IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

DC. CIVIL APPEAL NO. 3 OF 2019

(Originating from the Decision of the District Court of Dodoma at Dodoma in Civil Case No. 35/2017)

OKOA MUDA LTD.. APPELLANT

VERSUS

CHAMWINO DISTRICT COUNCIL ....RESPONDENT

JUDGMENT

18/10/2021 & 13/12/2021

KAGOMBA, J

OKOA MUDA LIMITED (The "appellant") sued CHAMWINO DISTRICT COUNCIL (The "respondent") at the District Court of Dodoma at Dodoma (the "trial Court") in Civil Case No. 35 of 2017 for recovery of a performance bond worth Tshs. 45,433,200/= plus Tshs. 10,000,000/= as accrued interest thereon. The claim emanated from Tender No. LGA/019/2014/2015/5/1 whereby the appellant had applied to, and was engaged by the respondent, by way of a contract dated 1/7/2014 to collect crop cess in Chamwino District for a period of one year.

Under the contract, the appellant was required to remit to the respondent Tshs. 15,144,400/= per month, via an agreed bank account, before 28th day of each month. At the end of the year, on 30/6/2015, the appellant was bound to have deposited Tshs. 181,732,000/= based on agreed estimated collection but managed to remit Tshs. 151,930,600/=.

It transpired that at the end of the contract period, the appellant requested the respondent to discharge the performance bond, but in vain. Hence, the said civil suit was instituted against the respondent to recover the performance bond money. The trial court entered judgment and decree in favor of the appellant for the amount of Tshs. 15,000,000/= as appellant's entitlement, plus costs of the case. The appellant was aggrieved, believing that she was entitled to much more, to the tune of Tshs. 24,802,200/=. Hence this appeal which is based on the following grounds:

1. That, the trial Magistrate erred in law and in facts by awarding the appellant Tshs. 15,000,000/=only without considering the weight of evidence adduced by the appellant.

2. That, the trial Magistrate erred in law and facts by holding that the deduction of Tshs. 29,000,000/= by the respondent from the deposited performance bond of Tshs. 45,433,200/= was proper.

3. That, the trial Magistrate erred in law and facts to decide the matter basing on contradictory and irrelevant evidence adduced by the respondent.

4. That, the trial Magistrate erred in law and facts by failure to analyze the evidence adduced.

The hearing of the appeal proceeded by way of written submissions as per order of this court dated 13/9/2021. Ms. Amina Nyahori, learned Advocate, drew and filed the submissions for the appellant while the respondent's submissions were drawn and filed by her Legal Unit.

Arguing on the first and the second grounds of appeal, Ms. Nyahori for the appellant submitted that the trial Magistrate was at fault by awarding Tshs. 15,000,000/= while the respondent had admitted only because he did not consider the amount of Tshs. 20,631,000/= admitted by the respondent in the Written Statement of Defence to be the amount refundable to the appellant, which if considered, the appellant could be awarded Tshs. 24,802,200/= and not Tshs. 15,000,000/=. To support her contention, she cited Order XII rule 4 of the Civil Procedure Code [Cap 33 R.E 2019] as well as the Ruling of this court in **Amir Sundeerji v. J.W. Ladwa**, Misc. Civil Case No. 820 of 2016 (unreported).

Ms. Nyahori also referred to Rule 29(6) of the Public Procurement Regulations, 2013 for an argument that a performance security has to be released after issuance of the certificate of completion of service if there was no claim filed against the tenderer, contract guarantor or surety.

On the third and fourth ground of appeal, the appellant's advocate argued that the trial Magistrate misunderstood the role of CHOBU TRADERS and CHABUMA SACCOSS. She argued that the two had different roles to play in the collection of cess as compared to the role of the appellant. She clarified that, while CHOBU TRADERS were authorized by the respondent to collect levy on auction and from open market only, the appellant was authorized to collect crop cess within the whole of the Chamwino District. She blamed the respondent for letting CHOBU TRADERS collect crop cess as well as levy on auction at the same time, contrary to the contract. She further heaped blame on the respondent for refusing to promptly stop CHOBU TRADERS from collecting crop cess when the appellant reported the matter until after elapse of five months.

