

**IN THE HIGH COURT OF TANZANIA
MWANZA DISTRICT REGISTRY
AT MWANZA
LAND CASE NO. 10 OF 2017**

SHILINDE LIMITED ----- PLAINTIFF

VERSUS

ATTORNEY GENERAL ----- DEFENDANT

JUDGMENT

28th July & 25th August, 2020.

TIGANGA, J

In this case the plaintiff Shilinde Limited, a Limited liability company incorporated in Tanzania, sued the defendant the Attorney General for payment of the outstanding sum of Tshs. 56,622,482.1 being a liquidated and ascertained damages at a rate of 0.04% that is Tshs. 8,509,881.6 the interest on the accrued sum, general damages, costs and any other relief as the court may deem fit and just to grant.

The claim arose from the contractual relationship which the plaintiff entered with the government through the headmistress of Bwiru Girls Secondary School for constructing the dining and assembly hall at Bwiru Girls Secondary School in Mwanza.

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The consideration of that contract was a payment of Tshs. 5,372,400/= for the contract which was to commence on 24/06/2005 to be completed in eight weeks from the date of commencement of the contract.

It is averred in the plaint that, the plaintiff completed his work and was given a certificate of practical completion of work. However the defendant paid the plaintiff only Tshs. 2,000,000/=. It is further averred that, despite several reminders for the defendant to pay the remaining balance subject to the agreed term of the contract, although the defendant has been acknowledging the debt, but it refused to pay the debt.

It is averred that Tshs. 3,372,400/= together with interest of 18% and cushion on inflation a rate of 7%, had accrued to Tshs. 47,112,590.5 up to the time when this case was filed.

He also claims a liquidated and ascertained damages at a rate of 0.004% of contract sum for each subsequent day, which when computed becomes Tshs. 8,509,881.6 and further interest of 25% on the accrued sum until payment in full. The defendant filed the written statement of defence in which he complained that the plaintiff was the one who was in breach of the terms of the contract, as he delayed to complete the work for almost two years. He admitted the certificate of handing over and practical completion to be issued, but he insisted that the completion of the said work was not done timely.

Further to that, he averred that it was in the contract that should any conflict arise, then same was to be resolved by way of arbitration. Last but

one he averred that, the plaintiff is not entitled to payment whatsoever and the amount stated is purely exaggerated.

The written statement of defence was accompanied by the notice of preliminary objection that the suit was time barred. After the hearing of that objection my brother Hon. Siyani, J, who was by then handling the case, dismissed the preliminary objection for want of merits.

After the pleading were complete and mediation has failed, three issues were framed, namely;

- i. As between the plaintiff and defendant, who breached the contract?
- ii. Whether the plaintiff has been reminding the defendant about the claim.
- iii. To what reliefs are the parties entitled from the court.

In effort to prove the case, the plaintiff called one witness Benard Kachwele who had his evidence recorded as PW1 who introduced himself as one of the Director of Shilinde Company Limited, who testified on oath testified that on 16/06/2005, the plaintiff contracted to construct a dining hall of Bwiru Girls Secondary School. He tendered the agreement and schedule of conditions of work contract which was admitted without objection and marked as exhibit PE1.

He said the contractual sum was Tshs. 5,372,400/= and the work was supposed to be completed within two months. It is his evidence that the work was completed within time. He said they paid him only two

millions, and with regard to the remaining balance they told him they would pay after they have seen the strength of the said building.

He said thereafter he was given a certificate of completion of work, which he tendered and was admitted and marked as exhibit PE2. That was followed by a certificate of handing over of the work, issued on 04/01/2007, which was also admitted and marked as exhibit PE3.

He said the handing over took so long because the government wanted to satisfy itself on the strength of the building.

He said the balance of Tshs. 3,372,400/= was not paid even after the handing over, consequence of which the plaintiff wrote a letter to remind the defendant to pay the balance but no response was given. He thereafter wrote a letter to the permanent secretary, which was tendered, admitted and marked as exhibit PE4. That letter was informing the Permanent Secretary that the debt had accumulated up to Tshs. 6,586,818.75, the top up amount being interests.

It is also his evidence that even the ministry did not answer and on 20/04/2011 he wrote another letter to the Permanent Secretary Ministry of Education, the same was admitted and marked as exhibit PE5. In that exhibit the claim had already raised to Tshs. 10,291,904/= including the interest. He said up to when he was testifying, the amount had already escalated to Tshs. 41,019,531/= at the interest of 18%. He in the end asked his prayers and claim be allowed for the reason given, as he has proved the claim and that he be paid general damage.

