

**IN THE HIGH COURT OF TANZANIA**

**DAR ES SALAM DISTRICT REGISTRY**

**AT DAR ES SALAAM**

**CIVIL CASE NO. 164 OF 2018**

**TEMEKE MUNICIPAL COUNCIL..... PLAINTIFF**

**VERSUS**

**M/S HEPAUTWA INVESTMENT AND GENERAL BROKERS LTD.....DEFENDANT**

**JUDGMENT**

Last Order: 25/5/2022

Judgment: 26/7/2022

**MASABO, J.:-**

The parties herein contend over performance of an agency agreement for management, operation and collection of revenue from street car parking lots executed by the parties in September 2016. The plaintiff has alleged that, in total breach of her contractual obligation, for two consecutive months after commencement of the agreement the defendant failed to remit the collected revenue agreed upon by the parties. Disgruntled, the plaintiff terminated the agreement and has come to this court seeking for judgment and decree against the defendant for payment of the unremitted sum of Tshs 1,254,054,000.00, interest thereto and costs of the suit. The defendant

disputed the claims and averred that the performance of contract was inhibited by the plaintiff's failure to render her the agreed assistance.

Three issues were framed at the commencement of hearing, namely: (i) whether there was an agreement between the parties (ii), whether there was any breach of the agreement by the defendant and (iii) to what reliefs are the parties entitled to. Both parties had representation. The Plaintiff was represented by Mr. Jumanne Mtinangi and Grace Umoti, City Solicitors from Dar es Salaam City Council and after its dissolution, Ms. Shughundu Mvungi, Solicitor from Temeke Municipal Council which succeeded the claims. The Defendant enjoyed the service of Mr. Deniol Msemwa, learned counsel.

The first issue for determination will not detain me as it has been positively answered by Exhibit P1, an agency agreement whose existence and content were all acknowledged by PW1, PW2 and PW3. The agreement, which was executed by both parties (the plaintiff was then operating as Dar es Salaam City Council) in September 201, was a fixed term contract lasting for a period of one year reckoned from the 1<sup>st</sup> October 2016 to 30<sup>th</sup> September 2017. By this agreement, the defendant undertook to collect parking fees and remit

the revenue collected to the principal on consideration of 25% of the monthly collected revenue. As this agreement has all the traits of a valid contract, I have no hesitation in holding that there was a valid agreement between the parties.

Regarding the second issue, as per clause 2.4 of Exhibit P1, the defendant undertook to collect revenue to a tune of not less than Tshs 627,198,000/= per month and upon collection, deposit the daily collected revenue in a bank account number No. 0150211141600 operated in the name of Dar es Salaam City Council Own Resources at CRDB Bank (clause 2.1). Thereafter, he would furnish the plaintiff with a bank pay slip for the amount so deposited. On consideration, the defendant was to receive a commission of 25% of the monthly collected revenue. As there were no other agreement to the contrary or evidence on variation of these terms which were well acknowledged by PW1, PW2 and PW3, there can be no doubt that the defendant was duty bound to collect and remit the agreed sum.

The ascending question is whether the defendant discharged this duty. It is a cardinal law of evidence that, in civil cases, the burden of proof lies on the

party who alleges anything in his favour. The principle is embodied under section 110(1) and 111 of the Evidence Act which provides that:

110.-(1) Whoever 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 exist.

(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.

111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side.

As the plaintiff in this case alleged that the defendant breached the agreement, it was upon her to prove that, indeed the defendant was in breach of contract. As held in **Paulina Samson Ndawavya vs Theresia Thomasi Madaha**, Civil Appeal 45 of 2017, CAT

It is again trite that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his and that the burden of proof is not diluted on account of the weakness of the opposite.

From the evidence it is uncontroverted that execution of the agreement commenced on the date agreed upon by the parties. Through the testimony

of PW1, PW2, PW3 it is ably established that the execution of the contract commenced in October 2016 after the parking lots at Temeke were handed over to the defendant and it continued to November 2016. Thus, in terms of the agreement above stated, the defendant had to remit a sum of Tshs 1,254,000,000/= being revenue collection for two months, a sum which, as per the testimony of PW2 and DW1, was not remitted. From these two witnesses it has been establish that the revenue remitted to the plaintiff in these two months were far below the contractual sum. According to PW2, the total amount remitted by the defendant in this period was Tshs 9,300,000/= only a figure which was confirmed by DW1 and through Exhibit D1. As the terms of the agreement was never varied, I find it crystal clear that the defendant breached the terms of the agreement.

Lastly on the damages, the plaintiff's demands are for a sum of Tshs 1, 245,054,000.00 being an outstanding sum of the total contractual revenue of Tshs 1,254,000,000/ less the remitted sum. In view of my finding in the second issue and in further analysis of the evidence of PW2, DW1 and Exhibit D1, I am fortified that the plaintiff deserves to recover the unremitted sum claimed.

Accordingly, judgment is entered against the defendant for breach of the Agency agreement between her and the defendant and she is subsequently ordered to pay:

1. the unremitted sum of Tshs 1, 245,054,000/=;
2. Interest on the decretal sum at a rate of 12% from the date of judgment to final settlement
3. Costs of this suit.

DATED at DAR ES SALAAM this 26<sup>th</sup> day of July 2022.

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Signed by: J.L.MASABO

**J.L. MASABO**

**JUDGE**