As regards the presence of CHABUMA SACCOSS, the learned Advocate argued that the trial Magistrate also mistook the SACCOSS for another agent of the respondent while it was not the case. She clarified that the SACCOSS was but another cess payer, and therefore it was a wrong premise for the trial Magistrate to consider that the appellant didn't do enough due diligence to know that there were other cess collection agents, by wrongly referring to the said SACCOSS.

Ms. Nyahori also faulted the trial Magistrate for failure to consider the appellant's evidence with regard to the debt of Tshs. 5,000,000/= which the SACCOSS had not paid to the appellant up to the end of the appellant's contract period. She submitted that CHABUMA SACCOSS didn't pay that amount of Tshs. 5,000,000/= to the appellant on pretext that it had an agreement to pay the cess directly to the respondent and the respondent told the appellant not to demand it from the said SACCOSS. For this reason, it was the learned Advocate's apparent argument that the unpaid amount of Tshs. 5,000,000/= ought to be deemed as money collected by the appellant, thereby reducing the amount deducted from the performance bond.

The learned Advocate also faulted the trial Magistrate for failure to consider the fact that the appellant promptly reported to the respondent the non-issuance of receipt books, which affected cess collection. She added that collection was also affected by drought, for which she faulted the trial Magistrate for deciding that the appellant didn't state the time he noticed the drought and its effects on the agreed cess collection targets. She submitted that the trial Magistrate didn't consider the evidence contained in exhibit P9 wherein the appellant informed the respondent about occurrence of drought and requested the respondent to accept remittance of Tshs. 5,144,200/= instead of Tshs. 15,144,200/=.

After the above submission, the learned Advocate for the appellant rested her case, praying the Court to allow the appeal with costs.

Submitting her reply to the first ground of appeal, the respondent argued that the award of Tshs. 15,000,000/= to the appellant was arrived at after a normal deduction by the trial Magistrate which was based on the following calculations:

Agreed estimated collection.........Tshs. 181,732,000/=
Remitted amount........................ Tshs 151,930,600/=
Deficit amount ....Tshs. 29,822,200/=
Performance Bond........................Tshs 45,432,200/=
Less Defict...................................Tshs 29,802,200/=
BALANCE......................................Tshs. 15,631,000/=

It was the respondent's argument that the purpose of the performance bond was to take care of such situation where there was default in performance, arguing that trial Magistrate couldn't open up unnecessary contractual conflict under such circumstances.

The respondent further replied that the trial Magistrate did consider the amount of Tshs. 20,631,000/= allegedly admitted by the respondent in the WSD, adding that, in reaching to its conclusion, the trial Court was aware of the payment of Tshs. 5,000,000/= made by the respondent to the appellant vide Payment Voucher No. 72310V1800036 dated 17/8/2017 in recovery of additional bond deposited by the appellant. She submitted further that the amount of Tshs. 24,802,200/= which the appellant appeared to require to be awarded is baseless. She clarified that by simple mathematics the amount of Tshs 15,631,000/= awarded by the trial Court was a result of deduction of the deficit amount of Tshs. 29,802,200/= from the Performance Bond of Tshs. 45,433,200/=.

With regard to the third ground of appeal, the respondent argued that the trial Magistrate properly and carefully considered the evidence adduced by both parties, including the alleged respondent's admission. She added that the amount admitted is the same as the amount awarded by the trial court after making the deductions. She emphasized that what the trial Court did in arriving at its finding was the same as what was done when the parties met to settle the matter amicably.

In the above connection, the respondent sought to distinguish the decision in **Amir Sundeerji vs J.W.Landwa** (supra) arguing that in that cited case there was no prior amicable settlement between the parties, but only a claim by the plaintiff. She argued further that, in the case at hand, there was an amicable settlement made by the parties under the chairmanship of the Chamwino District Commissioner adding that the trial Court was only cemented what was agreed by the parties in the Amicable Settlement.

