

**IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)**

AT MWANZA

CIVIL CASE NO. 15 OF 2019

TANZANIA ELECTRIC SUPPLY COMPANY LIMITED PLAINTIFF

VERSUS

SAHARA MEDIA GROUP LIMITED DEFENDANT

DEFAULT JUDGMENT

Date of last order: 11.02.2021

Date of Judgment: 26.02.2021

A.Z. MGEYEKWA, J

This is a default judgment. The facts of the case, as can be gleaned from the plaint are that: the dispute arising from a claim for payment of monies, owing and payable by the Defendant to the Plaintiff. Plaintiff and the Defendants are both limited liability companies incorporated under the laws of the United Republic of Tanzania. The Defendant (original Plaintiff) was demanding Tshs. 233,291,100/= from the Plaintiff (original

Defendant) being an outstanding balance from the money erroneously transferred to the Defendant's bank account. It is alleged that after realizing the error, various communication were made with the Plaintiff's Bank and the Defendant's Bank to ensure that the funds is returned immediately to the Defendant's Bank account. On 19th November, 2016 the Plaintiff returned Tshs. 575,000,000/=. The Defendant also owes the Plaintiff Tshs. 77,708,900/= which made the remaining balance to be returned by the Plaintiff to the Defendant to be Tshs. 233,291,100/=.

On 30th October, 2018 both parties herein concluded consent settlement in respect to the claim of the Plaintiff and the two ended the case. What was remain intact was the determination of the Counter Claim which was filed by the Plaintiff on 21st May, 2018. It is alleged that the Plaintiff in the Counter Claim, claims against the Defendant for a sum of Tshs. 274,018,500/= being the costs for the replacement of the Plaintiff's studio damaged equipment. The Plaintiff claims that he has suffered a total loss in a tune of Tshs. 274,018,500/=.

The hearing of the case was scheduled to take place on 25th November, 2020. On this date, the Plaintiff was represented by Mr. Boniface Sariro, learned counsel whereas the Defendant enjoyed the legal service of Ms. Theresia Masanja, learned counsel.

Upon completion of all preliminaries, the Final – Pre Trial Conference was conducted and the following issues were framed by this Court:-

- 1) *Whether the Plaintiff is responsible for the electric fault occurred on 5th December, 2014 resulting in the destruction of the defendant's radio equipment*
- 2) *Whether the defendant suffered loss as a result of the destruction is referred on the first issue.*
- 3) *What reliefs are each party entitled to.*

By consent, the Plaintiff and the Defendant were allowed to prove the case by affidavit of proof subject to the deponents of the affidavits being cross-examined. The affidavits were filed in compliance with the court direction.

Again, by consent of the parties, on 12th November, 2020 they agreed to make final submissions in writing. The court blessed the agreement and proceeded to schedule the submission dates. Both learned counsels filed their final submissions as ordered.

To prove the above issues the Plaintiff called one (1) witness in the defence of his claims against the Defendant, the witness was Kiama Karinge who testified as **PW1**. On the part of the Defendant he also called two (2) witnesses; Julius Cellophane Ntwenya who testified as DW1 and

Hamis Ally Mkiwa who testified as DW2. The Plaintiff tendered a total of 6 documentary Exhibits, to wit a Pictures on was admitted and marked as **Exhibit P1**. Electronic documents were admitted and collectively marked as **Exhibit P2**. Emails correspondence were collectively admitted and marked as **Exhibit P3**, Proforma Invoices were admitted and marked as **Exhibit.P4**, a Demand Notice was admitted and marked as **Exhibit. P5** and a certificate of change of name was tendered and admitted as **Exhibit.P6**.

To prove his case, the Plaintiff only witness; Mr. Kiama Karinge (PW1), a technical operator working with Sahara Media Group Ltd since 1996. PW1 testified that his duties are to manage the technical operation of the media house and liaise with equipment vendors and technical service providers to get proper support for smooth running the media house operations. PW1 further testified that on 5th December, 2014 while on his duty at the studio he heard a loud explosion sound and the main power went off. The standby generator automatically supplied the power to the studio and head office. PW1 continued to testify that he saw the electrical pole and line supporting the high voltage line had collapsed. He added that the electrical pole and line belong to the Plaintiff, they reported the incident to the Plaintiff. PW1 went on to testify that the Plaintiff received the

report. PW1 testified that the Plaintiff is responsible for deactivating the line wherever there are issues that may cause danger to life and property.

