505,966/=. He submitted that according to clause 12 of the contract exhibit P1 the said contract would be rescinded after the instruction from an authorized representative of the either party. He submitted that the instruction from the authorized representative changed or altered the previous dimensions of 8metres x 13.25meters to 16.2m x 16.4m which increased the costs automatically to Tshs. 44,444,362.35/=. He argued that according to the evaluation of this evidence by the learned trial Magistrate he was satisfied to award the amount claimed by the respondent. He thus invited this court to dismiss the compliant of the appellant for being baseless.

On validity of the instruction to alter the written contract, he submitted that the representatives of the appellant namely the Programme Coordinator one Mr. Ndikai and the Cashier one Mr. Lugira were involved in the process when the sketch plan and bill of quantity were presented to the planning and finance committee at the site meeting on 8th February, 2009. He argued that after the previous contract was rescinded payment of Tshs. 29/505,966/= only cannot be said to be discharge of the contract as contended by the appellant.

He went on submitting that courts of law such the Resident Magistrate courts of Bukoba, have discretion to award any amount claimed as general damage. He argued that by awarding twelve million shillings as general damages and Tshs. 22,222,181.18/= being specific performance, the learned trial Magistrate exercised his power judiciously thus he should not be faulted on that. He buttressed his submission by referring to the case of **Mwita Mhere and Ibrahimu Mhere V.R [2005] TLR No. 107** where it was clarified that judicial discretion is the discretionary powers invoked by the court to reach fair decision. He insisted that the reliefs awarded by the trial court were prayed for by the respondent as they were foreseeable due to the damages suffered.

I have noted in the course of composing this judgment that there was irregular change of Magistrates and no reasons assigned for such a change. On 19th March, 2015 when this suit came up for hearing of the plaintiff case it was before Lushasi, S.S- RM who heard the evidence of PW1. On 28th January, 2016 the file changed hand to Mpelembwa, D.J. RM who heard the evidence of PW2. During the defence the trend continued and this time the file shifted to Mwakihaba, S.J. R.M up to the judgment delivery. I am aware that change of magistrates or judges to the case

without assigning reasons has been abhorred by the court of Appeal in a number of Criminal Case including but not limited to the case **Donatus Yustad @Begumisa V.R, Criminal Appeal No. 365 of 2016, Bukoba Registry** (unreported). In this case the Court of Appeal referred to the case of **Remebisele Edson V.R. (1967) HCD No. 72** and held at page 9 thus:-

“---such discretion given to a magistrate should be exercised with great care because the primary of the hearing to permit the court to observe the demeanour and evaluate the credibility of all the witnesses. Moreover, as far as assessment of credibility is concerned, a magistrate who sees and hears the witness is placed in a better position than the successor”.


Being guided by this authority, I find that the same principle equally applies in civil suit such as the present case where there was irregular change of magistrates without reasons being assigned.

In view of the above, I declare all the proceedings null and void. The judgment is hereby quashed and orders thereof set aside.

The matter should be re-tried before another Magistrate with competent authority.

Each party to bear own costs.




S.B. Bongole

Judge

29/6/2018

Date: 29/6/2018

Coram: Hon. S.B. Bongole, J.

Appellant: Mr. Nicodemus Mbuha.

Respondent: Mr. Lameck

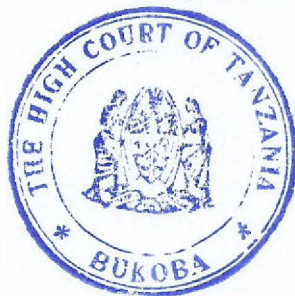
B/C: A. Kithama

Mr. Lameck:

My Lord, the Appeal comes for judgment.

Court:

Judgment delivered.



S.B. Bongole

Judge

29/6/2018