It was the respondent's further argument that the appellant signed the contract while in sound mind, and knew too well that the bond money was to be used to cover the respondent in case of default of performance of the agreement by the appellant, being exactly what the trial court did.

With regard to the cited provision of Order XII rule 4 of the CPC, the respondent argued that in deciding the matter, the trial Court accommodated that provision of CPC by awarding the appellant the difference between the performance bond and the cess collection deficit.

Regarding existence of other cess collectors as a factor for appellant's underperformance, the respondent dismissed it as a baseless claim arguing that CHOBU TRADERS and CHABUMA SACCOSS were only collecting cess on grapes. She argued that when the appellant entered into a contract with the respondent, the "zabibu" cess collection came to an end. She argued further that Tshs. 5,000,000/= which the appellant craved to be considered as part of her collection, was actually collected by CHABUMA SACCOSS before the appellant started the cess collection assignment. She added that the appellant performed well in the first six months but later failed to remit the collections for reasons best known to himself, and that was when the conflict and baseless reasons started.

Regarding the problem with the receipt book, the respondent also dismissed it as a baseless claim. She blamed the appellant for not reporting the receipt book challenge immediately after noticing the difference, and for not making close follow up to ensure the mistakes in those receipt books were corrected. She further argued that, instead of reporting and making follow up on the corrections, the appellant continued with collection using the same books which he alleged to have caused the loss, which implied that she had a bad intention in acting so negligently with a sensitive matter of government income.

The respondent further dismissed the allegation of drought for being another unconceivable excuse. She elaborated that when the appellant submitted her tender, being an experienced cess collector in other Districts of Dodoma, knew that Dodoma was a semi-arid region. That, the appellant's allegation reporting the probability of occurrence of drought and the request to be allowed to remit Tshs. 5,144,200/= instead of Tshs. 15,144,200/= had no base for not showing how she arrived at that amount of Tshs. 5,144,200/=. The respondent reiterated that the appellant had a chance of taking precaution before she could package her tender. With this reply submissions, the respondent prayed the court to find the decision of the trial Court properly done and proceed to dismiss the appeal with costs. There was no rejoinder submission from the appellant.

Having considered the above submissions, and after reading the judgment and proceedings of the trial Court, it is apparent that the issue for my determination is whether the award of Tshs. 15,000,000/= by the trial Court was lawful, in light of the cess collection agreement between them.

In this matter, it is not disputed that the parties entered into an agreement whereby the appellant was to collect cess on behalf of the respondent for a period of one year. It is also not disputed that the contract had set the annual cess collection target of Tshs 181,732,000/= but the appellant managed to remit only Tshs. 151,930,600/= for the one-year contract period. This amount, undisputedly carried a deficit of Tshs. 29,822,200/=.

It is also not disputed that the parties had agreed to have a performance bond worth Tshs. 45,433,200/= executed to guarantee contract performance.

With the above undisputed facts in mind, I shall start by stating in the outset two principles of law that shall guide me in determining the issue at hand. The first principle is that, each case shall be decided according to its set of facts and obtaining circumstances. Second and most importantly, parties to a contract are bound by its terms and conditions and courts are enjoined to observe the sanctity of contract, once duly executed. In this appeal, it is unfortunate that the appellant has decided to forfeit her right to rejoin on the respondent's reply submission. Under such circumstances, the court shall have to deal with the available facts in the eyes of the law.

According to the judgment of the trial Court, during trial the appellant herein sought to be refunded Tshs. 45,433,200/= which was the entire value of the performance Bond plus Tshs. 10,000,000/= as accrued interest. The trial Court had to determine, whether the appellant was entitled to recover those amounts, and whether the deduction of the performance bond money by the respondent was proper. In its final analysis, the trial Court found that the deduction was proper and the appellant was only entitled to Tshs. 15,000,000/=, a decision which the appellant is not happy about.

