

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

**CIVIL CASE NO. 165 OF 2018**

**THE BOARD OF TRUSTEES OF THE PUBLIC  
SERVICE SOCIAL SECURITY FUND ----- PLAINTIFF**

*VERSUS*

**AFRICAN FOCUS TOURISM AND  
HOSPITALITY CONSULT LIMITED ----- DEFENDANT**

**EX-PARTE JUDGMENT**

**MUTUNGI, J.**

In the instant suit, **THE BOARD OF TRUSTEES OF THE PUBLIC SERVICE SOCIAL SECURITY FUND** (hereunder shall be referred as the plaintiff) has sued the **AFRICAN FOCUS TOURISM AND HOSPITALITY CONSULT LIMITED** (hereunder shall be referred as the defendant) on the following cause of action;

*“that, the plaintiff's claim against the defendant is  
for payment of United States Dollar, Four Hundred*

*Fifty Nine One Hundred Seventy Eight, Sixty Nine Cents, (USD 459,178.69) plus the general damages being a loss suffered by the plaintiff as the result of the defendant's failure to adhere to the terms and conditions of the agreement thereby forcing the plaintiff to suffer loss".*

In view of the above claim, the plaintiff is seeking for the following reliefs against the defendant: -

- 1. The defendant to pay the plaintiff USD 165,438.82 as specific damages for cost of the part of missing items that were not delivered.*
- 2. The defendant to pay the plaintiff USD 268,839.87 as specific damages for cost incurred by the plaintiff for clearance of the delayed items at the bonded warehouse.*
- 3. Defendant to pay the plaintiff USD 24,900.00 for the cost incurred to pay defendant's travel and per diems cost to China on the items that were not purchased as contracted.*

4. Defendant to pay the plaintiff USD 300,000.00 as general damages.
5. Payment of 7% interest or any other rate not exceeding 12% of the claim in item (1) and (2) above, from the date of institution of the suit to date of judgment.
6. Payment of 7% interest of the decretal sum from the date of judgment to the date of payment of the decreed claim.
7. Costs of the suit.
8. Any other further reliefs a this honourable court may deem just and fit to grant.

The defendant did not file its defence nor appeared in court. In the event, on 13/05/2019 the court ordered the suit to proceed Ex-parte in the absence of the defendant. They had been dully served through publication in the Daily News issue of April 2 – 8, 2019. The following issues were framed by the court: -

1. Whether there is a contract between the plaintiff and defendant for supervision and refurbishment of the plaintiff's landed property.

2. *Whether the contract was breached by the defendant.*
3. *Whether such breach caused loss on the plaintiff.*
4. *What reliefs is the plaintiff entitled to.*

The plaintiff brought SALVATORY MCHUNGUZI RUGUMISA (PW1) who currently works with the plaintiff as a Senior Estate Officer. He stated that before the current position, he was working with LAPF. As far as the instant suit is concerned, PW1 alleged that the plaintiff had entered into an agreement with the defendant to refurbish and upgrade the plaintiff's hotel situated at Kijitonyama near Makumbusho in Millennium Towers building. The contract was from May, 2011 to September, 2011. The same was tendered and admitted as Exhibit "P1".

PW1 further alleged that, as per the contract the plaintiff had to pay the defendant to supervise the contractor and to improve the said hotel. Further, the defendant was to make sure that all the materials were to the specification and the number which were to be cleared from the bonded ware house on time and fixed accordingly. PW1

PW1 contended that even the items imported were not cleared timely. He alleged that, these items were ultimately cleared from the bounded ware house, however the process of clearance took 311 days while the same was supposed to have been done within seven days. PW1 tendered a letter dated 27/07/2012 from the clearing agent in which the plaintiff was copied and the same was admitted as Exhibit "P5". More so, the defendant notified the plaintiff over the said delay via letter dated 25/05/2013 which was admitted as Exhibit "P6". Due to the said delay, the plaintiff summoned the defendant in a meeting. The minutes of the said meeting were tendered and admitted as Exhibit P.7. The plaintiff had to pay the storage costs of the items at the bounded ware house.

PW1 alleged the defendant continued to breach the agreement as a result on 19/11/2013 the plaintiff decided to write the defendant a demand notice. This was because despite various meetings with the defendant and several letters, the defendant deliberately remained defiant, ignored, neglected or refused to heed to them. The same was admitted as Exhibit "P8". The plaintiff has now instituted

the instant suit against the defendant claiming for reliefs out of the breach of terms and conditions of the Agreement. The defendant did not supervise the work contemplated by the Agreement. Neither did the defendant deliver, reconcile, verify and ship the needed goods. Did not undertake quality assurance and audit of the operations of the hotel and did not fully refurbish the hotel as required under the agreement. More importantly the defendant failed to supervise installation of all systems and interfaces at the hotel to ensure that they function properly and to distribute all furniture that were procured in all respective areas in the hotel.

