IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TABORA DISTRICT REGISTRY)

AT TABORA

CIVIL APPEAL NO. 04 OF 2023

(Arising from the decision of Nzega District Court in Civil Case No. 08 of 2018 and Misc. Civil Application No. 04 of 2023, High Court of Tanzania at Tabora)

NZEGA TOWN COUNCIL ..... APPELLANT

VERSUS

DICKSON MUTABUZI MAMBO

(HARSHOK TREE MOTEL) ..... RESPONDENT

Date of Last Order: 11.08.2023
Date of Judgment: 24.08.2023

JUDGMENT

KADILU, J.

This appeal originates from the decision of the District Court of Nzega in Civil Case No. 08 of 2018. Before determination of the grounds of appeal, I find it appropriate to narrate the factual background of the case. The appellant sued the respondent before Nzega District Court claiming for Tshs. 2,901,000/= as payment of hotel levy from July 2015 to February, 2018. It also claimed for general damages for the unpaid levy, interest at the court's rate and costs of the suit. The appellant narrated that according to law, from July 2015 to February 2018, the respondent was required to pay to the appellant a hotel levy at the rate of 10% of each guest's payment made to the hotel.

The appellant alleged further that, the respondent neglected and/or failed to pay the said levy without any justification. It was the respondent's account that being a registered Value Added Tax (VAT), he was exempted from payment of hotel levy. He argued that following the amendment to the VAT Act in 2008, he is not duty bound to pay hotel levy as doing so, would amount to double taxation. He cited Section 27 of the Hotels Act as expressly exempting registered VAT from payment of hotel levies. He added that although the Hotels Act was repealed in 2008 and replaced by the Tourism Act, Section 64 of the Tourism Act gives the legal force all the decisions, rights and privileges which were made under the Hotels Act to continue as if they were made under the Tourism Act.

After hearing both parties, the district court decided the case in favour of the respondent. The decision aggrieved the appellant. It filed the present appeal to this court containing two grounds as follows:

1. *That, the learned Magistrate erred in law and facts by holding that the appellant is not entitled to collect hotel levy from the respondent.*
2. *That, the learned Magistrate erred in law and facts for failure to analyse and evaluate the appellant's evidence critically hence, he arrived at an unfair decision.*

When the appeal was called on for hearing, the appellant was represented by Ms. Esther Mlaida and Mr. Gerald Mdemu, the learned State Attorneys while the respondent was represented by Mr. Langa Mvuna, the learned Advocate. Basically, the learned Counsel for both parties repeated their arguments which they presented in the trial court for and against the

claimed payment. I have gone through the record in the case file, the grounds of appeal and submissions by the Advocates. It appears to me that the parties' centre of contention is the interpretation of the law about whether or not the respondent is required to pay the hotel levy. The respondent is not denying that he has not paid the claimed hotel levy from July 2015 to February, 2018. His argument is that, he is exempted from payment of hotel levy because he is a registered VAT. Now, the point for my determination is whether the respondent is exempted to pay hotel levy.

The respondent relies on the VAT Act, Section 27 of the repealed Hotels Act and Section 64 of the Tourism Act for his argument. On the other hand, the appellant relies on the Local Government Finance Act, [Cap. 290 R.E. 2019] in claiming for payment of hotel levy from the respondent. The respondent did not cite any provision of the VAT Act, [Cap. 148 R.E. 2019] which exempts him from payment of the hotel levy. Section 27 of the repealed Hotels Act relied on by the respondent stipulates as hereunder:

> *"No hotel levy shall, on the coming into operation of the Value Added Tax Act, 1997, be charged on any person who or body of persons which has been registered under Part IV of the VAT Act."*

The VAT Act, 1997 was repealed and re-enacted in 2014 as the VAT Act No. 5 which came into force on 1st July, 2015 *via* the G.N. No. 224 of 2015 and revised as [Cap. 148 R.E. 2019]. Under the new legislation, there are various categories of VAT exemption, but hotel levy is none of them. In 2008, the Hotels Act was repealed by the Tourism Act which came into force

on 1st July, 2009 through GN. No. 212 of 2009. Section 64 of the Tourism Act contains transitional provisions relating to the applications for registration and licensing of tourism facilities and activities. It has nothing to do with payment of hotel levies.

