IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO. 104 OF 2017

(Original from Kilombero District Court at Ifakara Civil Case No. 12 of 2016 Hon. T.A.Lyon - RM)

SASA GENERAL SUPPLY .....APPELLANT

VERSUS

KILOMBERO CANE GROWERS ASSOCIATION (KCGA).....RESPONDENT

JUDGMENT

5/6/2018 & 20/6/2018

Mugeta, J.

Even if the tender advertisement was not tendered as evidence, it is not in dispute that on 9th May, 2016, the respondent advertised a tender with two lots. These are first; harvesting, loading and transporting and second, harvesting and transporting sugar cane. The appellant unsuccessfully applied for the second tender lot. Being aggrieved by the decision of the respondent not to award him the tender, the appellant filed a suit at the District court of Kilombero District at Ifakara and claimed:-

i) For a declaration that it won the tender and the same to be awarded to it.

ii) Payment of general damages

iii) Costs of the suit

In its judgment the trial court found that the appellant did not prove the claim on a balance of probabilities. The appellant is further aggrieved hence this appeal. Three grounds of appeal have been filed. These are:-

i) That the Trial Magistrate erred in law and in fact in failing to consider the weight of evidence given out by the appellant which was watertight in respect of violation of tender rules and procedures.

ii) The Trial Magistrate grossly erred in laws and in fact and so misdirected himself to hold and believe that the appellant had no contract with the respondent whilst the Respondent had promised the appellant via a contract to award her the tender.

iii) That the trial magistrate erred in law and in fact in not recording and including in his judgment vital evidence given out by both parties during the trial.

The appellant is represented by Bernard Chuwa, learned advocate while the respondent enjoys the profession service of January Nkobogo learned advocate. However, on the hearing date Modesta Medard, learned advocate, held brief for Mr. Nkobogo with instruction to proceed. Both counsels had the opportunity to submit on the grounds of appeal. In their oral submissions both counsels referred to decisions in unreported cases and promised to supply copies thereof, thereafter. However, none of them fulfilled the promise.

Counsel for the appellant argued ground one and three together and ground two separately. On his part, counsel for the respondent dealt with one ground after another. On the two grounds counsel for the appellant submitted that the trial court did not accord due weight to the evidence of the appellant which was corroborated by DW1 that the appellant had won the tender as he answered very well interview questions. Still on the same ground the learned counsel complained that the tender had been awarded to a person who never tendered, that is Kidinilo Transport Company. This was, the learned counsel submitted, a violation of procedures.

In reply, counsel for the respondent submitted that the evidence is clear that the appellant did not win the tender because upon physical verification it was established that he did not have the truck fleet he had mentioned during oral interview. The issue of awarding tender to a person who did not bid was not canvased by counsel for the respondent.

Did the appellant win the tender? One witness testified for each party. The only evidence to support that the plaintiff won the tender is that of PW1. However, this evidence is hearsay because according to PW1, he received phones to that effect and those who phoned him never testified in court. According to DW1, winners of a tender are usually notified by a formal letter and the appellant received none. DW1 who participated in the tender evaluation gave evidence as to why the appellant lost the tender. While he admitted that the appellant performed well at the oral interview, he failed the physical verification test where he was found in possession of two trucks only out of the five he had alleged to possess during oral interview. According to DW1, one of the two trucks was even mechanically defective. The fact that the appellant was found with two

trucks only was admitted by PW1 during his evidence in chief. He said:-

> *"I informed them I had five cars but they inspected only two cars. I asked the chairman to inspect the other three cars which were in Morogoro for maintenance".*

As I have said the tender advertise document is not part of the evidence on record. It was neither attached to the plaint nor admitted as exhibit. Therefore, it is difficult to ascertain tender conditions. It was upon the appellant to state the tender conditions and to prove how he met them to claim emerging the winning bidder. This duty, based on available evidence, he failed to discharge it. The trial court, albert briefly, evaluated the evidence of both parties to the case. Therefore, the complaint that he did not according weight to evidence of the appellant is without merits.

