

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB REGISTRY)
AT DAR ES SALAAM
CIVIL CASE NO. 45 OF 2018**

ARUSHA CITY COUNCIL.....1st PLAINTIFF

M/S NEW METRO MERCHANDISE LIMITED.....2ND PLAINTIFF

VERSUS

M/S MIC (T) LIMITEDDEFENDANT

JUDGMENT

Last Order: 27/6/2022
Judgment: 5/8/2022

MASABO, J.:-

The plaintiffs maintain an agency relationship by which the first plaintiff was entrusted to collect revenues for and on behalf of the 1st plaintiff. Their joint claims against the defendants are for boards/signboards advertisement fees/levies in Arusha City for the financial year 2009/2010. They alleged that the defendant has defaulted payment of Tsh 731,072,575/= comprising of fees/levy for 45,000 pieces of posters (Tshs 617,885,075) and signboards (Tshs 11, 217, 500). They have asserted that, acting on the capacity of an agent for the 1st plaintiff, the 2nd plaintiff surveyed all the posters and signboards owned by the defendant. Having established the number, size and respective levies of such posters and signboards, she issued an invoice

to the defendant on 2nd November 2009 but the same was not heeded to by the defendant. The claims have remained outstanding as the defendant has made no attempt to settle even after being served with demand notices requiring him to make good of the dues, Hence, the present suit in which the plaintiff is seeking the court's indulgence to compel the defendant to pay the outstanding fees/levies.

The defendant sternly disputed the claim. She averred that the number of posters/sign boards and the chargeable fees are overly inflated. The total number of posters sent to Arusha Region per year is 5,000/=. Thus, it is not possible to have 45,287 posters for Arusha city only. She further averred that she paid directly to the first plaintiff a sum of Tshs 50,000,000/ being levies for the financial years 2009/2010 and 2010/2011. Thus, the plaintiffs have no any claim against her.

In substantiating these claims, the plaintiffs who were represented by Mr. Godwin Muganyizi, learned counsel paraded three (3) witness to support their claim. The first witness, Recho Crispin Mroso (PW1) was working for the 2nd plaintiff as secretary and was responsible for typing and printing the

statistical data of the posters which were admitted as Exhibit P1. PW2, David Abdallah was also an employee of the 2nd defendant working in the capacity of manager. Together with PW3 and one Jacob, PW2 did the leg work. He went through the streets, identified the posters, wall paints etc and their respective measurements. Thereafter and guided by the first plaintiffs by laws (Exhibit P2), he computed the payable fees/levy and established that the total amount due from the defendant for the year 2009/2010 was Tshs 731,072,575/=. He prepared an invoice and sent it to the defendant.

PW2 stated further that, upon receipt of the invoice, the defendant disputed the claims and averred that the figures were exaggerated. In the alternative, she offered to pay sum of Tshs 45,000,000/=. The plaintiffs found the offer unattractive and rejected it. Subsequently, it was agreed between the parties that a verification exercise be conducted. The verification started as scheduled but could not proceed to completion owing to lack of cooperation from the defendant's representative. Thereafter, the defendant paid a sum of Tshs 50,000,000/= to the 1st plaintiff. On cross examination, he revealed that, there were negotiations between the parties whereby a reduction of

the levy to a tune of Tshs 365,000,000/= was agreed but still the defendant defaulted.

Fabiola Casmir Kisarika, an employee of the first plaintiff was PW3. Her relevant testimony was on the existence of an agency relationship between her employer and the 2nd plaintiff. She stated that, being the 1st plaintiff's agent, the 2nd plaintiff undertook to collect levies and to remit to the principal a monthly levy of Tshs 43,000,000/=. Also, relevant was her testimony that during the subsistence of the agency agreement, the 1st plaintiff was not receiving any payment from clients as all payments were made to the 2nd plaintiff.

Led by Mr. John James, learned counsel, the defendant has only one witness, Gaudence Anicet Mushi, a Trade Marketing Manager for the defendant. He told the court that the claim is exorbitant as the highest payment ever made by her office for boards and signs in Arusha Municipality is Tshs 50,000,000/=. He testified further that in the year 2009/2010, his office paid a levy of Tshs 50,000,000/= and they were thereafter issued an invoice for 2010/2011. Throughout his testimony he was insistent that the figure

claimed is exorbitant and disproportionate to the number and size of the boards and wall signs on site and it is far above the levies paid in Arusha in the preceding years and the levies paid in bigger cities such Dar es Salaam. In cross examination, it turned out this witness was based Dar es Salaam and not in Arusha. He has never been to the site and for that reason, he totally had no idea of the number and the size of boards and the wall signs from which the present suit emanates.