Looking at the analysis made in the judgment of the trial Court, I am inclined to agree with the learned trial Magistrate that, indeed, the appellant was not entitled to a refund of the entire performance bond amount of Tshs. 45,433,200/= but to a difference between that amount and the deficit in cess collection which amounted to Tshs. 29,822,200/=. The reason is simple. The appellant didn't collect as much as agreed in the contract between the parties. As correctly argued by the respondent, the purpose of the performance bond, in this case, was exactly that of off-setting the under performance by the appellant. It has not been disputed that the performance for the first six month was good but declined thereafter for reasons better known to the appellant.

The main reasons for the appellant to fault the decision of the trial court are twofold: firstly, the appellant is of the view that the respondent had made an admission in the WSD that she was supposed to refund the appellant the sum of Tshs.20,631,000/=. Since this was an admission, the trial court ought not to look further but deduct that amount from the performance bond amount of Tshs. 45,433,200/= and award the appellant the sum of Tshs. 24,802,200/=. It is for this reason, the appellant referred to Order XII rule 4 of the CPC which provides:

"Any party may at any stage of a suit, where admissions of fact have been made either on the pleading, or otherwise, ***apply to***

the court for such judgment or order as upon such admissions he may be entitled to*, without waiting for determination of any other question between the parties; and* ***the court may upon such application make such order, or give such judgment, as the court may think just****".*

[Emphasis added].

Looking at the above provision on judgment by admission, there are two aspects that need to be considered. The first one is the requirement for either of the party to apply to the trial court for such a judgment. This was supposed to be done by the appellant herein who claimed to be entitled to the benefit of such admission.

The second aspect is that the above cited provision of the law, in the way it was drafted, does not mandatorily oblige the trial Magistrate to enter the judgment by admission, based on a mere fact of existence of such an admission. The provision requires the trial court to consider justice. This is my take from the clause "*as the court may think just*". In this matter, the trial court held the view that since the appellant had defaulted to perform the contract, justice would be rendered by deducting the deficit amount from the performance bond. I cannot agree more with the approach taken by the trial Magistrate.

The second reason which was advanced by the appellant to fault the decision of the trial court is, generally, that there were justifiable reasons for underperformance in cess collection. These reasons, according to the appellant, included the alleged interference by CHOBU TRADERS and CHABUMA SACCOSS, the problem with receipt books and drought.

I have carefully read both the arguments put forth by the appellant on each of the cited reasons for the underperformance and the reply thereto by the respondent. I have considered the undisputed fact that the appellant was an experienced cess collector within the region of Dodoma and had sufficient knowledge of the working environment, including the fact that drought was a characteristic feature of Dodoma region. I have been convinced that the appellant also knew the terms and conditions of the tender she was applying for and she willingly signed the contract to accept its terms and conditions.

I agree with the respondent's argument that the appellant, who is an experienced cess collector, should have known better how to timely handle the challenges she came to complain about later. In light of the fact that the appellant proceeded with cess collection as usual, and did well in the first six months, despite errors in the receipt books and existence of CHOBU TRADERS and CHABUMA SACCOSS, the excuses raised for the appellant's underperformance certainly loose ground. Besides, as there was no rejoinder submission, the denials and refutations made by the respondent in response to the appellant's allegations have gone unchallenged. The respondent has been able to convince this court that the appellant's assortment of reasons for underperformance was nothing but an afterthought. As such all the four grounds of appeal are rendered meritless.

Therefore, in determining whether the award of Tshs. 15,000,000/= by the trial Court was lawful, I am of the view that so long as there was a contract for collection of crop cess which was lawfully entered by the parties herein, and so song as there was a performance bond executed for ensuring the appellant's due performance of his obligation under the contract, and so long as the appellant's remittance fell short of the agreed amount of cess collection and in absence of any *force majeure* event, the award of Tshs. 15,000,000/= to the appellant, after deducting the amount of deficit from the performance bond was very much lawful.