When he was cross examined, he said in Shilinde Limited, they are three directors; other directors are Michael Shilinde and Martin Shilinde as well as himself, PW1. He said the company was registered in 2000. He said that before entering into the said contract, they did not seat and resolve to do so. He said he signed a contract for eight weeks. He finished the foundation, they finished the poles and coram and a renter beam, which is what they contracted for.

As the contract starting on 21/06/2005 and the completion was to be on 18/08/2005. He said had he failed to complete the work in eight weeks, they would have charged him costs. He submitted that he handed over the project before eight weeks had expired, but the government remained with the building observing it for one year of a defect liability period. He said in exhibit PE1, there is no paragraph 17 (1) and in exhibit PE2 there is no paragraph 35 (2) (b) and that the exhibit PE3 show that the project was handed over on 04/01/2007. He said in exhibit PE4 and PE5, he calculated the interest at 25% although there is no paragraph in the contract providing for 25% or 18% or any term of the contract stipulating that percentage of interest.

He said his claim is Tshs. 41,019,531.00/=, however, the plaint shows another and different amount. It completely avers different figure. PW1 said his names are not registered at BRELA as one of the director of Shilinde Limited, he said further that the headquarter of Shilinde Limited is in Meatu not in Mwanza.

He said he signed exhibit PE3, PE4 and PE5 as the project manager not as a director. It is also his testimony in cross examination that he has never received any Power of Attorney from Shilinde Limited. He said they got the job by winning the tender.

In re examination, he said he signed as a project manager because he was managing the project besides being a director, and that he was third Director of Shilinde Limited in 2005.

He said from 2005 to 2017 on 01/04/2017, the government has never raised any claim against the plaintiff that he did not complete the job. The defence called two witnesses namely Mwl. Joseph Tibenda Bangilana, and Moses Urio, who testified as DW1 and DW2 respectively. DW1 testified on oath that he was a teacher in 2005, and a second head master deputizing the Headmistress of Bwiru Girls Secondary School.

He informed the court that, on 16/06/2005 Bwiru Girls Secondary School entered into contract, with Shilinde Limited, a contractor company, to build a hall, the company was supposed to build the foundation and the slab and the contract, was to last for two months up 20/08/2005. He said he signed the contract as a witness. He said although the contract was to be completed on 20/08/2005 but the project was not completed, and up to when he was transferred to another duty station the plaintiff had not yet completed the building and handover the same. He said that in the circumstance of the case it is the plaintiff who breached the contract.

He said on cross examination that at page 2, paragraph 2 of the contract, the non completion of work was attracting 40% liquidated

damage of the contract sum per day. He said it was a minor work not a complete dining hall.

The DW1 was an Engineer from Tanzania Building Agency TBA - Mwanza. He said, although he was employed in 2015, but from the record was acquainted with the fact that which happened in 2005, a contract between headmistresses Bwiru Girls Secondary School for minor work which included building of a dinning hall. The contract started on 24/06/2005 and was supposed to end on 24/08/2005, when the certificate of practical completion and certificate of handing over were supposed to be issued.

He said the issue of a waiting period was normally for minor repair does not exceed three months. According to him, the date of issuing a practical completion is the date of completion of the project. Both the certificate of practical completion and that of handing over are issued together, and last that if there is any breach of contract any party to the contract may take action.

After the hearing, parties asked to be allowed to file their final closing submissions which were filed as ordered. The plaintiff submitted that he proved his case at the required standard. He submitted further that DW1 did not in any way prove that he breached the contract, and DW2 said by conceding that reading Exhibit PE1 it is not easy to conclude that the plaintiff breached the contract. On the reliefs prayed, he said he needed to be paid his outstanding balance coupled with interest and cushion on

inflation at a rate of 7% making a total of Tshs. 56,622,482,1/= . He cited a case of **Zuberi Augustino Vs Anicet Mugabe** (1992) T.L.R. at page 137.

He said he subscribe to the holding of the case cited above on the ground that since 18th June 2005, up to when he submitted these final submissions, almost 15years had expired without the plaintiff being paid despite the fact that the plaintiff has been acknowledging the debt including the additional amount brought up by inflation or devaluation of Tanzania shilings as to per exhibit PE3 an PW4.

He submitted that the issue of company resolution raised by the defendant's counsel was not part of the pleading. He cited the case of **Tanzania Electric Supply Co. Limited Vs Muhimbili Medical Centre**, (2003) T.L.R. at page 276.

