

**IN THE HIGH COURT OF TANZANIA**

**(DODOMA DISTRICT REGISTRY)**

**AT DODOMA**

**(DC) CIVIL APPEAL NO. 10 OF 2019**

*(Arising from Civil Case No. 3 of 2018 of the  
District Court of Dodoma )*

**NEEMAN MALLYA.....APPELLANT**

**T/A NEHOS GENERAL SUPPLY**

**VERSUS**

**TANZANIA NATIONAL ROAD AGENCY.....RESPONDENT**

***JUDGMENT***

*Date of last order: 13<sup>th</sup> December, 2021*

*Date of Judgment: 20<sup>th</sup> December, 2021*

***A. J. Mambi, J.***

The Appellant who was the Plaintiff at the trial court was aggrieved by the decision of the District court of Dodoma in Civil case No. 3 of 2018. The trial court ordered that the Appellant (who was the plaintiff) be paid a total sum of 4,146,700/= Tshs

as unpaid amount due, interest at commercial rate of 17% on the decreed amount from 8<sup>th</sup> February, 2013 to 8<sup>th</sup> January, 2018. The trial court also ordered the respondent (who was the defendant to pay the appellant an interest at the court rate of 6% from the date of judgment to the date of final payment, and finally but not least that each party to bear his or her own costs.

It was against those orders that the Appellant is before this court by way of an appeal seeking court redress. The appellant in her memorandum of appeal advanced three grounds of appeal as follows:-

1. That the trial court erred in law and in fact for failure to consider that the act of the Respondent's officers to sign delivery notes and tax invoices proved that the Respondent was supplied with Appellant's services and "*Respondent*" had delivered to the Respondent the ordered goods so they had to pay the claimed amount.
2. That the trial court erred in law and in fact for failure to consider that the local purchasing orders (LPO) are prepared by the Respondent before they are sent to the Appellant as supplier to which any defect therein should be decided in favour of the Appellant.

3. That the trial court erred in law and in fact for failure to hold that lack of some local purchasing orders could not disprove the claimed amounts since the Respondent had acknowledged receiving service from the Appellant by signing delivery notes and tax invoices and had obtaining many local purchasing orders.

During the hearing of this appeal both parties were represented by the learned counsels. While the Appellant enjoyed the services of Mr. Frank learned advocate the Respondent was represented by Mr. Peter Sengerema learned advocate.

Mr. Frank for Appellant briefly submitted that the Appellant delivered the goods as required and the delivery notes were sent by the Respondent and, it was erroneous for the trial court to award some amount instead of the whole amount claimed. To substantiate his submission, the learned counsel referred the decision of the court in **East Africa Cables Limited Vs. Kayuwa GDK Enterprises Limited,(HC) Commercial Case No. 105 of 2016** High Court Commercial division Dar es salaam, where the court at page 4, it held that:-

*“In any business involving supply of goods, the delivery of goods and values thereof can be*

*proved by the delivery notes and corresponding invoices thereto”.*

The appellant counsel prayed this court to allow an appeal filed by the appellant.

Responding to the grounds of appeal, the respondent counsel, Mr. Peter Sengerema briefly submitted that, delivery notes and tax invoices do not conclude contract as per **Rule 160 (2) of The Public Procurement Regulations** and that no delivery note was submitted but rather tax invoices which does not conclude contract. The counsel for the Respondent also referred the court to **Rule 1(2) of The Public Procurement Regulations 2013 GN No.446** which Rule require the submission of Local Purchase order that contains description of goods, quantity, units and class.

The respondent counsel contended that the grounds of appeal by the appellant has no merit since the trial court properly made its decision.

This court before venturing into the ground of appeal have noted that in essence the parties are not at issue on whether or not between them there was a contract to supply materials but

rather the issue is whether or not the principal amount awarded of 4,146,700/= was proper or not.

My perusal for the records of the trial court in particular exhibit P5 reveal that a total of eighteen purchasing orders were issued and out of those purchasing order number 680338 of 27/07/2011, 680413 of 14/08/2011, 680417 of 16/09/2011, 695015 of 30/07/2012 and 702736 of 12/06/2012 were blank on the unit, quantity, rate and amount and the rest of purchasing orders totals 12,295,386.5/= Tshs. Further exhibit D1 shows that the total amount paid out of the raised purchasing orders was only 2,004, 140/= and thus the balance is 10,291,246.5/=.

