

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY**

AT MOSHI

CIVIL CASE NO. 7 OF 2022

MEMA FOUNDATION TANZANIA.....PLAINTIFF

VERSUS

CHARLOTTE STRANDFELT..... 1ST DEFENDANT

DR. FOCUS MARO 2ND DEFENDANT

GOOD SAMARITAN FOUNDATION OF

TANZANIA..... 3RD DEFENDANT

THE EXECUTIVE DIRECTOR OF KILIMANJARO

CHRISTIAN MEDICAL CENTER4TH DEFENDANT

JUDGMENT

27/06/2023 & 14/07/2023

SIMFUKWE, J.

The Plaintiff MEMA FOUNDATION TANZANIA herein after referred to as the Plaintiff, has instituted this suit against the defendants herein claiming for the following reliefs:

- 1. The defendants to be ordered to return the Eye Test Equipment and Spectacles worth ninety-two thousand six hundred seventy USD (92,670.00 USD) to the Plaintiff.*

- 2. Payment of General damages as this court deems fit to grant.*
- 3. Costs of this suit to be provided for by the Defendants.*
- 4. Any other relief(s) that this Honourable Court may deem just and equitable to grant.*

Contesting the claims of the plaintiff, the defendants filed their respective Written Statements of Defence. In her Written Statement of Defence among other things, the 1st defendant stated that the alleged equipment could not be returned to the plaintiff since Bedre Syn Africa Denmark had a written agreement with the plaintiff on working together on eye test and handing out glasses to people in need in Tanzania and that the equipment that were for distribution were eye glasses only. Other equipment belonged to the school of optometry in Copenhagen and they were brought to facilitate free eye clinic program in 2021. That, it was the said Bedre Syn Africa Denmark that imported the said equipment in Tanzania. The same were returned to Denmark when the specialists returned in December 2021.

The 2nd, 3rd and 4th defendants also disputed the plaintiff's claim. They argued that the plaintiff has never given the 2nd, 3rd and 4th defendants any eye equipment and spectacles worth USD 92,670.00/=.

At the trial, the plaintiff was represented by Mr. John Chuwa, learned counsel, the 1st defendant was represented by Mr. Baraka Lusewa and Dr. Miriam Matinda learned counsels; while the 2nd, 3rd and 4th defendants had the service of Ms. Rachel Mboya, learned counsel. Prior to commencement of the trial, the following issues were framed and agreed on:

- 1. Whether there was an agreement between the Plaintiff and the 1st defendant to deliver Eye Equipment and spectacles worth USD 92,670/=*
- 2. If the 1st issue is in the affirmative, whether the agreement has been breached?*
- 3. Whether this honourable court has jurisdiction to entertain this matter?*
- 4. Whether the plaintiff has a cause of action against the defendants*
- 5. Whether the delivered Eye equipment were delivered for help or for business in Tanzania.*
- 6. To what reliefs are the parties entitled?*

The plaintiff in proving her claim relied on the testimony of **PW1 Dr. Alfred Lameck Kaaya** and a total of three (3) exhibits. The defendants had two witnesses namely: **DW1 Ms Charlotte Strandfelt** and **DW2 Focus Prosper Maro** and four exhibits.

PW1 Dr. Alfred Lameck Kaaya, the principal Officer of the plaintiff in his Written witness statement testified that the plaintiff is a Non-Governmental Organisation (NGO) registered in Tanzania with her office situated at Arusha. That, sometimes in August 2021 the plaintiff and the 1st defendant entered in an oral agreement to import in Tanzania a luggage of eye equipment and 5000 pieces of spectacles worth USD 92,670.00. That, after such agreement, the plaintiff secured Tax exemption from Tanzania Revenue Authority after Arumeru District Commissioner had introduced the plaintiff to the Commissioner for Customs. The introductory letter was admitted as exhibit P1. However, on arrival of the said equipment, the first defendant remained with the same

at Pazuri Hotel in Arusha, while the plaintiff had an expectation of receiving the luggage on the next date.