He also submitted that in **Pasintti Adriano Vs Giro Gest Ltd & Another** (2001) T.L.R 89, the court cannot decide on the issue not raised in the pleading. Further to that, as to whether there was a resolution to enter into contract or not that is internal affairs of the company as per section 147 of the Company Act (Cap 212 RE 2002) which this court has not been asked to adjudicate.

In his written submission Mr. Lameck Merumba State Attorney for the defendant, submitted that under section 110 and 111 of the Evidence Act as interpreted in the case of **Bereli Karangirangi Vs Asteria Nyalwambwa**, Civil Appeal No. 237 of 2002, the person who alleges has the duty to prove the existence of what he alleges.

He insisted that PW1 did not prove that the work he contracted to complete in eight weeks was actually completed within eight weeks, but to the contrary the same was not so completed. The evidence shows that it was completed beyond the agreed period of eight weeks. He cited and relied on section 73 (1) of the Law of Contract Act [Cap 345 RE 2002], that being the party who suffered for such breach, the defendant is entitled to damages or compensation for any loss suffered.

He cited the case of **Univeller Tanzania Limited vs Benedict Mkasaya Bema Enterprises**, Civil Appeal No. 41 of 2009, in which it was held that, parties are bound by their agreement and no one would therefore be permitted to go outside the agreement for remedy.

He insisted that the plaintiff was bound by exhibit P1, to complete the work after two years which was beyond the agreed time amounts to the breach of contract, and entitles the defendant, the damages to the breach of contract. On the second issue as to whether the plaintiff had been reminding the defendant about the claim, he submitted that the same is answered in negative, as there is no evidence to prove that the defendant was ever reminded about the debt as alleged.

He cited Coopers **Motor Corporation (T) Limited Vs Arusha International Conference Centre** [1991] TLR 165, in support of the contention that special damages was not pleaded, he said a party is always awarded a damage which he pleaded.

He said that interest sought of 18% and 25% has not been justified, as exhibit PE1 has no clause suggesting that interest rate, and the same has never been pleaded.

He reminded the court that parties are bound by their pleadings, and no party to proceedings is allowed to present its case beyond pleadings. He cited the authority in **Yara Tanzania Limited Vs Charles Aloyce Msemwa, Junior Agravet & 2 others**, Commercial case No. 5 of 2013 in which the decision of the Supreme Court of Nigeria, held *inter alia* that, **Mojeed Suara Yusuf Vs Madam Idiatsu Adegoke** at page 6, in which it was held that

"parties are bound by their pleadings and that evidence led by any of the parties which does not support the averment in the pleadings, or put in another way which is at variance with the averments of the pleadings goes to no issue and must be disregarded by the court".

Further to that, it was held in that case that

"It is a settled law that parties are bound by their pleadings and that no party is allowed to present a case contrary to its pleadings"

Mr. Merumba submitted by way of conclusion that, there evidence and the claim is contrary to what the plaintiff pleaded in the plaint, therefore the claim in the plaint has not been proved. He in the end asked the dismissal of the case with costs.

Now from the pleadings and evidence as adduced by the parties, it has been proved without doubt that parties entered into the contract for minor works where the plaintiff was contracted to build the dining /assembly Hall of Bwiru Girls Secondary School.

That contract was commencing and actually commenced on 24/06/2005, and was ending on 20/08/2015, which period is computed to be eight weeks.

It is also the fact that the contract sum was Tshs. 5,372,400/= say, (five millions three hundred and seventy two thousands and four hundred) and out of that amount only Tshs. 2,000,000/= was paid, leaving a balance of Tshs. 3,372,400/= unpaid. From the pleadings, parties are blaming each other to have breached, the contract, that precipitated the framing of issue number 1, which is;

"Who between the plaintiff and the defendant breached a contract?"

While the plaintiff complain that he did complete the work as required by the contract, but was not paid the balance of Tshs. 3,372,400/=, by the defendant which acts amounts to the breach contract, the defendant blames the plaintiff that he did not complete the job on time, that is why he did not pay him the balance as he is in breach of the contract, the evidence as to what he want the court to base in holding that the plaintiff breached the contract is the facts that the certificate of practical completion was issued on 04/01/2007 and so to the certificate of handing over.

The plaintiff insisted that he completed the project in time, and was ready to hand over the work, but the defendant through the Headmistress Bwiru Girls Secondary School was not ready to receive, because they first wanted to satisfy themselves as to the strength of the building, that is why the certificate was issued almost two years later and during all this time, the building was being used. Now from the evidence submitted, this issue will be resolved on the basis of the credibility of the witnesses who testified in court.

