

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

AT DAR ES SALAAM

CIVIL CASE NO. 185 OF 2016

MULTIPLE LOGISTICS (T) LIMITED PLAINTIFF

VERSUS

GOLDEN AGRICULTURAL COMMODITIES PRIVATE LTD..... DEFENDANT

JUDGMENT

14th Sept & 23rd Oct, 2020.

E. E. KAKOLAKI J

The plaintiff in this suit is a clearing and forwarding company dully incorporated under the laws of Tanzania. She is suing the defendant a corporate body trading in agricultural commodities for breach of contract for payment of a total sum of United States Dollar Hundred Thousand Seven Hundred Forty Four (100,744.00) only being a contractual sum arising out of contractual relationship for the services rendered to the defendant and Tanzanian Shillings Sixty Million Four Hundred Forty Two Thousand only (Tshs. 60,442,000) being demurrage charges/costs incurred by her for handling SESAME seeds containers for transportation on defendant's behalf and general damages. The plaintiff alleges in paragraph 4 of her amended

plaint that both parties in July 2016 entered into oral contract whereupon the plaintiff undertook to transport cargo from defendant's godown to the stuffing area (yard), provide stuffing labourers (stuffing gang), provide the stuffing area, place empty containers at the yard for stuffing, provide container paper and living dry bags, fumigation services, transport sealed containers to the port of loading, book shipping line and preparation of custom and shipping documents. It is claimed by the plaintiff that she fully performed her obligation under the contract and through her agent, Ms. **Aristepro Investment Company Limited**, prepared custom and shipping documents for a total of 217 SESAME seeds containers worth USD 166,216.00 and Tanzanian Shillings 35,600,000.00 which were not stuffed. And that, up to the time of institution of the suit the defendant had paid only USD 58,472.00 and Tshs. 15,158,000.00 were paid except the above claimed amount.

The defendant in her written statement of defence vehemently disputed the plaintiff's claims against her charging that the plaintiff has no any claim against her whatsoever as she was paid in full for the services rendered. That aside, the defendant in paragraphs 3 and 5 of the written statement of defence claims that the plaintiff proposed to be engaged by the defendant on a pretext that was a registered clearing agent company while in fact she was not, and the defendant became aware of that fact when plaintiff presented invoices in the name of **Ms. Aristepro Investment Company Limited** who in fact provided her (defendant) services directly. The defendant further raised counter claims against the plaintiff which were later on withdrawn at the closure of her defence case. Upon consultation with

both counsels, Mr. Gwamaka Mwaikugile, advocate for the plaintiff and Mr. Gratian B. Mali, advocate for the defendant and for the purposes of determination of parties' rights in this case three (3) issues were framed by the court going thus:

- (i) What were the terms of the oral contract entered into by the parties sometimes in July 2016 for provision of services;
- (ii) Whether the parties had each fully performed its obligations under the contract and if the answer is not, whether there is any loss suffered by each of the parties;
- (iii) To what reliefs are the parties entitled.

The plaintiff in discharging her duty of proving the case on the balance of probabilities paraded in court a sole witness going by name of Faustine Lucas Massawe, the Director of **Ms. Aristepro Investment Company Limited** who testified as PW1. This witness told the court that their company was engaged by the plaintiff to provide services to the defendant on the agreed terms between the plaintiff and defendant as the plaintiff had no licence to allow her perform clearing and forwarding services. He said, it was agreed that their company would communicate the client (defendant) direct and confirmed all instructions were made direct to them by the defendant. And further that payments were also effected direct to them through cheques or bank transfer with the copies served to the plaintiff. PW1 testified that, all agreed services were provided to the defendant but up to the time of giving his testimony their company was still claiming from the defendant USD 100,744.00 and Tshs. 64,442,000/= the amount which he prayed the court to issue a decree for, plus general damages and the costs of the suit. No

documents were tendered by this witness as the attempt to tender the profoma invoices failed after they were rejected by the court for non-compliance of the provisions of section 67(1)(b) of the Law of Evidence Act,[Cap. 6 R.E 2019] for not being original documents (photocopies). Similarly, the defence side in disproving plaintiff's case called in one witness Erick Mchopa, the defendant Operation Director who testified as DW1. This witness denied any contractual relationship or engagement with the plaintiff asserting that, the agreement for provision of the alleged services was between his company and **Ms. Aristepro Investment Company Limited** directly as the plaintiff indicated from the beginning to have had no business licence. He testified that, their company received services from **Ms. Aristepro Investment Company Limited** and paid all the due claims in full. At the closure of defence case parties were allowed to file their closing submissions.

