

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 58 OF 2006

FUTURE CENTURY LIMITED.....PLAINTIFF
VERSUS
TANZANIA ELECTRICAL
SUPPLY CO.LTD..... DEFENDANT

J U D G M E N T

Date of final submission March 21, 2007
Date of Judgment June 18, 2007.

MJASIRI J

The Plaintiff in this case Future Century Limited, is a company registered under the Companies Ordinance Cap.212 and carrying on diverse business including electrical engineering. The Defendant is a public corporation engaged in supplying and distributing electricity to its customers in Tanzania.

The Plaintiff's claim against the Defendant is for the following orders:

- a) *A declaration that the Defendant's refusal to install two bulky meters on No 25 Blocks comprising of 8 Apartments is unreasonable and unjustifiable.*
- b) *An order compelling the Defendant to install the two bulky meters.*
- c) *Specific damages in the sum of Shs 59,000,000.*
- d) *Punitive and general damages to be assessed by the Court but preferably from Six Hundred Million Shillings.*

The Defendant denied the Plaintiff's claim and filed a counter claim against the Plaintiff for breach of contract and asking for special damages of Tshs 15,324,475 and general damages.

The following issues were framed by the parties with the approval of the court.

1. *Whether the Defendant occasioned/caused the delay in respect of the power supply for the 25 Blocks of 8 Apartments each at Kijitonyama.*

- 2. If the answer to Issue No.1 is in the affirmative whether there was any justification for the said delay.*
- 3. Whether the materials used for the construction of the High Tension Line (HT) and Low Tension Line (LT) were lawfully acquired by the Plaintiff.*
- 4. Whether the Plaintiff's image was tarnished in view of the Defendant's letter dated August 28th 2006.*
- 5. What reliefs are the parties entitled to.*

The Plaintiff was represented by Mr. Mdamu Advocate and the Defendant was represented by Mr. Johnson Advocate. The Plaintiff called one witness one Albert Albino who is the Managing Director of the Plaintiff Company. PW1 testified to this effect. His company deals with the supply and installation of power lines to clients. He constructs power lines on behalf of his client in order for them to be connected with the TANZANIA ELECTRICITY SUPPLY COMPANY (TANESCO) System. According to PW1 sometime in July

2005 his company was subcontracted by the NATIONAL SERVICE CONSTRUCTION DEPARTMENT "NSCD" together with Dunstan Electrical Engineering Services Limited and Namis Corporate for the project of power supply on the 25 Blocks at Kijitonyama Housing Estate which was meant for the employees from the President's office. A contract was executed by the parties on August 4, 2005 (Exhibit P1). PW1's duty under the contract was to supply power to the main contractor, that is NSCD. The value of the contract was TShs 119,789,230. The works under the contract was supposed to be completed after 4 weeks. According to PW1 he was then introduced to TANESCO as the job could not be done without TANESCO. He therefore wrote to TANESCO asking for the requirements for the Project, on August 10, 2005 TANESCO replied to him on August 30, 2005.

The conditions imposed by TANESCO were that he should construct the power line and must pay TANESCO before doing so. He therefore paid TShs 960,000 as supervision fees for High Tension (HT) Lines and TShs 600,000 inclusive of VAT being commission fees for HT

Line and Transformer substation. (Exhibit P2 and P3)
Receipts were issued by TANESCO for the payments.

PW1 further testified that the other condition to be fulfilled under the contract was to let TANESCO inspect all the materials that would be used for the construction work. TANESCO inspected the materials and supervised the works from the state of the pole holes to the time the line was being energized; that is up to the time the line is charged. The line is then joined to TANESCO's existing system. TANESCO does this to ensure that the power line is well built as it would become the property of TANESCO. Payment was made in November 2005 because the reply from TANESCO reached PW1 in November 2005.