PW1, reported the matter at Arusha Central Police station. The plaintiff was informed that the said luggage was illegally handled to KCMC by the 1st defendant with the assistance of the 2nd defendant who was an employee of KCMC at School of Optometry. PW1 through his advocate issued a demand note to KCMC to return the said luggage to him. The Executive Director of KCMC replied that according to exemption letter written to the Commissioner of Customs, KCMC was the custodian of the said luggage. That, since KCMC refused to handle the said equipment to the plaintiff, the plaintiff decided to file the instant suit praying for the above reliefs.

PW1 tendered the demand Note cum Notice of intention to sue addressed to the Executive Director of Kilimanjaro Christian Medical Centre (KCMC) which was admitted as **exhibit P2**. He also tendered reply to the said demand note which was admitted as **exhibit P3**.

During cross examination, PW1 admitted that the said letter had not specified the offered equipment. He elaborated that his agreement was with Charlotte. He said that he had no evidence to prove that the said cargo was taken to KCMC.

That marked the end of the plaintiff's case.

The Defendants called two witnesses. **DW1 Ms. Charlotte Strandfelt** testified that she was among the founders and members of Better Vision for Africa. She explained that she met the plaintiff for the first time in 2021 when she came in Tanzania as a representative of Better Vision for Africa looking for NGO to work with for helping people with vision

problems. That, she was advised to work with the NGO of Mr. Alfred Kaaya which is called MEMA Foundation. That, they discussed how to work and they had a team of 12 volunteers. The organisation was to facilitate the program which was to take place in November 2021. Thus, DW1 came to Tanzania in October 2021. Apart from MEMA Foundation, they had a doctor from Eye Hospital and they had planned to help children who had vision problems. The doctor from MEMA had to check the quality of spectacles.

Thereafter, they had a meeting in which they were introduced to members of MEMA Foundation. On November, 2021 they had conversation with Alfred Kaaya on how to work. On 22/11/2021 she sent an email to him concerning what they could offer and what they expected from Mema Foundation. The said email was admitted as **exhibit D1**. DW1 narrated further that on 22/11/2021 she sent an email in order to check out if they had an agreement with MEMA Foundation. Copy of the said email was admitted as **exhibit D2**.

DW1 explained further that they arrived at Kilimanjaro International Airport on 26th November 2021. Unfortunately, Mema Foundation had not done most of the things at the custom. Therefore, they had to reschedule the program. They planned to visit the Government Optometry School in Moshi so that they could work with them. Thus, they met the Eye Doctor Michael Lawrence from Mount Meru Hospital.

DW1 explained that their Organisation is 100% non-profit. They raise fund from other organisations including DANIDA. That, in case things are going on well, the project is sustainable.

DW1 stated that she met the plaintiff on Monday at TRA in Arusha. The Officer from TRA - Arusha asked whether she wanted to work with the NGO or the Government. She had to make sure that there was reliable relationship. The project was to identify pupils with eyes problems and give them spectacles for free. The project failed and MEMA foundation was the cause of the failure.

DW1 went on to state that she is very stressed and she was surprised to be summoned at this court while everything was done in Arusha. That, she was surprised that an organisation from Tanzania can take a person from Denmark to court. She said that she had travelled to Tanzania because there was huge need for people to get chance to see and they had more than 8 places where they had to reach. DW1 averred that she received a video from Alfred Kaaya through WhatsApp saying thank you to Better Vision for Africa. The said video was played in court and the CD of the said video was admitted in court as **exhibit D3**.

DW1 clarified that the equipment was with the owners the Danish School of Optometry. That, they took back the equipment with them as they volunteer in different countries. That, she was advised that she should apply for new tax exemption and keep the spectacles at the safe place. That, she communicated with Prof. Massenga of KCMC who agreed to keep the spectacles for them. Thus, they got tax exemption through KCMC. DW1 tendered a letter addressed to Commissioner of TRA asking for tax exemption which was admitted for identification purposes as ID1.