Turning to the framed issues and starting with the first issue whether there is a contract between the plaintiff and defendant for supervision and refurbishment of the plaintiff's landed property. Upon going through the adduced evidence by PW1 and tendered exhibits (Exhibits "P1" to "P8"), it goes without saying the first issue is answered affirmatively. I say so because, the adduced evidence indicated that, the plaintiff is the owner of the said hotel which is located at Plot No. 13, 14 and 15 Block "D" along

Bagamoyo Road Kijitonyama named Millennium Towers Hotel. The evidence further indicates, the plaintiff desired to refurbish and upgrade the same. This led the plaintiff to enter into an agreement with the defendant (Exhibit P.1) for the said purpose. In view thereof, the defendant was supposed to import various items for the said task which were to be shipped. Thereafter, the said items were supposed to be fixed in the said hotel. All these duties were supposed to be executed by the defendant upon being paid by the plaintiff. Clause 2:0:1 – to 2:1:16 sets down the scope of work and the warranty. Clause 3:0 provides that in consideration of the company performing the costs the client shall pay the company a total of USD 24,900.00, VAT inclusive.

Basically Exhibit "P2" indicates the defendant issued the Tax Invoice to the plaintiff and more so, Exhibit "P3" tried to prove the plaintiff had paid the amount of money to the defendant as requested in conformity with the said agreement. Further, Exhibit "P5" the letter from the Clearance Agent in which the plaintiff was given a copy, suggests the defendant had imported the items as per the

agreement. To add salt to the wound, Exhibit "P6" indicates the defendant had notified the plaintiff over the delay to clear the items. Had it been there was no binding contract between the parties herein, obviously the plaintiff could not have been given the letter (Exhibit "P6") concerning the said delay or a copy of the letter (Exhibit "P5") from the Forwarding and Clearing Agent. It would seem the defendant had not refurbished the premises on time hence had to incur costs for storage, damages, custom ware house rent, clearing and other charges.

In view of the above conduct of the parties and the circumstances of the instant suit as shown above, I am of the settled view there was a binding agreement between the plaintiff and the defendant under the ambit of **section 10 of the Law of Contract Act, [Cap. 345 R.E 2002]. Section 10 of the Law of Contract Act** states as follows: -

***"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 expressed declared to be void". [Emphasis mine]***

The defendant was acting as per the terms of the said Agreement which was entered into by the two sides and the plaintiff was furnishing payments in accordance to the Agreement.

As regards the second issue whether the contract was breached by the defendant. Basically, PW1 in proving there was a breach, he solemnly relied on Exhibit "P4, P5 and P6". Upon my scrutiny of the evidence, I find the plaintiff has managed to prove the fact that, the defendant had breached the said agreement. Exhibit "P5 and P6" indicate the defendant took long to clear the imported hotel items from the customs bonded ware house as per the said agreement. This fact was also acknowledged by the defendant through its letter which was sent to the plaintiff (Exhibit "P6"). The agreement between the parties herein was from May, 2011 to September, 2011. However, the letters cited above (Exhibit "P5 and P6") were written on 27/07/2012 and 25/05/2012 respectively. The same indicate

the items were not fixed in the hotel within the prescribed period as per the agreement.

From the above stated reasons, the second issue is answered affirmatively.

Coming to the third issue whether such breach caused loss on the plaintiff. As quoted earlier the plaintiff is seeking USD 165,438.82 against the defendant for specific damages, for costs of the missing items indicated in Exhibit "P4". Further, the plaintiff is claiming against the defendant USD 268,839.87 for costs incurred to clear the delayed items and USD 24,900.00 for the costs incurred to pay the defendant's travel and per diem's costs to China on the item which were not purchased.

The law relating to the specific damages is well settled. Recently, in the case of **RELIANCE INSURANCE COMPANY (T) LTD & 2 OTHERS VERSUS FESTO MGOMAPAYO, CIVIL APPEAL NO. 23 OF 2019 (CAT – DOM) (UNREPORTED)** at page 19 the Court of Appeal had this to say and I quote;

**“the law is specific damages is settled, the said damages must be specifically pleaded and strictly proved...”**

Having in mind, the above legal position and the circumstances of the instant suit, I find the same has not been proved in accordance with the law. I say so because, PW1 merely stated that the plaintiff is claiming USD 165,438.82 against the defendant for costs of the missing items as per Exhibit “P4”. However, there was no evidence from the plaintiff's side to indicate at the time of the alleged inspection of items therein, both parties herein including their respective witnesses were present to witness the said inspection. Basically, it is trite law that he who alleges must prove the same as per **section 110 (1) of the Evidence Act, [Cap. 6 R.E 2002]** which states as follows: -