Therefore, it is the finding of this court that although the hotel levy was not retained by the Tourism Act, the VAT Act and Tourism Act do not contain any provisions which exempt the respondent from payment of the hotel levy. Thus, the appellant's mandate to collect hotel levy is not derived from the Tourism Act because the same is not provided under that law. It is important to note that, hotel levy is one form of tax whose base is neither the VAT Act nor Tourism Act. The basis of any tax is Article 138 (1) of the Constitution of the United Republic of Tanzania, 1977 which provides that, tax of any kind cannot be imposed unless it is prescribed in the law enacted by the Parliament. The said Article stipulates as follows:

> *"No tax of any kind shall be imposed save in accordance with a law enacted by Parliament or pursuant to a procedure lawfully prescribed and having the force of law by virtue of a law enacted by Parliament."*

The position that tax cannot be levied unless it is prescribed in the statute was reiterated by the Court of Appeal in the case of ***Bidco Oil and Soap Ltd v Commissioner General Tanzania Revenue Authority***, Civil Appeal No. 89 of 2009, in which it was held that where there is no a specific legislation to support the imposition of tax or duty, the said tax is not

sustainable in law. In the present appeal, the appellant's contention is that he has the mandate to collect hotel levy from the respondent. Indeed, Section 7 (1) (t) of the Local Government Finance Act, [Cap. 290, R.E. 2019] empowers the appellant to collect hotel levies from the hotels within its area of jurisdiction. The Section provides that the revenues, funds and resources of a district council shall consist of all monies payable as hotel levy equal to ten per centum of the guest house payable by a guest. Moreover, the appellant's power to collect the hotel levy has been emphasized under Section 25 of the Finance Act, 2015 which is essentially a replica of Section 7 (1) (t) of the Local Government Finance Act. The Finance Act of 2015 came into operation on 1st July, 2015.

Based on all the authorities above, I think holding that the respondent is not duty bound to pay hotel levy was a misdirection on part of the learned trial Magistrate. Argument by the respondent is that, payment of the hotel levy shall amount to double taxation for him since he is at the same time a registered VAT. In a nutshell, double taxation is a tax principle referring to income taxes paid twice on the same source of income. The respondent herein being a registered VAT does not pay VAT by himself rather, he merely taxes it from the guests of his hotel and remit it to the revenue authority. This is to say, the respondent's business is not in anyhow affected by the VAT except in so far as he is required to administer it.

The burden of the VAT falls to the end consumer. In the context of hotel business, it is the guest of the hotel who pays the VAT, not the hotel

owner. In this regard, the VAT is never taxed from the respondent's income hence, the concept of double taxation does not sit well on the respondent's argument.

It is therefore the holding of this court that the respondent is duty bound to pay hotel levy to the appellant. Nevertheless, the appellant is claiming from the respondent payment of Tshs. 2,901,000/= being the outstanding hotel levy from July 2015 to February, 2018. As shown above, hotel levy is supposed to be 10% of the charges paid by each guest to the hotel. The appellant in this case has not shown how it has arrived to the claimed Tshs. 2,901,000/=. There is no any evidence on record indicating the number of guests of the respondent within the claimed period and the money paid by each guest so as to calculate the required 10%. For this reason, the appellant has failed to prove its claim of Tshs. 2,901,000/=.

Concerning the general damages pleaded by the appellant, it is common knowledge that the aim of damages is to put the innocent party in the position in which he would have been if the party in default had performed his obligations. See the case of ***Njombe Community Bank & Another v Jane Mganwa***, DC. Civil Appeal No. 3 of 2015, where it was stated that damages are that sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been if he has not sustained the wrong for which he is now getting compensation or reparation.

It should also be remembered that general damages are awarded where the injury suffered is a direct, natural or probable consequence of the action complained of. From pages 23 to 24 of the typed proceedings, the appellant's Trade Office (PW1) informed the trial court that the respondent's act prevented the appellant from executing its development plans. However, since the claimed hotel levy was not established by the appellant, this court has no base from which to assess the general damages pleaded by the appellant. In view of the foregoing, the Court hereby decides that:

1. The appeal is allowed to the extent shown above.
2. The respondent is duty bound to pay hotel levy.
3. Costs of this appeal shall be borne by the respondent.

KADILU, M.J.
JUDGE
24/08/2023.

Judgment delivered in chamber on the 24th Day of August, 2023 in the presence of Mr. Gerald Mdemu, State Attorney for the appellant.

KADILU, M.J.,
JUDGE
24/08/2023.