DW1 elaborated that she did not know where the allegations of disappearing with eye glasses came from as the same were donated by them freely. DW1 tendered an email dated 8th August 2022 which was

sent by MEMA Foundation to the Minister of Health in Demark. It was admitted as **Exhibit D4**. DW1 argued that the said email was sent after filing this case and it was circulated to different organisations which were donors of their project. Thus, the Danish government is making follow up of this issue.

In conclusion, DW1 prayed the court to dismiss this case with costs which include travel costs, Visa and accommodation. Also, she prayed the court to stop the plaintiff from sending emails to different organisations in Denmark as it destroys her reputation.

During cross examination by the advocate for the 2nd to 4th defendants, DW1 explained that she managed to identify the spectacles in the shop of the plaintiff through their label and the display showed that it was for sale.

While being cross examined by the counsel for the plaintiff, DW1 elaborated that the importer and owner of the spectacles was Better Vision for Africa.

DW2 Focus Prosper Maro; Eye Care Specialist and Lecturer told the court that sometimes he conducts Outreach services for the purpose of helping the poor who cannot afford to come to hospital. He testified that he was aware of spectacles which have been stored at the 4th defendant who helped Better Vision for Africa to be exempted from paying tax at the Airport.

DW2 explained further that there was an agreement between Better Vision for Africa and Optometry School that the spectacles should be stored until next program. Thus, it was not true that he aided the 1st defendant to illegally hide the said spectacles at the fourth defendant. The said spectacles were taken direct from Kilimanjaro International Airport to

KCMC and kept in store and that the same had never been taken to Arusha since then.

DW2 prayed this court to dismiss this case with costs in order to save time of this court. That, including the 3rd and 4th defendants in this case, tarnishes the reputation of the institutions. Also, he prayed the court to restrain the plaintiff from involving other government institutions.

During cross examination by the counsel for the 1st defendant, DW1 said that Kilimanjaro College of Allied Health Sciences School is a government institution and so he wondered why the plaintiff sued him as he should have sued the Attorney General.

While being cross examined by Mr. Baraka counsel for the 1st defendant, DW2 said that they only received eye glasses and not eye test equipment. That marked the end of testimonies of both parties.

Having gone through the testimonies of witnesses of both parties and the exhibits tendered it is now the Court's task to resolve the framed issues.

It is trite law under **Section 110 of the Evidence Act (supra)**, that he who alleges must prove. For ease reference, the provision reads:

"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."

In the case of **Ernest Sebastian Mbele vs Sebastian Mbele & Others (Civil Appeal 66 of 2019) [2021] TZCA 168 [TANZLII]** at page 8, the Court of Appeal stated that:

"The law places a burden of proof upon a person "who desires a court to give judgment" and such a person who

asserts...the existence of facts to prove that those facts exist (Section 110 (1) and (2) of the Evidence Act, Cap.6). Such fact is said to be proved when, in civil matters, its existence is established by a preponderance of probability (see section 3 of the Evidence Act, Cap. 6.”

I will be guided by the above ever-cherished principle of law in answering the raised issues. On the first issue as to whether there was an agreement between the plaintiff and the 1st defendant to deliver the Eye Test equipment and spectacles worth 92,670 USD; it is undisputed fact that the said eye test equipment and spectacles were valued USD 92,670, the issue is whether there was an oral agreement between the plaintiff and the 1st defendant in respect of the said equipment and spectacles.

The law recognised oral contract as long as it meets the standard covered under **section 10 of the Law of Contract Act, Cap 345 R.E** which provides that:

10. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void...”