However, what I have not been able to follow, and the appellant has neither dwelt on nor complained about in her written submission, is the reason for the balance amount to be Tshs. 15,000,000/= and not Tshs. 15,631,000/=. While the appellant illustrated that the calculation done by the trial court was such that the deficit of Tshs. 29,802,000/= was deducted from the performance Bond amount of Tshs. 45,433,200/= to remain with Tshs. 15,631,000/= which was awarded to the appellant. The respondent also referred to the same figure of Tshs. 15,631,000/= which present a difference of Tshs. 631,000/= from the amount actually awarded by the trial court to the respondent.

Despite the noted difference of Tshs. 631,000/=, I restrain myself from invoking the revisionary powers of the court to vary the awarded amount, for two reasons. Firstly, the appellant has not pleaded that there was such a difference, and neither did the respondent plead it as such.

Secondly; in the appellant's written submission, the illustration of how the award was arrived at is marred by many typographical mistakes on numerals, with figures wrongly punctuated. For example, there are figures written as "TZS 45,4333,200/=", "20,631,1000/=", "181,732,8000", "151,930,6000", "29,802,00", "15,631,00/=" and "45,433,2000/=" With such many mistakes in numbers intended to substantiate the claim, I find it unsafe to reverse the amount of Tshs. 15,000,000/= that was warded by the trial court.

As I stated in the outset, this judgment is premised on the facts as pleaded and the principles of the law, which enjoin courts to uphold the sanctity of contract. I have made my firm finding that the allegation raised by the appellant are unfounded. The appellant was bound by the contract to remit an agreed amount of money, failure of which the trial court found it appropriate to deduct the deficit from the performance bond. In this connection, I recall various decisions of the Court of Appeal pertaining to sanctity of contract. In **Simon Kichele Chacha v. Aveline M. Kilawe** (Civil Appeal 160 of 2018) [2021] TZCA 43 (26 February 2021), the Court of Appeal stated on 8 of its typed Judgement thus;

> *'It is settled law that parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract.'*

A more instructive decision with regard to upholding the sanctity of contract was made in the case of **Philipo Joseph Lukonde vs Faraji Ally Saidi** (Civil Appeal 74 of 2019) [2020] TZCA 1779 (21 September 2020), where the Court of Appeal stated thus:

> *"We take any such deliberate breach of contracts very seriously. Once parties have duly entered into a contract, they must honour their obligations under that contract.* ***Neither this Court, nor any court in Tanzania for that matter, should allow deliberate breach of the sanctity of contract".*** **[emphasis added].**

In the above decision, the Court of Appeal made reference to a decision of the Court of Appeal of Kenya in **Michora v. Gesima Power Mills Ltd** [2004] eKLR which quoted from another Kenyan decision in **Shah vs Shah** [1998] KLR 289 at 292 paragraph 35 where it was stated thus:

> ***"If the words of the agreement are clearly expressed and the intention of the parties can be discovered from the whole agreement then the court must give effect to the intention of the parties".***

In the case at hand, the parties intended that the appellant shall carry out crop cess collection on behalf of the respondent for a period of one year at an agreed amount. To ensure the performance is done as per agreed collection targets, the appellant was obliged to, and did furnish a performance bond in favor of the respondent. The bond was intended to guarantee the performance of the contract as per agreed targets, failure of which the respondent was to be redressed accordingly. The appellant failed to remit the cess as per agreed targets, which was a breach of a fundamental term of the contract. The excuses raised by the appellant for underperformance, as I have indicated, could neither satisfy the respondent nor this Court. Hence, the remedy embedded in the contract was activated whereby the respondent got the necessary redress from the performance bond, as confirmed by the trial Court. This is what happened.

In the above premise, I find no merit in the entire appeal and hereby dismiss it accordingly.

Dated at **Dodoma** this 13th day of December, 2021.

THE HIGH COURT TANZANIA

ABDI S. KAGOMBA

JUDGE