It was PW1's further submission that later they noticed that they had issues in the studio that caused interruptions to normal service and transmission to Radio Free Africa, Kiss FM, Star TV, and Continental Digital services. The same was caused by electrical and electronic system failures that develop the High Voltage line belonging to the Plaintiff collapse as manifested by damage in power systems with the various system and equipment within the studios of the Defendant. PW1 testified that they have listed all the systems and equipment that were damaged. He referred this court to Exhibit P5.

PW1 did not end there, he referred this Court to Exhibit P... Demand Notice which shows the particulars of the destroyed equipment with a total actual loss is Tshs. 274,018,500/=. PW1 testified that they have made several attempts without success to reach out to the Plaintiff to discuss the available avenues to resolve the issues related to the loss incurred from the incident of collapsed high voltage line and poles. He further testified that on 10th February, 2015 they served the plaintiff with a demand notice.

PW1 continued to state that the collapse of the High Voltage Electrical poles and line of the Plaintiff resulted in the destruction of one of the High Voltage 11 KV Ceramic insulators and bushing to the Defendant's transformer that was connected with the same. He went on to testify that as a result of multiple radio and TV studios equipment and pay TV satellite uplink were destroyed.

PW1 further testified that they seek redress and legal remedy for the losses arising from the Defendant's collapse power line in form of total compensation for the equipment damaged, subsequent general damage, interest and costs of the suit.

During cross-examination PW1 testified that the incident occurred on 5th December, 2014 whereby TANESCO pole fall on a wall and the electricity went off. He went on to testify that the standby generator automatically switched on. PW1 further testified that a demand notice proves that the power installation was not working and the pictures reveal that the transformer was broken. He continued to testify that the UPS was huge therefore they were not able to tender it in court. He testified that the power went off for six hours.

When PW1 was re-examined, he testified that the incident occurred on 05th December, 2014 whereby the power machines were destroyed v. He

testified that the automatic generator was on. He testified that he served the Defendant with a demand note. He refuted that the Plaintiff's claims were brought after the incident. PW1 further stated that the computers were not destroyed.

The defence on their part DW1, Hamis Ally Mkima, an Electric Technician working with the Tanzania Electric Supply Company Limited testified that he was instructed to supervise all electrical District works and maintenance. DW1 stated that he knows the Defendant; a media company located in Ilemela District. DW1 went on to testify that on 05th December, 2014, while at his office he received information from the District Manager one Julius Cleoplace Ntwenye informing him that there was a fallen pole at Ilemela District which needed to be remedied.

DW1 continued to testify that when he reached the scene of the incident he saw one high tension electric pole had fallen down and red phase high tension primary bush had bent as the result of being pulled by the fallen poles. DW1 further testified that they fixed the problem by raising the high tension pole. He went on to testify that after the maintenance they did not receive anything relating to the fault in causing destruction of the defendant's studio equipment ever since.

It was DW1 further submission that he understand that the falling of the electric pole of 11KV line (11000) could cause the electric fault to a low voltage power used in the defendant premises of Volt 230. He further testified that according to the electric engineering principle for equipment to be destroyed by electric fault neutral wire must be burnt, a scenario which did not happen on 4th December, 2014. He ended by testifying that if at all the Defendant's equipment were destroyed by electric fault, it could be as the result of internal faults of the Defendant's electric infrastructure and not the responsibility of the plaintiff.

DW2, Julius Cleophace Ntwenya, a District Manager working with the Tanzania Electric Supply Company Limited at Misungwi District and also served as a District Manager of Ilemela District within Mwanza City from 2013 to 2017. He testified that among his duties is to ensure customers of Ilemela District are supplied with electricity at all times, supervising employees, and ensuring the safety of employees and customers. DW2 testified that the Defendant is one of his customers operating at Ilemela District. DW2 testified that he has not heard any claims relating to the alleged fallen pole until when he was notified by the Zone Legal Officer on 26th May, 2020. DW2 continued to testify that on 5th December, 2014 one red phase high tension primary bush bent as a result of being pulled by a falling high tension pole at Ilemela. DW2 went on to testify that they

changed the red phase high tension primary bush and the high tension pole and service was restored.