That said, I wish to resort to the grounds of appeal. As to the first grounds one will note that the Appellant's complaint was that the trial court failed to draw an adverse inference from the Respondent's act of signing the delivery notes and tax invoices. It is worth noting that the Plaintiff had the duty to prove his allegations and not rely on unfounded assumptions. This in live with section 110 of the Evidence Act which provides that:-

*110.(1) Who ever desires any court to give judgement*

*as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.*

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

The records are clear that the purchasing orders were the documents used by the Respondent as proof of goods or services received and effect payments as evidenced by exhibit D1. This means that there is no way a court properly guiding itself would have proceeded to award the 37,105,496.80/= without the Plaintiff now the Appellant producing evidence to that effect.

With regard to the second ground, it is simple if the defect on the purchase order is arithmetical then that moves sense, but for the above itemized purchasing orders the defect is far reaching unless the court ventured into assuming that the Plaintiff claim of 37,105,496.80/= was genuine without basis for so doing, then, there is no way the court could have filled in the figures as those five purchasing orders were completely blank and one could have equally referred to them as ghost purchasing orders.

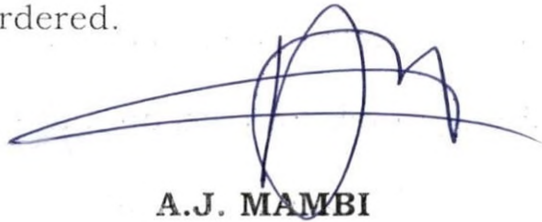
Looking at the third ground of appeal, the Appellant complained that lack of some purchasing orders did not disprove

the claimed amount, since the Respondent had acknowledged receiving services. Once again, I wish to point out that the parties by their arguments do not in any way suggest to be at issue in respect of whether or not services was not rendered and received. The issue is what services were rendered and at what cost. In my considered view, since the two could not reach amicable settlement on the issue between them, then it became necessary to seek legal intervention a channel which unfortunately has its rules and procedures of which there is no way one can avoid rules of evidence that demands that he/she who alleges must prove. Furthermore, since the plaintiff (now the Appellant) alleged to have a claim of 37,105,496.80/= then the duty to prove the same exclusively was upon the Appellant which in the opinion of this court was not proved to that extent but to the tune of 12,295,386.5/=. On the other hand, since the Respondent (who was the Defendant) managed to defend himself to the tune that it had paid a total of 2,004,140/= then the genuinely proved claim due to the Appellant is 10,291,246.5/= and not 4,146,700/= which was awarded by the trial court. Basing on my findings, I substitute the amount that is Tshs. 4,146,700/= awarded by the trial court with proper amount of



Tshs.10,291,246.5. In this regard, the respondent shall pay the appellant the amount of Tshs.10,291,246.5 as unpaid amount due.

As to other orders pertaining the interest and costs awarded by the trial court, I find no good reason to interfere the same and I uphold the same to remain as before. Basing on the reasoning I have made, I find that the appeal has merit. In the end, this appeal is partly allowed to the extent of the order on the principle amount. I have ordered.

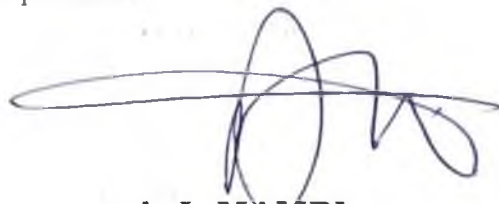


**A.J. MAMBI**

**JUDGE**

**20/12/2021**

Judgment delivered in Chambers this 20<sup>th</sup> day of December, 2021 in presence of both parties.



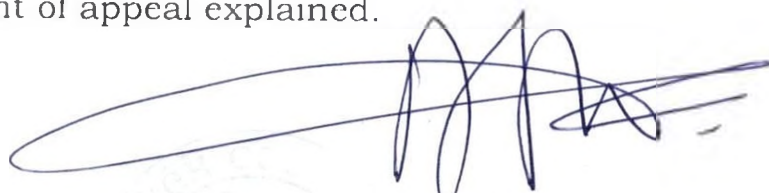
**A.J. MAMBI,**

**JUDGE**

**20/12/2021**



Right of appeal explained.

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke.

**A.J. MAMBI,**

**JUDGE**

**20/12/2021**