Looking at the plaintiff's evidence it is has established that after finishing the job, he demanded to be paid, but it seems that he was not. That is evidenced by the letter written to the Permanent Secretary Ministry of Education, which was forwarded by the Headmistress Bwiru Girls Secondary School dated on 13/02/2009 that is Exh PE4. That letter was forwarded with the comment that; "*imepitishwa naomba alipwe ni deni la muda mrefu*". This literally means, that the plaintiff be paid as the debt had taken so long. That letter was so forwarded by the headmistress who signed and stamped it. The other letter is Exh PE5 also a letter to the same ministry, which was also forwarded by the some Headmistress though this time without any comment.

The evidence through Exh PE1 and the testimony of both parties witness is clear that the client or employer of the plaintiff in the contract was the Headmistress, Bwiru Girls Secondary School. If there was any non completion or breach of contract, then she would have been the first person to complain. The correspondence to the Permanent Secretary as

reflected under Exh PE4 and PE5, he have never commented that he should not be paid because he was in breach of the contract.

Neither does the certificate of practical completion nor the certificate of handing over show that the same were issued with reservation from the issuing authority that the plaintiff breached the contract. That waters down the implied evidence which bases on the date of the issue of these two certificates to be the base of the alleged delay. That said, it is safe to conclude that the defendant is the one who breached the contract and that the plaintiff through Exh PE4 and PE5 has been reminding the defendant to pay him the balance.

Regarding the last issue as to what reliefs are the parties entitled? The plaintiff claimed the payment of outstanding sum which is Tshs. 56,622,482.1, that according to him was reached at by taking the unpaid sum of Tshs. 3,371,400/= together with interest at a rate of 18% and cushion an inflation, at the rate of 7% plus the liquidated and ascertained damages at the rate of 0.04% of the contract sum for each subsequent day as to per exhibit PE1 which is Tshs. 8,509,881.6 and further interest of 25% on the accrued sum until payment in full.

As I have found that the defendant is the one who breached the contract, he is therefore entitled under section 73 (1) of the Law of Contract Act [Cap 345 R.E 2019] to be paid compensation for any loss or damage caused to him, which naturally arose in the usual course of things from such breach or which the parties knew, when they made the contract to be likely to result from the breach of it.

Now, from the wording of the provision of section 73(1), it goes without saying that the plaintiff is duty bound to prove any **loss or damage caused to him** by the breach of the contract to entitle him to be paid such an amount, computed from the alleged percentage.

The said percentage are not shown and reflected in the contract in the contract Exh PE1. In **Univeller Tanzania Limited Vs Benedict Mkasa s/a Bema Interprises** (supra), it is the law that parties are bound by the agreement they freely entered into. No party would therefore be permitted to go outside that agreement for remedy.

As earlier on indicated, the only remedy is dependent to conditions of contract of the agreement for minor works. In that contract, it is a condition and a term of the contract that liquidated and ascertained damages at the rate of 0.04% of contract sum for each subsequent day.

This in the only remedy, it was equally the duty of the plaintiff to show that he actually so suffered, now since this is a contractual term, calculated from the principal amount payable, the amount payable in terms of condition No. 7 as a liquidated damage is Tshs. 10,000,000/= (Ten millions) as a liquidated damage.


Over and above, there is no dispute that the plaintiff suffered general damages resulting from the breach of contract especially nonpayment of the balance contractual amount on time. The general damages assessed is Tshs. 5,000,000/= (Five Millions). He is also entitled to the principal amount of Tshs. 3,372,400/= (three millions three hundred and seventy two thousands, and four hundred only).

In upshort, the plaintiff is entitled and should be actually paid the followings;

- i. Tshs. 3,371,400 as the principle amount of unpaid contractual sum.
- ii. Liquidated damages of Tshs. 10,000,000/=(ten millions)
- iii. General damage to the tune of Tshs. 5,000,000/= (five million).
- iv. Interest at 7% percent from the date of this judgment to the date of payment in full.
- v. He is also entitled to the costs of the suit.

It is so ordered

DATED at MWANZA this 25th day of August 2020



J. C. Tiganga

Judge

25/08/2020

Judgment delivered in the presence of Mr. Leonard Kachwele – Director of the plaintiff and Miss. Subira Mwandambo-State Attorney for the defendant. Right of Appeal explained and guaranteed.



J. C. Tiganga

Judge

25/08/2020

