

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CIVIL CASE NO. 03 OF 2023

BIHARAMULO DISTRICT COUNCIL1ST PLAINTIFF

THE ATTORNEY GENERAL.....2ND PLAINTIFF

VERSUS

JESPAN COMPANY LTD.....DEFENDANT

EX-PARTE JUDGMENT

23/11/2023 & 08/12/2023

E. L. NGIGWANA, J.

This is an ex- parte judgment. Rule 1 of Order VIII of the Civil Procedure Code, [Cap.33 R.E 2019] provides that;

"Where a summons to file a defence has been served in accordance with Order V and the defendant wishes to defend the suit, he shall within twenty-one days from the date of service of the summons, file to the court a written statement of defence and enter appearance on the date specified in the summons"

Rule 14 (1) of same Order provides;

"Where any party required to file a written statement of defence fails to do so within the specified period or where such period has been

*extended in accordance with sub rule 3 of rule 1, within the period of such extension, **the court shall, upon proof of service and on oral application by the plaintiff to proceed ex parte, fix the date for hearing the plaintiff's evidence on the claim**"*

In the case at hand, the defendant was duly served on 28/07/2023 through its secretary, namely Raphael Samwel, phone No. 06 82 302376, with a summons to file a Written Statement of Defence (W.S.D), but the same was never filed. The summons which was issued by this court was returned; it was duly signed, dated and stamped meaning, service to the defendant was effected. Therefore, guided by the herein above provisions of the law, the matter proceeded ex- parte against the defendant.

Briefly, the plaintiffs herein, by way of plaint instituted the instant suit against the above-named defendant; claiming for USD 1376 being an outstanding service levy, general damages, interest on the decretal sum from the date of judgment to the final satisfaction of the same, costs of the suit and any other relief as this court may deem fit to grant.

When this matter came for ex-parte hearing; the plaintiffs appeared through Mr. Lameck Buntuntu, Mr. Nestory Lutambi and Ms. Zainabu Kassim; learned State Attorneys.

The plaintiffs featured three (3) witnesses. PW1 Bruno Mbaso Ngawagala who is an Agricultural Field Officer of Biharamulo District Council testified that, the defendant being a company dealing among other things with processing and exporting of Tobacco products, entered into contract with Kalenge Agricultural Marketing Cooperative society (AMCOS) for the Crop Season 2020/2021 effectively from 1st August 2020 to September 2021 whereas the defendant was a buyer of tobacco while Kalenge Amcos was a seller.

He further testified that, since Kalenge Amcos is found and operating within Biharamulo District, the defendant had an obligation to pay service levy at the rate of 3% of the purchased tobacco. It is PW1's further evidence that for the season of 2020/2021, the defendant purchased 59,123 Kilograms of tobacco valued at USD 74421 whereas 3% of USD 74421 is USD 2233, meaning that; for the season of 2020/2021, the defendant had an obligation

to pay service levy at the tune of USD 2233. According to PW1, the defendant paid part of it only, hence this case.

PW2 Frank Mathew Minja who is the Treasurer of the 1st plaintiff testified confirming that in the crop season of 2020/2021, the defendant purchased from Kalenge Amcos 59123 Kilograms of tobacco valued at USD 74421. He also testified confirming that the rate service levy payable was 3% of the total purchase, thus the defendant had an obligation to pay USD 2232 equivalent to **Tshs.5,700,00/=** to the first plaintiff but until May 2023, it paid **Tshs.2,500,000/=** only.

According to PW2, the outstanding service levy is **Tshs. 2,700,000/=** He tendered a Revenue collection print out dated 15/11/2023 and was admitted as **exhibit M1** to prove that the defendant had paid **Tshs. 2,500,000/=** only.

He added that, they made several follow-ups to get the outstanding service levy but, the defendant had been adamant that is why this case has been instituted. PW2 ended his evidence praying this court to order the defendant to pay to the 1st plaintiff the outstanding service levy, interest and costs of the suit.