After payment was made PW1 further stated that TANESCO came to the site, inspected all the materials and allowed the construction to proceed. TANESCO employees were present at the site on a daily basis inspecting and supervising the works. The construction of the power line was completed on December 18, 2005. TANESCO charged the line and what remained was for

the metres to be installed. A letter dated December 19, 2005 was sent to TANESCO asking TANESCO for the installation of Bulk Metres (Exhibit P4). TANESCO was supposed to give a quotation and to install the said metres. The Bulk Metres were required to enable NSCD to use power for construction purposes and for use by residents once the apartments were ready for occupation. The first reminder was sent to TANESCO on July 11, 2006 and the second on August 27, 2006 (Exhibit P5). PW1 further stated that during site meetings he was given a deadline by his client that power must be available at the site by September 31, 2006 otherwise his contract would be terminated.

According to PW1 TANESCO sent a reply on August 28, 2006, and PW1 was asked to explain to TANESCO where he obtained the construction materials. The letter was copied to the client as well. The client was concerned and wanted to know what was going on. He further stated that in view of this he decided to come to court. He would not be paid the remaining balance by NSCD as he had not fully completed the contract. As a result his contract was

terminated by the client National Service Construction Department (Exhibit P7).

PW1 further stated that the metres were installed following a court order.

According to PW1 before the construction took place TANESCO had already asked him where he obtained the materials. PW1 showed them receipts indicating where he purchased the materials. He has been buying materials from Automech and some of the materials he purchased from TANESCO. PW1 further stated he had obtained work from other companies as well such as CELTEL and TTCL.

PW1 testified that the materials used for construction of the line alleged to have been stolen from TANESCO were worth TShs 15,000,000, but the materials used by him for construction was worth TShs 96,700,000.

PW1 further testified that in view of the termination of the contract by the National Service Construction Department, their image was tarnished completely. They

lost NSCD immediately after being accused of theft. They lost NSCD as a client. They also failed to pay some of their suppliers, as some suppliers are paid after the work is completed. They also lost three technical experts. PW1 also testified that their annual turnover declined from TShs 1.4 billion to TShs 365,000,000.

PW1 further testified that the Dodoma Project and Kijitonyama Projects were more or less the same. Therefore the remaining material bought from TANESCO in Dodoma was used by them for the Kijitonyama Project.

On cross examination by Mr. Johnson Advocate for the Defendant he stated that though he is not an electrical engineer, the construction of the power lines related to his academic qualifications. The work done by his company was supervised by a TANESCO Engineer one Mr. Mmari. The person supervising him issued a certificate as to quality of goods, quality of the construction and source of materials.

PW1 denied that he testified in court that TANESCO delayed in issuing him quotations.

PW1 also testified that the power was there and the issue in question was the installation of bulk meters, PW1 further testified that after installation of bulk meters the client was to pay for the tariff.

PW1 further testified that the installation of the metre was not automatic, a contract was required between the client (NSCD) and TANESCO. PW1 stated that he was supposed to handover the Project by August 31, 2006. TANESCO refused to avail him the procedure for meter installation unless he explained how he acquired the material used for the power line installation.

With regards to informing TANESCO how he got the materials PW1 stated that according to conditions given to him by TANESCO, TANESCO was supposed to conduct inspection before the construction work, which they did.

PW1 stated that he did not reply to the letter by TANESCO asking where he obtained the property TANESCO suspected to be theirs.

PW1 further stated that he has proof that after the dispute with TANESCO, if he tendered for a job, he did not get it.

PW1 stated that the materials bought from TANESCO took place after a request placed by him. There were no special conditions for such a sale.

The Defendant called one witness. DW1 Nsajigwa James Mwaisaka testified as under. He is the Distribution and Safety Manager of the Defendant, since 2006 and before that he was the Regional Manager Temeke. According to DW1 his duties are to prepare specifications for materials for the company and to ensure there are enough material for the company work.

DW1 testified that PW1's company was prequalified by TANESCO to undertake distribution work. Though the Plaintiff Company performed well but there was a problem as some of TANESCO materials were found at the Plaintiff's site.

DW1 further stated that for this job the Plaintiff Company was subcontracted by NSCD. TANESCO was to supervise the work for a fee. TANESCO supervision was required to ensure that the work was done according to standards required by law and in compliance with TANESCO rules and regulations. The origin of the material had to be known and acceptable, in order to ensure that the materials are not fake. Though the standard of the materials was acceptable the materials was illegally obtained from TANESCO.