Two issues have to be answered. *First*, whether the defendant owned the advertisements pleaded by the plaintiff and *second*, to what reliefs are the parties entitled to.

Embarking on the first issues, the plaintiffs' allegations are that upon surveying the site they found out that there were 45,287 pieces of posters and signboards measuring 10,085 square meter. My task is, therefore, to critically evaluate the evidence rendered by the plaintiffs to establish whether these 45,287 pieces of posters and signboards measuring 10,085 square meters were existent. Three pieces of evidence comprised of oral testimonies of PW1 and PW2 and Exhibit P1 are specifically relevant in

answering this question. Of these three, the testimony of PW1, attract no substantive weight as she totally had no clue on whether the alleged posters and signboards were existent. Her role was limited to word processing/typing of the statistical data contained in Exhibit P1 as presented to her by PW2. This leaves us with the testimony of PW2 and exhibit P1 to which I now turn.

It is my considered view, much as PW2 was a material witness, his account entertains a serious doubt on the pleaded measurements of signboard which was one of the two areas for contestation, the first being the actual number of posters and signboard. Whereas the number of posters and signboards can be established by a mere look the actual measurement would obviously require some equipment and calculations. Under the circumstances, it was crucial for the plaintiff to render a credible explanation as to how the pleaded measurement were computed. The absence of such explanation, presupposes that the measurement pleaded were just plunked from the air hence devoid of any value.

Turning to the Exhibit P1, I have entertained a serious doubt on its authenticity and relationship with the case at hand, as it is conspicuously

contradictory and does not adequately speak to the pleadings in the
plaint. Out of its 58 pages it is only the last page that appears to tally with
the pleadings in the plaint. Whereas the plaint alleges that there were
45,287 pieces of posters, exhibit P1 shows that the items found during
the survey were: signboards (543), wall paints (37), wall signs (150) and
"bango" (103). The absence of posters from this list presupposes that the
word poster appearing in the last/summation page and its respective
figure which is also pleaded in the plaint was plucked from the air as it
has no relationship with the rest of the document.

Assuming that *bango* is a Swahili term for 'poster' as it is translated so in
Tuki, Kamusi ya Kiswahili-Kiingereza Swahili-English Dictionary, will the
doubt be resolved? Unfortunately, the doubt will still persist as the
number of posters pleaded is far higher than the total number of bango
which as shown above is 103 which is far below the 45,287 posters
pleaded by the plaintiff in the plaint and reflected in the summation page
of exhibit P1. This is an obviously inconsistent.

A relatively similar inconsistent is observed on the measurements. Just as
the number of posters in the summation page and the plaint which had

no relationship with the substantive content of Exhibit P1, the measurement pleaded seems to have been drawn from "wall paints, signboards, roof/ABC etc" which, save for the signboard, they were not pleaded. Moreover, the last two items from which the measurement appears to have been drawn from, that is, "roof/ABC etc" have no any relationship with the rest of the content of Exhibit P1. The inconsistencies above exposed are material and demand that they be resolved in favour of the defendant's averment that the number of the items are hypothetical as they been overly inflated. Accordingly, I find no hesitation in appending a negative answer to the first issue.

Regarding the second issue, the plaintiff's substantive prayer was for Tshs 731,072,575/=. Having negatively resolved the 1st issue, this issue will not detain me as it was entirely depended upon the first issue.

In winding up, it is trite and I need not cite any authority that the burden of proof lies on the person who positively asserts existence of certain facts. Section 110 (1) and (2) of the **Evidence Act [Cap 6 R.E. 2019]** provides:

"(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."

Expounding this principle in further in **Paulina Samson Ndawavya v Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017, the Court of Appeal, stated that:

It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R.E 2002].

It is to be recalled that this being a civil case, the standard of proof required to establish the plaintiff's case is balance of probabilities which simply means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. As stated in **Miller –vs- Minister of Pensions** [1947] 2 All ER 372:-

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal

can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not. This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

Exemplifying this principle further, the High Court of Kenya, in **William Kabogo Gitau v George Thuo & 2 Others** [2010] 1 KLE 526 stated that:

“In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

It is similarly trite that, this duty does not shift unless it has been discharged as emphatically stated by the Court of Appeal in **Paulina Samson**

Ndawavya vs Theresia Thomasi Madaha (supra):

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.

Thus guided, as defenced case was pretty weak, I find no hesitation in holding that the case fails as the plaintiffs have miserably failed to discharge their duty. In the foregoing, the suit is dismissed for want of proof. Costs to follow event.

DATED at **DAR ES SALAAM** this 5th day of August 2022

X



Signed by: J.L.MASABO

J. L. MASABO

JUDGE