Having briefly narrated both parties case, let me revert to determination of issues framed by the court. To start with the first issue as to what were the terms of the oral contract entered into by the parties sometimes in July 2016 for provision of services; it is the understanding of this court when framing issues that, there was no dispute that oral contract existed between the parties. However, in her defence the defendant seem to have raised it when DW1 stated in his testimony that the defendant has never entered into any agreement with the plaintiff except with **Ms. Aristepro Investment Company Limited**. It is from that fact this court finds it enjoined to determine this issue first. Responding to that issue in his submission Mr. Mwakugile for the plaintiff stated that, in paragraphs 3 to 5 of the

defendant's written statement of defence the defendant agreed to have contractual engagement with the plaintiff for provision of the services claimed by the plaintiff until when he came to note that the plaintiff issued her with invoices in the name of the agent **Ms. Aristepro Investment Company**. That being the position and relying on the Book of **Sarkar on Evidence** Vol. 2 14th Edition (1993) and section 123 of the Evidence Act, [Cap.6 R.E 2019], he submitted, the plaintiff is estopped from denying the facts admitted in her pleadings. Sarkar (supra) at page 1595 defines a principle of estoppel to mean:

"A rule by which a person, in some cases, will not be allowed to plead the contrary of a fact or state of things which he has formerly asserted by words or conduct, in plain words, a person shall not be allowed to say one thing at one time and the opposite of it another time."

Likewise, section 123 of the Evidence Act, provides:

"123. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing."

Having visited the said paragraphs 3 to 5 of the defendant's written statement of defence in which she admits there was contractual engagement with the plaintiff until when discovered the existence of **Ms. Aristepro**

Investment Company and applying the principle of estoppel as defined herein above, I am satisfied and therefore hold that, as per the pleadings oral contract existed between the parties in this case. If the defendant wanted to change her defence she could have amended her pleadings as it was held in the case of **James Funke Ngwagi Vs. Attorney General** (2004) TLR 161 where the Court of Appeal had this to say:

- (a) That, the function of pleadings is to give notice of the case which has to be met. A party must therefore so state his case that his opponent will not be taken by surprise.*
- (b) If a party wishes to plead inconsistent facts, the practice is to allege them in the alternative and he is entitled to amend his pleadings.*

Since in this case the defendant failed to amend his defence to plead inexistence of any oral contract between her and the plaintiff she is estopped from denying that fact as she is bound by her pleadings.

Having so found now I go back to the first issue, what were the terms of agreement between the two parties. On this PW1 is on record that the terms were that the plaintiff undertook to transport cargo from defendant's godown to the stuffing area (yard), provide stuffing labourers (stuffing gang), the stuffing area, place empty containers at the yard for stuffing, provide container paper and living dry bags, fumigation services, transport sealed containers to the port of loading, book shipping line and prepare custom and shipping documents. These terms were never controverted by the defendant when testified through DW1, so they remain accepted terms

of the oral agreement entered between the parties sometime in July, 2016 for provision of services to the defendant. And further that the defendant agreed to pay in return of the services rendered to him by the plaintiff. Whether the same are valid or not, performed or not, those question are reserved for next issue. Having ascertained this issue positively let me move to the next one.

The second issue is whether the parties had each fully performed its obligations under the contract, and if the answer is not, whether there is any loss suffered by each of the parties. The plaintiff in paragraph 5 of the plaint claimed to have performed the contract by providing the services to the defendant but the defendant failed to pay for the said services rendered to her. And further in paragraph 6 that, through her agent, **Ms. Aristepro Investment Company Limited**, she further performed her obligation under the contract by preparing custom and shipping documents for a total of 217 SESAME seeds containers worth USD 166,216.00 and Tanzanian Shillings 35,600,000.00 which were not stuffed but the defendant paid only USD 58,472.00 and Tshs. 15,158,000.00. PW1 in his evidence stated that, his company **Ms. Aristepro Investment Company Limited**, was engaged by the plaintiff to perform its obligation as the plaintiff had no licence to operate as clearing and forwarding company and that PW1's company was allowed to have direct communication with the client (defendant). He testified further that, his company provided services to the defendant as per the agreed terms and all instructions and payments were made between **Ms. Aristepro Investment Company Limited** and the defendant with copies served to the plaintiff. Mr. Mwaikugile in his

submission with regard to that evidence is of the view that, since the services were provided to the defendant then the plaintiff is entitled to the claims raised as the same were never paid to her by the defendant who also failed to provide proof of payments to the plaintiff.