The first supervisor from TANESCO did not do a good job and was interdicted. The said supervisor failed to disclose that the material used by the Plaintiff belonged TANESCO. The name of the supervisor is engineer Eva Fumbuka.

DW1 in his testimony made reference to Exhibit P6 a letter from TANESCO dated August 28, 2006 requiring clarification on how the materials used for construction of HT lines, the property of TANESCO was obtained by the Plaintiff. According to DW1 the Plaintiff did not reply to the said letter but came to court instead.

DW1 further stated that the metres were installed following a court order dated September 7, 2007.

DW1 further testified that the receipts admitted as Exhibit P8 are not all related to the issue. The Dodoma site was visited and from the work done at the site there could not have been a lot of materials left for the Kijitonyama works. DW1 further stated that they do not store any materials at Automech.

DW1 also stated that a transformer ordered from India by TANESCO was found at the Plaintiff's site. The manufacturer in India VJ was contacted. According to the said manufacturer no transformer was sold to the Plaintiff. (Exhibit D2) e-mail from VJ to TANESCO.

DW1 further stated that on making enquiries to ABB another manufacturer of transformers, ABB also indicated that no transformer was sold to the Plaintiff (Exhibit D3).

On the counter claim filed by TANESCO DW1 stated that TANESCO is claiming to be paid back for the materials that belonged to TANESCO. The total value of the material is TShs 15,324,475. These were materials found at the site belonging to TANESCO. Exhibit D4 (List of materials drawn by TANESCO). Some of the materials found at the site belonged to the Plaintiff. DW1 also stated that for instance out of many wooden poles they found at the site 4 belonged to TANESCO. A report was made after TANESCO inspected the 25 blocks (Exhibit D5).

DW1 also stated that the matter is still under investigation. However for the Kijitonyama project they were sure that the materials used were theirs and he asked the court to order Future Century to pay for the materials and to dismiss the Plaintiff's claim.

On cross examination by Mr. Mdamu learned Advocate for the Plaintiff DW1 stated that Fumbuka and Mmari TANESCO supervisors messed up. However this was contributed by the Plaintiff an outsider and TANESCO has to make a claim against the Plaintiff.

DW1 also stated that TANESCO did not carry out its duties properly under Engineer Fumbuka, but properly carried out its duties under another manager. According to DW1 the line was not energised by December 2005. Until the metre is energized, by TANESCO the work would not be considered completed.

According to DW1 the works was not completed by December, 2005. Even after the court order for installation of the meters was made the installation could not be done at once as there was a problem.

DW1 also testified that TANESCO never authorized Dison Cable to sell materials to the Plaintiff, materials meant for TANESCO. The purported letter never reached Dison Cable. DW1 stated that the Project was not complete before the installation of the metres.

DW1 further testified that TANESCO will have a problem if Dison Limited sold materials with TANESCO marks to the Plaintiff. Even if TANESCO allowed the

Plaintiff to make purchases from such places authorisation from TANESCO must be shown.

DW1 testified that the Plaintiff did not tell them of the problem it was having with NSCD. DW1 further stated that TANESCO does not sell materials to parties contracted. Parties contracted supplied the labour and TANESCO supplied the materials.

On re examination by Mr. Johnson DW1 stated that if TANESCO staff handed over its materials to an outsider it had to make a follow up on the said materials. TANESCO was not a party to a contract between NSCD and the Plaintiff.

Mr. Mdamu learned Counsel in his written submissions argued as follows:

On issue No.1 Mr.Mdamu submitted that the Plaintiff fulfilled its obligations under the contract with the Defendant, the construction could not have commenced if no inspection of the materials was done. The Plaintiff should not be penalised because of the fault of the Defendant's employees. The construction work was

completed by the Plaintiff on December 18, 2005 (Exhibit P4). Efforts were made by the Plaintiff to follow up, and letters were sent to the Defendant dated August 27, 2006 and July 11, 2006 (Exhibit P5). The Defendant's query as to how the Plaintiff obtained its material was ridiculous and unreasonable. Counsel asked the court to answer Issue No.1 in the affirmative.