DW2 did not end there, he testified the office never received any complaint or notice on anything relating to the incident until he was transferred to Misungwi District in January, 2017. DW2 went on to testify that the Defendant's claims are baseless, frivolous, and unfounded as the Defendant kept silent for almost three years until when the Plaintiff's monies Tshs. 886,000,000/= were wrongly credited to her account thus he came up with the allegations by withholding Tshs. 274,000,000/= of the Plaintiff's monies.

DW2 in his testimony blamed the Defendant for failure to come up with an independent expert opinion that established the Plaintiff's liability. He insisted that the Plaintiff's liability to the customer ends at the meter from the meter onward the obligation to protect the customer's equipment lies with the customer. DW2 testified that the Defendant's documents were forged; the invoice is dated 21st August, 2013, Order of Confirmation dated 15th November, 2013, Purchase Order is dated 8th October, 2013 and the insurance certificate is dated 28th March, 2014 while the alleged fault occurred on 5th December, 2014 thus the documents are irrelevant.

DW2 concluded by stating that the Defendant failed to attach a delivery note to substantiate his claims.

I now proceed to determine the issues as agreed upon and in the order, they have been argued by both learned counsels. But before I embark on that task, let me, firstly, appreciate the submissions of the Plaintiff's and Defendant's learned counsels on their final submissions. By the consent of the parties, on 12th November, 2020 both learned counsels were supposed to file their Final Written Submissions whereas both counsels complied with the court order. The learned counsels submissions are not only brief focused, and to the point but also have been argued with tenacity and ability to unveil without certainty a lot of industry allotted to the matter. This is, indeed, a good work well done.

I should state at the outset that, in the course of determining this case I will be guided by the principle set forth in civil litigation. The said principles include the following; the one who bears the burden of proof is he who wants the Court to believe him and pronounce judgment in his favour. Therefore, the burden of proof lies with the persons who instituted the suit. The Rule finds backing from the provisions of sections 110 and 111 of the Law of Evidence Act, Cap.6 [R.E 2019] states categorically to whom the burden of proof lies 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.

(3) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

From the above position of the law, the burden of proof of the same at the required standard is left to the Plaintiff being the one who alleges. What this court is to decide upon is whether the burden of proof has been discharged by the Plaintiff.

The first issue for determination is whether the Plaintiff is responsible for the electric fault that occurred on 5th December, 2014 resulting in the destruction of the defendant's radio equipment.

It is no dispute that on 5th December, 2014 one red high tension was bent as a result of being pulled by a falling high tension pole at Ilemela District. The Defendant who is the Plaintiff in the counter claim case complained that his studio's equipment were destroyed due to the collapse of the Plaintiff's transformer. Therefore the issue here is whether the explosion of the Defendant's transformer resulted in the destruction of the Plaintiff's studio equipment.

In order to prove his claims, PW1 tendered a list of documents that tend to show that the Defendant was responsible for the destruction of his studios' equipment. PW1 tendered several exhibits; the photos (Exh.P1) show that the collapsed high tension line pole was bent, lying on the wall the same proves that the power went off and both sides admitted that on that day the power was off for some hours.

The Plaintiff also tendered email correspondence dated June, 2010 (Exh.P2), email, and quotation dated October, 2005 (Exh.P3). Promfoma invoices (Exh.P4), Demand Notice dated 10th February, 2015 (Exh.P5), and a certificate of Change of name (Exh. P6). PW1 claimed that they have reported the incident timely vide Report Reference No. 120311343 therefore in his view, the Defendant was aware of the said loss. PW1 testified to the effect that at the time when the power went off the Plaintiff's generator automatically went on. When PW1 was cross-examination he partly stated as follows:-

“ ...TANESCO pole falls on a wall, then the electric went off and the standby generator was automatically on.

In his affidavit, PW's stated that:-

"...shortly we learned that despite our standby generator operating normally we had issues in studios that caused interruptions to normal services... the multiple services interruptions were caused by electrical and electronic systems failure that developed when the High Voltage line belonging to the Defendant collapsed as manifested by damage in power systems with the various systems and equipment within the studios of the Plaintiff."