***“110 (1) – whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. [Emphasis mine].***

Further, neither the witnesses nor the person who noted the said alleged missing items were called as witness to prove the same. In the case of **MAGAMBO J. MASATO & 3 OTHERS VERSUS EASTER AMOS BULYA & 2 OTHERS, CIVIL APPEAL NO. 199 OF 2016 (CAT-MWZ) (UNREPORTED)** at page 17 of the Court of Appeal of Tanzania cited the case of **HEMEDI SAIDI VERSUS MOHAMED MBILU [1984] TLR 113** it was held: -

*“where for undisclosed reasons, any party fails to call a material witness on his side, **the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the party’s interests**”. [Emphasis mine]*

In the event, the court is now entitled to draw an adverse inference that if those witnesses would have been called to testify, obviously they would have given evidence which is contrary to the plaintiff's interest.

Regarding the amount claimed of USD 268,839.87 for costs incurred to clear the delayed items and USD 24,900.00 for the costs incurred to pay the defendant's travel and per diem costs to China on the item which were not purchased.

I find the amount claimed were not proved to the required standard of proof. There is no tangible evidence to suggest if at all the plaintiff had incurred these costs and paid fully for the delayed items as alleged. PW1 did not tender any cheque or payment receipts to prove if at all the said payments were done as alleged. Even though, PW1 merely tendered Exhibit "P7" which was to suggest the plaintiff convened a meeting as a result of the delay of some items. However, Exhibit "P7" does not indicate if at all the alleged costs were incurred by the plaintiff.

As to the claimed USD 24,900.00 for the costs incurred to pay the defendant's travel and per diem costs to China on the item which were not purchased. Again, there is no prove on that account. The court is unaware if at all the defendant's employees travelled to China since there was no tendered Exhibit to prove the same. Basically, I find the said alleged costs were solemnly baseless and hypothetical.

In view thereof, I find the third issue is answered negatively.

As to the fourth issue what reliefs is the plaintiff entitled to. In line with the outcome of the above issues, since there is

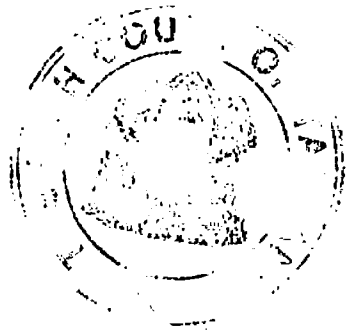
clear evidence to prove the breach of contract as shown earlier, then the plaintiff is liable for general damages. The plaintiff must have suffered due to the acts of the defendant. The plaintiff has prayed against the defendant to be paid USD 300,000 as general damages.

In the case of **RELIANCE INSURANCE COMPANY (T) LTD & 2 OTHERS VERSUS FESTO MGOMAPAYO (SUPRA)** at page 23 and 24 the Court of Appeal of Tanzania cited with approval the case of **ADMIRALTY COMMISSION V. S.S SUSQEHANNA [1950] 1 ALL ER 392** where it was held;

*"if the damages be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question".*

Having in mind the above legal position and upon considering the nature and circumstances of the matter at hand, I find the plaintiff is to be awarded USD 100,000 for the injuries caused in the operation of the said hotel as a result of the breach of contract.

All said and done, the plaintiff's suit against the defendant succeeds to the extent stated in the judgment with costs. It is ordered accordingly.

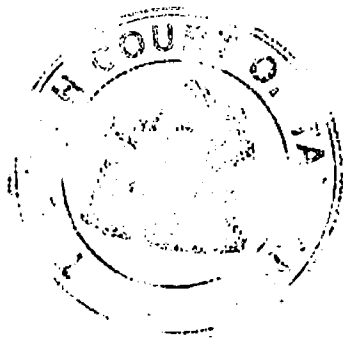


B. R. Mutungi

**JUDGE**

**29/10/2019**

Read this day of 29/10/2019 in presence of Anna Shayo for the plaintiff.

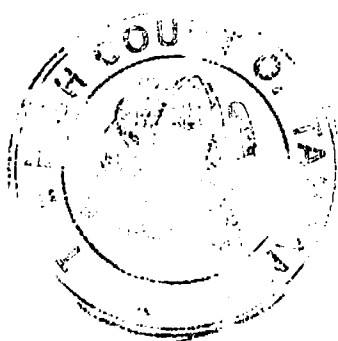


B. R. Mutungi

**JUDGE**

**29/10/2019**

Right of appeal explained.



B. R. Mutungi

**JUDGE**

**29/10/2019**