In what seem to be corroboration of PW1's evidence, DW1 in his testimony is recorded to have confirmed that the services were rendered to them by PW1's company and not the plaintiff. And that, all payments were made to PW1's company directly as there is no any pending amount due to them. And further that, if any amount is claimed, the claim has to come from Ms. **Aristepro Investment Company Limited** and not the plaintiff. It is Mr. Mali's submission in view of the foregoing evidence that, the plaintiff failed not only to substantiate her claims that she rendered services to the defendant but also to prove how much she owes the defendant since it is the law under section 110(1) of the Evidence Act that he who alleges must prove. To support his stance he referred the court to the case of **Lashore Limited and Js Kinyanjui Vs. Bizare K.U.D.K** (1999) TLR 330. He said, the burden of proof on the existence of these facts lies to the plaintiff. On Mr. Mwaikugile's insistence of DW1 to show the evidence of payments ever made to the plaintiff by the defendant, Mr. Mali countered that, at any rate the said burden of proof could not have shifted from the plaintiff to the defendant. He referred the court to the case of **Hamida Hamis Vs. Principal Magistrate of Mbagala Primary Court and 2 Others**, Civil Case No. 192 of 2011 (unreported) where this court observed:

"...the principle (burden of proof) stresses that the plaintiff discharges of his burden of proof is not dependent on the

weakness (if any) of the defence case. The plaintiff must first discharge his burden before calling upon the defendant to prove his case.”

Basing on the above cited authorities I find no difficulties in agreeing with Mr. Mali that, the burden of proving that services were provided as per the terms of agreement and that no payments were made for the services rendered if any lies to the plaintiff. Under no circumstances in this case it can be said that the burden of proof turned to the defendant. It is evident from the evidence of both PW1 and DW1 that, there was direct engagement between the defendant and Ms. **Aristepro Investment Limited**, and that services rendered, the instructions and payments were made direct to each other between the two parties. This is a proof and I satisfied therefore hold that, the agreed services to the defendant were provided by Ms. **Aristepro Investment Company Limited**, and not the plaintiff. I will tell why. The plaintiff's claims that she rendered the alleged services through her agent Ms. **Aristepro Investment Company Limited**. Conversely to what is alleged by the plaintiff, it is a proved fact by both PW1 and DW1 that the plaintiff had no licence to operate as clearing and forwarding agent. Absence of licence in my finding disqualified the plaintiff from acting as principal and therefore lacked capacity to enter into agreement with Ms. **Aristepro Investment Company Limited** to engage her to perform any contractual obligation relating to clearing and forwarding as her agent as PW1 and Mr. Mwaikugile would want this court to believe. The purported existing engagement of Ms. **Aristepro Investment Company Limited** by the plaintiff as agent, to perform the contractual obligations she had no capacity

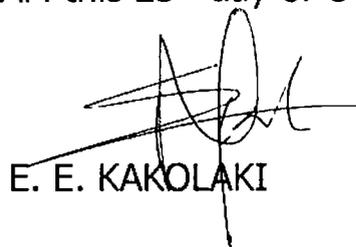
to enter into, I hold never existed and if so existed was null and void ab initio. Even if it was proved that the plaintiff had capacity to perform the contract and performed it, still her claims were bound to fail as she failed to adduce any evidence to prove that no payments were ever made to her by the defendant.

The conclusion of the second issue against the plaintiff takes me to the next issue as to whether the parties have suffered any loss. I think this issue need not detain me much as it is already determined in the second issue that, the plaintiff never performed any contractual obligation under the contract. She therefore suffered no any loss and I so find. With regard to the defendant side, I also hold she suffered no loss as her claims in the counter claim were withdrawn. Thus the issue is answered in negative.

In the premises and for the forgoing reasons, I am inclined to hold that the plaintiff has failed to prove his case on the required standard and his claims are therefore bound to fail. Her suit is therefore dismissed with costs.

It is so ordered.

DATED at DAR ES SALAAM this 23rd day of October, 2020.



E. E. KAKOLAKI

JUDGE

23/10/2020

Delivered at Dar es Salaam this 23rd day of October, 2020 in the presence of Mr. Gwamaka Mwaikugile advocate for plaintiff, Mr. Fatius Kamugisha advocate for the defendant, and Ms. Lulu Masasi, Court clerk.

Right of appeal explained.

A handwritten signature in black ink, appearing to be 'E. E. Kakolaki', written over a set of horizontal lines.

E. E. Kakolaki

JUDGE

23/10/2020