PW3 Conrad Simon who is a secretary of Kalenge Amcos testified confirming that Kalenge Amcos entered into a contract with the defendant for the crop season of 2020/2021. The contract agreement was tendered and admitted as **exhibit M2**. PW3 went on testifying that initially, Kalenge Amcos agreed to sell to the defendant 50,000 Kilograms of tobacco as per M2, but since they produced tobacco in excess, the defendant agreed and purchase 59123 Kilograms of tobacco. PW3, tendered reconciliation form and was admitted as **exhibit M3** to prove that the defendant purchased 59123 Kilograms of tobacco. That marks the plaintiffs' case.

Having read the pleadings and heard the evidence of all three witnesses and having gone through the exhibits tendered in evidence, the major issue before me is to determine whether the plaintiffs have managed to prove their claim to the required standard.

It is trite law under section 110 (1), (2) and 111 of the Evidence Act, [cap 6 R.E 2022] that he who alleges must prove that a certain fact exist in which matter, the onus of proof lies on the plaintiffs.

This stance was emphasizes by the court of Appeal in the case of **Joao Oliveira & Another versus IT started in Africa Limited, & another,**

Civil Appeal No.186 of 2020 CAT at Arusha, where the Court had this to say in relation to evidential burden in civil proceedings;

"Ordinarily; in civil proceedings a party who alleges anything in his favor also bears the evidential burden and the standard of proof is on the balance of probabilities which means that, the court will sustain and uphold and sustain such evidence which is more credible compared to the other on a particular fact to be proved"

The Court of Appeal in the case of **Abdul Karim Haji versus Raymond Ndimbi Alois and Another**, Civil Appeal No. 99 of 2004 (CAT) (Unreported) had this to say;

"It is elementary that he who alleges is the one responsible to prove his allegations"

I will therefore, be guided by the herein above principles of the law in determining this matter. Having carefully gone through the evidence of PW1, PW2, PW3, the contract **(Exhibit M2)**, Revenue collection print out **(Exhibit M1)** and reconciliation form **(Exhibit M3)**, there is no doubt that there was a valid contract between Kalenge Amcos and the defendant for the crop season of 2020/2021.

The evidence is also strong to the effect that Kalenge Amcos is found and operating within Biharamulo District. The evidence adduced by PW1, PW2 and PW3 is sufficient to the effect that the defendant had an obligation to pay service levy to the 1st plaintiff at 3% of the total purchase.

Again the evidence of PW1, PW2 and PW3 is very strong to the effect that though Exhibit M2 shows that the defendant had to purchase 50,000 Kilograms of tobacco, it later purchased 59123 Kilograms of tobacco. **Exhibit M3** also speaks louder on that fact.

It is the evidence of PW1 that the defendant paid part of the service levy while according to PW2, the amount paid was **Tshs.2, 500,000/=** only thus; the outstanding service levy is now **Tshs. 2,700,000/=**. Exhibit M1 is very clear that up to 15/11/2023, the defendant had paid a sum of **Tshs. 2,500,000/=** only to 1st plaintiff as service levy.

I therefore find that the plaintiffs have discharged their burden of proof to the required standard under Civil cases that, the defendant had not paid the outstanding service levy worth **Tshs.2,700,000/=** and therefore the 1st plaintiff is entitled to the said amount.

That said, I enter judgment in favour of the plaintiffs on the following orders

- i. The defendant has to pay the 1st plaintiff an outstanding service levy worth **Tshs. 2,700,000/=**.*
- ii. The defendant has to pay interest on the decretal sum from the date of judgment till payment in full.*
- iii. The defendant shall bear costs of this suit.*

It is so ordered.

Dated at Bukoba 8th day of December 2023.



E.L. NGIGWANA

JUDGE

08/12/2023

Court: Judgment delivered this 8th day of December 2023 in the presence of Mr. Nestory Lutambi, learned State Attorney from the office of the Solicitor General- Bukoba and MS. Queen Koba, B/C. but in the absence of the defendant.



E.L. NGIGWANA

JUDGE

08/12/2023

Court: Right of appeal explained.




E.L. NGIGWANA

JUDGE

08/12/2023