The complaint that tender in the second category was awarded to a party who never bid also is unsupported by evidence. Indeed according to DW1 one of the tender was awarded to Kidinilo Transport Company. It is not disputed

that this company bid for one of the tender lots. However, there is no evidence, besides that of PW1, to establish that the Kidinilo did not bid for the second lot which he was awarded. Existence of a bid to a tender is provable by a bid document. The burden lied to the appellant to prove this by production of the relevant document as a requirement under section 61(1) of the Tanzania Evidence Act [Cap. 11 RE 2002]. This section reads:-

> *"61. All facts except the content of the document, may be proved by oral evidence"*

The oral evidence of PW1 that Kidinilo Transport Company did not bid for the second lot is therefore not admissible. It was upon the appellant to prove this fact with a bid document which would have shown what Kidinilo bid for. Again this burden was not discharged.

On 26/9/2016 the appellant filed a notice to produce documents under order XII rule 2 and 6 and order XIII rule 1 of the Civil Procedure Act [Cap. 33 R.E 2002]. One of the documents in the list required to be produced by the respondent is the bid documents of all tenderers. However,

no effort to tender any of the listed documents by PW1 was made despite the promise therein to tender photocopies in case the respondent failed to produce the original copies. By this failure, appellant missed the opportunity to produce relevant evidence to advance its case.

The issue raised in the third ground of appeal was not argued by counsel for the appellant. On his part, counsel for the respondent submitted that issue of challenging correctness of court record cannot be raised by a counsel from the bar. While I agree with this submission, I do not intend to go into details of the matter. As counsel for the appellant did not submit on it, I assume he abandoned it.

In view of the foregoing I find no merits in the first and third grounds of appeal argued together and they are accordingly dismissed.

On the second ground of appeal, indeed the trial court held that there was no contract between the parties. This holding of the learned magistrate came when he was considering if the appellant is entitled to general damages.

Counsel for the appellant has advanced two reasons to support that there was a contract. Firstly, that there was a promise to award the tender. Secondly, by visiting and inspecting the work facilities of the appellant, that amounted to creating a binding legal relationship. Counsel for the respondent submitted that no contract was ever formed between the parties because in law the tender advertisement was an invitation to treat and the appellant's bid was an offer which was rejected.

Did the respondent perform any act which amounted to a promise? The promise referred to here is that which PW1 referred to as having been received via phone calls. I have already held that the allegation as to appellant being called and told of winning the tender has not been proved. This allegation cannot create any obligation between the parties.

Did visiting the appellant premises intend to create binding legal relationship amounting to a contract? I do not think so. This is because; according to DW1 this was done to all bidders as part of the evaluation process. This fact is undisputed. Therefore, the trial court was right to hold

that there existed no contract between the parties breach of which could have entitled any party thereto to any damages.

The second ground, therefore is also without merits. It is hereby dismissed.

Finally, let me say a word regarding the proceedings of the trial court during mediation. The mediator recorded the proceedings of mediation in the case file. Therefore offer and counter offers of the parties are on record. This is un – procedural because proceeding of mediation are confidential. While the mediator is entitled to take notes of the mediation, such information is for his use only. A mediator is supposed to record in the court file the outcome of the mediation only.

Accordingly, I find and hold that the whole appeal is devoid of merits, it is wholly dismissed. Decision of the lower court is upheld. The respondent is awarded costs of the case.

I.C Mugeta
JUDGE
20/6/2018

20/6/2018
Coram: Hon. Mugeta, J
For the Appellant: Absent
For the Respondent: Absent
Cc: Massare

Innocent Msoffe:

I am legal officer from B. W. Attorney. Advocate S.B. Chuwa has sent me to receive the judgment.

Court:

Judgment delivered

I.C Mugeta
JUDGE
20/6/2018