In the present case, according to PW1 there was oral agreement with Better Vision for Africa to have a clinic at Arusha which was supposed to commence on 28/11/2021. That, on part of Better Vision for Africa they were supposed to issue/donate the eye test equipment and spectacles while the plaintiff was supposed to facilitate the program which included: coordination, making follow up of VISA and work permit of the personnel of Better Vision for Africa and applying for tax exemption.

The 1st defendant, testified that she met the plaintiff in 2021 and they had different discussion on how to work. That, the Plaintiff was to facilitate the program while Better Vision for Africa had to donate the eye test equipment and spectacles.

Up to this point, it goes without saying that the plaintiff and the 1st defendant had an oral agreement to work together in the outreach program and not to deliver the said Eye equipment and spectacles to the plaintiff as claimed.

On the second issue on ***whether the agreement has been breached;*** It is undisputed fact that the said equipment was to be used for Outreach services for the purpose of helping the poor with vision problems. According to exhibit D1, among other things the plaintiff was supposed to apply for tax exemption from the customs, working permit and Visa. This is also what the plaintiff told this court during cross examination by Ms. Miriam.

However, there is no evidence to prove that the said conditions were fulfilled by the plaintiff so as to be given the said equipment and spectacles or to work with the 1st defendant for the purpose of helping the people with vision problems. According to **section 39 of the Law of Contract Act, Cap 345 R.E 2019**, failure to meet the promise suffice the other party to end the contract/agreement. The provisions read:

39. When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

From the above provision of the law, I am of considered opinion that the conduct of the plaintiff in the case at hand, made the agreement impossible since the plaintiff did not fulfil their duty as agreed. Although the plaintiff testified that he applied for exemption of Tax from TRA, there is no evidence to prove such fact. According to the evidence of DW2, it is the 4th defendant who helped Better Vision for Africa to be exempted from paying tax and that is the reason why the said spectacles are kept by the 4th defendant on agreement to be used in the next program. This shows that the plaintiff herein did not fulfil her obligation. I am persuaded by the case of **Nakana Trading Co. Ltd v Coffee Marketing Board [1990-1994] 1 EA 448**; which held that:

"A breach occurs in contract when one or both parties fail to fulfill the obligations imposed by the terms..."

The next question is *Whether this court has jurisdiction* as raised on the 3rd. This court is satisfied that it is vested with both territorial and pecuniary jurisdiction to determine the matter as the incidence occurred at Kilimanjaro International Airport. Moreover, the spectacles, the subject matter of this suit are kept at KCMC within the jurisdiction of this court.

On the 4th issue on whether the plaintiff has a cause of action against the defendants; as far as the 1st defendant is concerned, as discussed on the 1st and 2nd issues, it is the plaintiff who breached the oral agreement between her and Better Vision for Africa. Therefore, the plaintiff has no cause of action against the 1st defendant.

On part of the 2nd 3rd and 4th defendants, in his evidence, PW1 failed to show any contractual obligations with the said defendants. Weighing the above evidence, I am convinced that the plaintiff did not manage to prove

as averred under paragraph 6 of the plaint that the defendants are obliged to return to her, the Eye test Equipment and spectacles worth USD 92,670.00. The agreement between the plaintiff and the 1st Defendant was to work together and not otherwise.

The 5th issue is whether the Eye Equipment were delivered for help or for business in Tanzania. According to the evidence of both parties, it is undisputed fact that the said eye test equipment and spectacles were for the purpose of Outreach services for helping the poor people with vision problems in Tanzania.

Having answered the 1st, 2nd, 3rd, 4th and 5th issues as such, the 6th issue **on the reliefs entitled to the parties**, is automatically resolved in favour of the Defendants. Hence, the plaintiff's case is hereby dismissed with costs for failure to prove it on the required standard. The plaintiff is ordered to stop sending emails to various organisations in Denmark as prayed by the 1st Defendant.

It is so ordered.

Dated and delivered at Moshi this 14th day of July 2023.



X

S. H. SIMFUKWE

JUDGE

Signed by: S. H. SIMFUKWE

14/07/2023