With regards to Issue No.2 counsel for the Plaintiff stated that the delay was not justified. According to Counsel once a line is energised it becomes an exclusive property of TANESCO.

With regards to Issue No.3 Counsel submitted that according to the testimony of PW1 before the commencement of the construction work the Defendant's office inspected all the materials at the site for quality and standard and source of materials. The Plaintiff was given a go ahead for construction. Exhibit P4 does not clearly state the criteria used in identifying items belonging to TANESCO. In the absence of a detailed audit report TANESCO's claim of ownership over the materials

cannot stand. Therefore the Plaintiff's counter claim has no basis.

With regards to Issue No.4 whether the Plaintiff's image was tarnished Counsel for the Plaintiff submitted that the Plaintiff's image was tarnished as a result of the Defendant's act of copying Exhibit P6 to its client NSCD who were the main contractors. This was the letter from Defendant asking the Plaintiff to explain how he obtained the materials belonging to TANESCO.

Counsel submitted that NSCD terminated the Plaintiff's contract (Exhibit P7). The termination was a result of Exhibit P6. Counsel therefore requested the court to answer Issue No.4 in the affirmative.

With regards to the reliefs claimed Counsel for the Plaintiff submitted that the Plaintiff is entitled to special damages of TShs 59,000,000 which the plaintiff lost as a result of the Defendant's delay in metre installations.

Counsel also submitted that the allegations of theft tarnished the Plaintiff's image. Plaintiff's former

customers like TANESCO, CELTEL, TTCL and NSCD are no longer interested to work with the Plaintiff. The Plaintiff experienced a drop of income, the plaintiff is entitled to general damages of TShs Six Hundred Million upwards.

Mr. Johnson learned counsel for the Defendant submitted as follows.

With regards to Issue No.1, Counsel submitted that the Engineers who supervised the works, Engineers Fumbuka and Mmari were interdicted for failure to properly supervise the work carried out by the Plaintiff. Counsel further submitted that, that the supply of power was not automatic and the Defendant had to conduct a technical inspection before power was supplied to the premises. Counsel further submitted that if there was a delay then the Plaintiff contributed enormously for the said delay for failure to disclose the source of materials. The two bulky meters were connected after the Defendant was satisfied that the installation by the Plaintiff was proper. The Defendant is still working on the information sent by the Plaintiff, and this forms the subject matter of

Commercial Case No.72/2006 between the same parties pending before the court. The Plaintiff rushed to court without informing the Defendant of his intention to do so.

Counsel further testified that there was no delay in the installation of the metres as the Plaintiff's work was incomplete. When the site was inspected it was found not to be in a good condition for power supply, and the Plaintiff was required to do the necessary work. The metres were installed after a month. Therefore the Plaintiff cannot say that the work was completed.

With regards to Issue No.2, Counsel submitted that since there was no delay and the Defendant's acts were justifiable and if there is delay, the Plaintiff contributed to the same.

With regards to Issue No.3 whether the materials used for the construction of the HT Line and LT Line were lawfully acquired by the Plaintiff; Counsel submitted that the position is not clear. Counsel further submitted that according to Exhibits D2 and D3 the manufacturers of some of the items stated categorically

that they never sold the items to the Plaintiff. Counsel for the Defendant further stated that the explanation given by the Plaintiff on the items listed in Exhibit D4 was so generalised to bring any meaningful assistance as to how the items were found at the site. According to Counsel this was meant to hide the fact that the goods were obtained through unscrupulous means from the Defendant, using unfaithful employee of the Defendant. Counsel further stated that since the Plaintiff failed to give proper explanation on how he came into possession of the items and since the items have already been installed at the site the court should order the Plaintiff to pay to the Defendant for the value of the said items, i.e the sum of TShs 15,324,475,000.

With regards to Issue No.4 as to whether the Defendant's image was tarnished counsel submitted that para 13 of the Defendant's Written Statement of Defence, which addresses that issue should form part of the Defendant's submission. Counsel further submitted that there was justification as the Defendant had a reasonable suspicion on where the materials were obtained and that NSCD as main contractors who introduced the Plaintiff to

the Defendant were entitled to know the progress of the work.

