

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CIVIL CASE NO. 11 OF 2019

BETWEEN

CHARLES JAMES BUSHELL _____ **PLAINTIFF**

VERSUS

ELIZEUS EMMANUEL KAGORO _____ **DEFENDANT**

JUDGEMENT

3rd November & 11th December 2020

GALEBA, J.

In this case **Mr. Charles James Bushell's** major claim is Tanzania shillings 521,322,367.50 from **Elizeus Emmanuel Kagoro (Mr. Kagoro)**. According to **Mr. Bushell**, he advanced the money to **Mr. Kagoro** for the latter to establish a gold leaching plant at Kerende village in the Northern Tanzania district of Tarime. The arrangement was that the plant would be owned jointly between the two parties to this case. The agreement was oral and the money to finance the project was sent to **Mr. Kagoro** through his account no. 33 010 001 396 maintained at the **National Microfinance Bank plc** and also through a globally renowned money transfer company, **Western Union**. The agreement was entered in 2016 and the money was

disbursed in different tranches between 2016 and 2018, according to **Mr. Bushell**. Those facts were disputed by **Mr. Kagoro** and according to him, **Mr. Bushell**, who is an Irish national and American resident, came to Tanzania on a tour mission with his wife **Ms. Mary Jane Clark** in January 2016 and they were booked at the **Peninsular Hotel** in Dar es Salaam where he was working. From that point they got closer and **Mr. Kagoro** became **Mr. Bushell's** family friend and the **Bushells** decided to assist him because of that friendship. When they left Tanzania, on various occasions they sent him Tshs 49,916,272/= as a donation or an assistance for him to quit employment as a porter in an hotel so that he could carry out some small mining activities on his own. **Mr. Kagoro** was ready to give back the Tshs 49,916,272/= because it has become clear that **Mr. Bushell** and his family had abandoned their original intention of assisting him.

In other words, **Mr. Kagoro** disputed entering in any contract with **Mr. Bushell** and also receiving the alleged Tshs 521,322,367.50.

To prove the plaintiff's case 3 witnesses were called. **PW1, Mr. Charles James Bushell**, the plaintiff, **PW2, Juma Sololoka**, a banker at NMB Bank plc Tarime branch and **PW3, G3369 Detective Constable**

Pocent Protazy, a Police Officer who participated in the investigation of funds transfer from **Mr. Bushell** to **Mr. Kagoro**.

PW1 Mr. Bushell, testified that in January 2016 his family visited Tanzania and were booked at the Peninsular Hotel in Dar es Salaam where Mr. Kagoro was working as a porter. Mr. Kagoro later went to their room and asked for a job but they later had a verbal agreement to do a gold leaching business. He testified that he was sending Tshs 1,000,000/= for leasing land and later he financed equipment and machinery and that he was sending the money to **Mr. Kagoro's** bank account at NMB bank and through Western Union money transfer services. He testified that all documents to prove that he sent the money to **Mr. Kagoro** were intact and that they were all in Tanzania already with his lawyer.

PW2, Juma Sololoka, a banker at NMB Tarime branch testified that he came to testify that **Mr. Kagoro** was the bank's customer and in so doing he tendered **EXHIBIT PE1** which is a bank statement in respect of account no. 33 010 001 396.

On the part of the plaintiff's case, the last witness was **G3369** Detective Constable **Pocent Protazy** a Police Officer who participated in investigating how the money to **Mr. Kagoro** was being received. Referring

to **EXHIBIT PE1**, this witness proved that **Mr. Bushell** either himself or through his wife **Ms. Mary Jane Clark** and his assistant **Ms. Rosane J. Dow** sent to **Mr. Kagoro** Tshs 65,992,000.05. This witness tendered **EXHIBIT PE3** which contained one letter from the Police addressed to Musoma Post Office General Manager and 3 spreadsheets. According to this witness, the documents show that **Mr. Kagoro** received Tshs 455,330,310/= from **Mr. Bushell**. This amount plus Tshs 65,992,000.05 is the amount of money that **Mr. Bushell** is now claiming from **Mr. Kagoro**.

Next was the defence in which the only witness was **Mr. Kagoro**. This witness admitted to have received Tshs 49,916,272/= from **Mr. Bushell** through his NMB bank account. That amount **Mr. Kagoro** was ready to repay. He denied to have received any money from Western Union offices.