From the foregone evidence, several issues come to the fore, First, PW1 said that the TANESCO power went off and while the Plaintiff's generator was operating automatically. And he went on to state that the studio's activities were operating well. I'm wondering whether the Plaintiff's equipment were destructed immediately after the explosion of the transformer are when the equipment were destructed when the generator was operating? I expected all studio's activities could have shut down immediately after the explosion.

Second, PW1 was not forthright on the issue of restoration of electrical power. He stated that:-

"... few days later we managed to restore all the services back to normal."

On cross-examination PW1 position was that:-

"...they managed to restore the services back to normal in six days."

A witness testifying on a factual issue must be straight forward the evidence must be consistent and reliable. To the make to believe the evidence in the instant case the Plaintiff failed the consistency test.

Third, regarding the issue, whether the Defendant was served with a demand notice.

On re-examination, PW1's position was that:-

" ...the Demand Notice was sent by registered mail and if tracked it could have been confirmed that it was received."

The learned counsel for the Plaintiff in his final submission stated that:-

" ...the said Exhibit P5 was sent to the Managing Director of the Plaintiff at its Head Office at Dar Es Salaam through the post. That being the case, it is our belief that the said Exhibit P5 (Demand Notice) was well received by the plaintiff but he purposely neglected to act on the same."

I have read the Demand Note dated 10th February, 2015 (Exh. P5). PW1 reminded the Defendant to effect Tshs. 274,081,500.00/=, however, the notification letter was not tendered in court to prove that the Plaintiff notified the Defendant about the loss incurred. Taking to account that DW1 and DW2 testified to the effect that they were not informed about any complaint on the loss incurred by the Plaintiff on 5th December, 2014. There is no any proof that the mail was registered, I expected PW1 could have tendered the notification letter and a receipt to prove his claims. The learned counsel for the Plaintiff in his final submission banked on his own belief that the Defendant received the Demand Note.

It is my considered view that the Plaintiff failed to prove if the demand letter was served upon the defendant. The Plaintiff was duty bound to prove that allegation. That is in accordance with the elementary principle of he who alleges must prove as embodied in the provisions of section 110(1) of the Evidence Act [Cap. 6 R.E. 2002], as stated in the case of **Abdul Karim Haji v Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2004 (unreported) the Court of Appeal of Tanzania held that:-

"...it is an elementary principle that he who alleges is the one responsible to prove his allegations."

Applying the above authority of the law, the Plaintiff was duty bound to prove his allegations. The Plaintiff tried to prove that his studios' equipment were destroyed by tendering proforma invoices (Exh.P5). With due respect, the proforma invoice tended to prove that the Plaintiff bought the electrical equipment but the same cannot prove if the equipment were destroyed by the explosion. The Plaintiff did not tender any equipment listed in the Demand Notice to prove that the equipment was destroyed.

For the reasons stated above, it is obvious that this issue cannot be answered in affirmative.

Addressing the second issue, whether the Defendant suffered loss as a result of destruction referred to the first issue. According to PW1, the Plaintiff has suffered loss due to the transformer explosion caused by the Defendant. Without wasting the time of the court, the Plaintiff's loss was not established nor proved on the required standards of the law. The Demand Notice was not delivered to the Defendant, the studio's equipment which were destroyed were not tendered in court thus the amount claimed was not linked to the said equipment. The evidence adduced and documentary evidence did not support the Plaintiff's claims. As I have mentioned earlier the one who alleges must prove, the Plaintiff has not proved his case.

The above said, this issue is answered in negative.

Now next for consideration is the third issue, what relief are parties entitled to. It is clear from the evidence and from what I have endeavoured to state above that the Plaintiff did not prove his case against the Defendant to the required standard of the law. In the premises, in view of the real situation which must presently be obtaining on the ground, this court fails to see how the Plaintiff is entitled to claims which he did not prove. Therefore, in my view, the Plaintiff is not entitled to the prayers sought in the Plaint.

In the upshot, the case is decided for the Defendant thus, I proceed to dismiss the suit in its entirety with no order to costs.

Order accordingly.

DATED at Mwanza this 26th February, 2021.


A.Z MGEYEKWA

JUDGE

26.02.2021

Judgment delivered on 26th February, 2021 via audio teleconference whereby Mr. Boniphace Sariro, learned counsel and Ms. Theresia Masanja for the Plaintiff and Defendant respectively were remotely present.




A.Z MGEYEKWA
JUDGE
26.02.2021

Right to appeal fully explained.