The words complained of were not defamatory at all since they were depicting a true picture of what was found at the site during the inspection. No reasonable man would interpret otherwise. According to Counsel no particulars of defamation were given. Counsel cited the case of *Waters Vs Sunday Pictorial Newspapers* 1961 IW L.R 967. Counsel submitted that it was stated in the above case that the Defendants can justify any meaning which the words are complained in the statement of claim in their proper context within the publication as a whole are reasonably capable of bearing irrespective of what meanings are pleaded.

Counsel submitted that the Plaintiff's image was not tarnished and the claim for damages should therefore fail.

With regards to Issue No.5, Counsel submitted that as some of Defendant's items were found at the site of the Plaintiff, the Plaintiff should pay the Defendant TShs 15,324,475 being the value of the said properties. Counsel

further submitted that the Plaintiff's claim has not been proved to the required standard and should be dismissed with costs.

Counsel further submitted that the Plaintiff's claim for TShs 59,000,000 is unjustifiable. NSCD is not a party to the proceedings. Any claim for damages for breach of contract should be made to NSCD, who are the parties who terminated the Plaintiff's contract. At the time of installation of the bulky meters on 13.10.2006 the site was still manned by the Plaintiff. No other contractor was found at the site. The allegations of the Plaintiff are therefore unfounded. Counsel prayed that the Plaintiff's case be dismissed with costs and Judgment be entered for the Defendant on the counter claim as prayed.

After carefully reviewing the evidence adduced in court in respect of this case and the submissions made by Counsels, I would like to state as follows:

With regards to issue No.1, whether the Defendant occasioned/caused the delay in respect of power supply for

the 25 Block in Kijitonyama, it is my finding that there was a delay in respect of the power supply for the 25 Blocks in Kijitonyama. According to the agreement entered between the Plaintiff and NSCD exhibit P1, the Plaintiff and two other contractors were supposed to complete the works within 4 weeks from the date of the agreement. The Agreement between the parties was dated August 4, 2005.

The Defendant, TANESCO was not a party to the contract entered between the Plaintiff and NSCD. The arrangement entered between the Plaintiff and the Defendant is based on a letter dated August 30, 2005 Exhibit P2. The said arrangement was vague and lacked details. According to PW1 the Defendant refused to install the metres in question, in view of their query on materials belonging to the Defendant found at the site of the Plaintiff. DW1 confirmed the said position, however DW1 testified that the works had not yet been finalised by the Plaintiff. According to DW1 even following a court order it took almost a month to have the metres installed because the works was not completed. According to DW1, materials belonging to the Defendant were found at the

Plaintiff's site. A list of the materials in question was produced by DW1 (Exhibit D4) and an investigation report on the materials found conducted by TANESCO officials (Exhibit D5).

According to DW1 the Defendant wanted to know how the Plaintiff happened to be in possession of the said materials before the metres were installed.

The delay in the installation by the Defendant therefore came about because of the query on the materials belonging to the Defendant, which was not responded to by the Plaintiff. The Plaintiff therefore was also responsible to the said delay.

This issue is still unresolved by the parties and there is no evidence on record as to how this issue was being addressed. I would also like to mention in passing that the arrangement reached between the Plaintiff and the Defendant was too general and lacked specifications on the materials to be used, the time factor, the type of supervision to be carried out by the Defendant. This left a lot of room for vagueness and uncertainties.

It is therefore my finding that in the light of the prevailing circumstances, the delay was justified. This addresses issue No.2.

With regards to Issue No.3 whether the materials used for the construction of the High Tension Line (HT) and Low Tension Line were lawfully acquired by the Plaintiff. According to PW1 some of the materials used for the construction of the power line were bought from TANESCO and some were bought from other suppliers. This is the reason why materials with TANESCO emblem were found at the site.

However DW1 testified to the effect that the materials bought from TANESCO were for construction of the site in Dodoma and could not have remained for use in the Kijitonyama 25 Blocks. The evidence on record does not clearly establish which materials were bought from TANESCO, and which materials were not. Evidence was also adduced by DW1 that some of the suppliers denied selling materials (such as transformers) to the Plaintiff. Both parties did not come out clearly as to the origin of

the materials. It is my view that each party had a duty and responsibility to come up clearly with the position. Based on the evidence on record, the issue of materials was still under investigation and in the light of the prevailing state the court is not in a position to conclude that the materials used for the construction were lawfully acquired.