In order to resolve the dispute between the parties this court assisted by parties' advocates formulated the following issues;

1. Whether the plaintiff and the defendant in 2016 did enter into an agreement to invest in a mineral leaching plant/project in Kerende village in Tarime district Tanzania.

2. Whether the plaintiff sent Tshs 521,322,367.50 to the defendant in financing the proposed mineral leaching project.
3. Whether the defendant breached the agreement referred to at issue no 1 above.
4. To what reliefs are parties entitled.

This court will start with the 1st issue. Was there proved that there was an oral agreement between the parties? **Mr. Bushell's** evidence was that it was there and **Mr. Kagoro** breached it. In this case, what is clear is that parties established a relationship which **Mr. Bushell** understood to be a binding contract but which **Mr. Kagoro** perceived to be a philanthropic assistance by **Mr. Bushell's** family to his.

In this case **Mr. Bushell** understood the agreement to be for purposes of developing a gold leaching plant and that partners were to be **Mr. Kagoro** and himself. Although that was his evidence and understanding but according the bank statement which was tendered to support his case, it shows that Tshs 2,516,272/= which was sent on 17.11.2017, Tshs 5,363,982/= which was sent on 07.12.2017, Tshs 4,084,290/= which was sent on 28.12.2017, and Tshs 1,276,170/= which was sent on 10.01.2018 were all sent by **Mr. Bushell** as *donations* to

Mr. Kagoro. This fact, the fact that **Mr. Bushell** sent money to **Mr. Kagoro** as *donation* supports **Mr. Kagoro's** understanding that the transaction was indeed a charity. However, the other sums in the same bank statement show that they were either for *business expenses* or *invoice payment*. The fact that some of the money was for business, supports the understanding of **Mr. Bushell** that the money was meant to be spent in business development, although there was no indication as to which or whose business was being financed. This means parties did not understand the same transaction in the same sense.

In Tanzania for an agreement to be valid it must be entered into by two or more parties with capacity to contract and the contract must be entered with *free consent*. In this case, free consent was at issue because section **13 of the Law of Contract Act [Cap 345 RE 2019]** (the Law of Contract Act) provides that;

'Two or more persons are said to consent when they agree upon the same thing in the same sense.'

In this case, this court is unable to hold that **Mr. Bushell** and **Mr. Kagoro** understood what was going to happen in the same way and in the same sense.

The agreement between the parties, in this case for reasons this court had no ability to know, was mistakenly entered one understanding it to be a business venture and another understanding it to be a humanitarian assistance and under **section 20(1) of the Law of Contract Act** a contract entered under a mistake, is void. It provides;

'20 (1) Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.'

Even if the agreement was not be void because of the confusion amongst parties, the same was so vague to be a lawful contract. For instance, it was not stated what did parties have in mind as to the size of the investment and its outcome. The shareholding of the parties in the venture was still unknown by the time the case was being lodged, and one of the parties is alleging to have spent half a billion shillings on the venture. It is not clear how would **Mr. Bushell** have guts to entrust that colossal amount of money with just a porter to invest in quite a different line of business, the business of gold processing. It could be different if they were investing in hospitality. These and many more doubts and questions, suggest that if **Mr. Bushell** wanted to go into that gold processing business through **Mr. Kagoro** it was expected of him in all

reasonableness, to have demanded some kind of commitment in writing from **Mr. Kagoro**. That is so because even humanitarian organizations, in circumstances where there is no intention of recovering returns from financial resources disbursed, they write documents clarifying their intention of financing to the recipient of their grants. Was it not more expected with a large commercial investment? There was **EXHIBIT PE2**. It is a large volume which was printed from a CD with information extracted by the Police from **Mr. Kagoro's** private telephone line. That document did not prove to be of any use. It was even difficult to make any reference to it. It was not authentic; it had a lot of irrelevant information including communication between **Mr. Bushell** himself and his lawyer based in Tanzania, which fact makes it difficult to believe that the document was extracted from **Mr. Kagoro's** private telephone.

Based on the above reasons, the first issue is answered in the negative, namely that in 2016 parties not did enter into any clear and valid agreement to invest in any mineral leaching project at Kerende village in Tarime Tanzania.