Section 111 of the Evidence Act provides as follows:

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

Section 112 provides as follows:

“The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.”

Section 115 provides as under:

“In civil proceedings when any fact is especially within the knowledge of any person the burden of proving the fact is upon him.”

With regards to whether the Plaintiff's image was tarnished in view of the Defendant's letter dated August 28th 2006, it is my finding that the Plaintiff's image was not tarnished. The letter was copied to NSCD, who was the Plaintiff's client. The relevant part of the letter is reproduced as under:

"Before we give you quotation for service line & meter connection and supply power to the project namely 25 Blocks Kijitonyama, we would like your office to clarify to us of how you obtained the materials used for construction of HT Line, Distribution/transformers/substation and LT Line at the premises all the materials appear to be of TANESCO."

The letter was not copied to any other party apart from NSCD, the Plaintiff's client.

The Plaintiff has not brought any evidence to show how the wording of the said letter tarnished the image of the Plaintiff or that the said information was published to other parties. No particulars of defamation were given.

According to Winfred and Jolowicz on Tort for an action of defamation to succeed the following factors must be present:

1. the words must be defamatory.
2. they must refer to the plaintiff.
3. they must be maliciously published.

The above factors are not present in this case.

The onus is on the Plaintiff to establish malice. I am of the view that the natural plain and ordinary meaning of the words complained of were in the context used not defamatory.

The Defendant was justified in making the enquiry following the behaviour of its employees, entrusted with the supervision of the works.

With regards to the Defendant's counter claim I would like to state as follows. A counter claim is substantially a cross a suit and the Defendant has the burden of proving its claim on the balance of probability. From the evidence adduced in court, the Defendant has failed to discharge the said burden.

Section 110(1) and (2) of the Evidence Act provides as under:

“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.

“When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

The Defendant has failed to prove his counter claim and it is therefore dismissed with costs.

On the relief claimed by the parties, the position is as under:

With regards to the Plaintiff's claim for specific damages of Tsh 59,000 it is my finding that special damages must be proved. In Zuberi Augustino V Anicet Mugabe 1992 TLR 137 and Cooper Motors Corporation (T) Ltd V Arusha Int Conference Centre

1991 TLR 165 it was stated that special damages must be specifically pleaded and proved. No documentary proof has been made available on the project costs of TShs119,789,230.00 and the outstanding balance of TShs 59,000,000. No breakdown of the payment process and how each of the three contractors engaged by NSCD were to be paid. No evidence was brought to establish and to justify the claim of Tshs 59,000,000.

In view of my finding on issues No.1 and 2, 3 & 4 the Plaintiff prayers for punitive and general damages cannot stand. General damages and punitive damages are assessed by the court, taking into consideration the circumstances of the case. The prevailing circumstances do not warrant for award of such damages.

With regards to the prayer for a declaration that in the circumstances of the Defendants refusal to install 2 bulky meters into the 25 blocks of eight apartments each at Kijitonyama is unreasonable and unjustified, it is my finding that in view of the evidence adduced in court and my findings on issues Number 1, 2 and 3 the said declaration cannot be made by the court. The Plaintiff

abandoned the prayer for an order compelling the Defendant to install the 2(two) bulky metres in view of he court order.

Costs follow the event, therefore in the light of what has been stated hereinabove the Plaintiff's case is hereby dismissed with costs. The Defendant's counter claim is also hereby dismissed with costs.

It is so ordered.

Sauda Mjasiri,

Judge

June 18, 2007

Delivered in Chambers this 18th day of June 2007 in the presence of the Plaintiff and Mr. Johnson Advocate for the Defendant and in the absence of Mr. Lutema Advocate for the Plaintiff.

Sauda Mjasiri,

Judge

June 18, 2007

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I hereby certify that this is a true and correct
copy of the original as filed in the court records.
Date 20/16/07