As for the 2nd issue that is whether **Mr. Bushell** sent Tshs 521,322,367.50, **Detective Constable Pocent Protazy**, making

reference to **EXHIBIT PE1**, fully proved that indeed **Mr. Kagoro** received Tshs 65,992,000.05 from **Mr. Bushell**. This amount was proved, step by step by this witness, although, **Mr. Kagoro** admitted to have received only Tshs 49,916,272/=. This court therefore holds that **PW3** proved that an amount of Tshs 65,992,000.05 was sent to **Mr. Kagoro** by **Mr. Bushell**.

When giving his evidence, **Mr. Bushell**, confidently informed the court that the money that was sent through Western Union money transfer will be proved by other witnesses based in Tanzania because upon receipt of it **Mr. Kagoro** signed all documents, adding that they had enough evidence already sent to Tanzania. This information never materialized; if the documents were sent to Tanzania the same were not tendered in Court. **EXHIBIT PE3**, was composed of 4 documents, one was a letter from the police to the Post General Manager and three spreadsheets. I think it was the spreadsheets that **Mr. Bushell** was referring to when he stated that he has abundant evidence in Tanzania. These excel sheets, *first* had sums in **dollars** of a country which is not disclosed whereas the alleged debt is in Tanzania Shillings although **Mr. Bushell** testified that the monies were sent in various currencies including **Euros** and that the money would be sent in a currency of a country in which **Mr. Bushell**

would be at the time he was to send the money. **Secondly**, those documents, the spreadsheets, do not have a title at least to show what they are. They are not even on Western Union headed papers. In other words additional proof on where they originated was needed especially a person from Western Union money transfer service in order to verify their authenticity and origin. **Thirdly**, those documents do not show that they in any way relate to **Mr. Kagoro** or to **Mr. Bushell**. In one of the three documents, there is a name **ELIZEUS** followed by a column with entry '**CB**' and next following there is an entry '**MJ**'. Before the defendant's name there is an entry with the word **SAMANENE BEACH HOTEL** and before that there are many blank columns with the last two on the left of the reader showing the date **1/16/2018** and then a figure **189.52** is inserted.

I must say one thing. Western Union is one of the most organized money transfer corporations globally. In order for one to send money through their system, or to receive it, there are very minute details that one has to provide in writing. It was unthinkable that it became impossible for **Mr. Bushell's** side to prove that they sent the money to **Mr. Kagoro** through Western Union money transfer system. *If it was difficult to get the*

documents at the destination in Tanzania how did it also become impossible to get the documents which were used to send the money from **Mr. Bushell** himself? To say it in summary, **EXHIBIT PE3**, the documents allegedly meant to prove that there were sums of money sent through Western Union money transfer, proved nothing against **Mr. Kagoro** and the same documents proved nothing in favour of **Mr. Bushell**.

In the circumstances, the 2nd issue is answered in the negative namely that the plaintiff did not send Tshs 521,322,367.50 to the defendant in financing any mineral leaching project at Kerende Village in Tarime Tanzania.

The 3rd issue is resolved in the negative namely that the defendant did not breach the agreement referred to at issue no 1 because the contract was void it would not therefore be breached.

The 4th issue is to what reliefs are parties entitled. This is not difficult to answer because its answers flow from responses to issues preceding it. In the Plaint **Mr. Bushell** prayed for Tanzania shillings 521,322,367.50 from **Mr. Kagoro**. We have demonstrated how the plaintiff failed to prove payment of all that amount to **Mr. Kagoro**, but by using **PW2 Mr. Juma Sololoka** and **PW3, G3369 Detective Constable Pocent Protazy**, it

was sufficiently proved that Tshs 65,992,000.05 was sent to **Mr. Kagoro**. That is to say this court dismisses the claim of Tshs 521,322,367.50 but it does award Tshs 65,992,000.05 to **Mr. Bushell** because the amount was proved.

There was a claim for general damages; that claim is refused because there was no contract which could legally be breached and give rise to general damages. Interest at commercial rate is refused because **Mr. Kagoro** thought the amount received was a donation although **Mr. Bushell** thought it was for business. Interest is granted at 7% per annum from the date of judgment to the date of full settlement of the awarded amount.

In the final analysis, this suit succeeds to the above extent with no orders as to costs.

DATED at MUSOMA Tanzania this 11th December 2020




Z. N. Galeba
JUDGE
11.12.2020