

IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NO. 65 OF 2009

CHARLES RICHARD KOMBE t/a

KOMBE BUILDING MATERIALS.....PLAINTIFF

VERSUS

EVARANI MTUNGI.....1ST DEFENDANT

MOHAMED LWIZA.....2ND DEFENDANT

GENERAL SERVICES & CONSTRUCTIONS

CO. LTD.....3RD DEFENDANT

JUDGMENT

BUKUKU, J.:

This is a judgment originating from a plaint duly filed in this Court on 10th day of August 2009. The plaint was preferred under Order XXXV: Summary Procedure. Having being served with the plaint, the Defendants prayed for leave to defend the suit, the prayer was duly granted and the

Defendants successfully filed their Written Statements of Defence. The Plaintiff is claiming against the Defendants jointly and severally for the following:

- (i) Judgment for the sum of T.shs. 46,000,000/= being an amount due from and owing to the Defendants, on account of dishonoured cheque No. 273730 dated 16th May 2004 for the sum of T.shs. 10,000,000/= and cheque No.273751 dated 22nd July 2009 for the sum of T.shs. 36,000,000/=.
- (ii) Interest on (i) at the rate of 20%pert annum from due date to the date of judgment;
- (iii) Costs of the suit; and
- (iv) Any other or further reliefs as this Honorable Court may deem just and fit to grant.

In support of their claim, the Plaintiff called three witnesses, and tendered four documentary exhibits (Exh. P1-4). On the other hand, the 1st and 3rd Defendants contend that the liability is on the 2nd Defendant as they were mere guarantors, while the 2nd defendant denies liability in toto. Altogether, the Defendants called a total of two witnesses, and did not produce any documentary exhibits.

In their joint Written Statement of Defence the 1st and 3rd Defendants denied the claim and averred that, they were mere guarantors of the 2nd Defendant and his company (Traced Building Services Ltd). Who had actually contracted with the Plaintiff. They further submitted that, there was an understanding between all parties that the manner in which the Plaintiff was to be guaranteed was through post dated cheques issued by the 3rd Defendant. They therefore prayed for the Plaintiff's suit be granted on condition that, the 2nd Defendant be ordered to pay the decreed sum and costs. On his part, the 2nd Defendant denied the Plaintiff's claim and averred that he was not a Director of the 3rd Defendant Company and that he was never ever involved in issuing the alleged dishonoured cheques. He further averred that, since the dishonoured cheques contains different dates, that is, years 2004 and 2009, thus there is a misjoinder of causes of action and therefore the suit is wrongly filed in Court, and that there is no cause of action. He therefore prayed that the suit be dismissed with costs for suing a wrong party and for not disclosing the cause of action by the Plaintiff against the 2nd Defendant.

The Plaintiff is represented by Mr. Kalolo, Advocate, the 1st & 3rd Defendants are represented by Mr. Blashi, Advocate while the 2nd Defendant is represented by Mr. Tibanyendera, Advocate. The Counsels prayed to conclude their closing submissions in writing, in which their prayer was duly granted and they complied with the order of this Court.

Issues which were framed during the final pre- trial and scheduling conference are:-

- (a) *Whether the Defendants entered into an agreement with the plaintiff;*
- (b) *Whether the Plaintiff fulfilled the terms of the agreement;*
- (c) *Whether Defendants issued dishonoured cheques;*
- (d) *Whether there was justification for non payment of chequed amount; and*
- (e) *What reliefs are the parties entitled.*

The first witness summoned on the Plaintiff's side as **PW1** was **CHARLES RICHARD KOMBE**, the plaintiff himself. He testified that, he is a businessman involved in selling building materials and hardware since 1995. He traded under the name of "*Kombe Building Materials*. He deposed that, he knew both Mr. Evaran Mtungi and Mr. Mohamed Lwiza since January 2004. He recalled that, his company entered into a contract with 3rd Defendant company for the supply of building bricks to General Services & Construction Company Limited (the 3rd Defendant). The agreement was to supply 60,000 building bricks at a price of T.shs. 600/= each, thus making the contract sum to be a total of T.shs. 36,000,000.00. The contract between General Service Construction Ltd and Kombe Building Material dated 14th Day of July 2004 with reference: GSC LTD/013/14 titled "*MKATABA WA KUUZIANA TOFARI KUFIKISHA HADI SITE-KAMBI YA JESHI ABDALILAH TWALIPO-MGULANI*" was tendered, admitted and marked as Exhibit P1.

It is PW1's testimony that, **Exh.P1** was signed on 13th day of July 2004 by Mohamed Lwiza and Evarani Mtungi as directors of General Services & Construction Ltd. Sometimes in January, February and July 2004, PW1 supplied sixty thousands (60,000) bricks at Mgulani Camp site as per the agreement. He further testified that, the arrangement of payment was such that, the 3rd Defendant was to issue post dated cheques as guarantee to secure the contract, and those cheques guaranteed were to remain with PW1 until the 3rd Defendant has paid in full the whole amounts for the bricks supplied by the Plaintiff. Unfortunately, the Defendants failed to effect payment within time as agreed. He further testified that, Mr. Mohamed Lwiza, (DW2) issued the first post dated cheque No.273731 for the payment of T.shs. 10,000,000.00. The cheque was tendered, admitted and marked as **Exhibit P2**.

PW1 testified further that, **Exh.P2** was signed by Mr. Mohamed Lwiza and Mr. Evarani Mtungi. The Defendants having been delayed for a long time to effect payment, PW1 decided to present the cheques to the bank for payment. When the said cheque was presented to the bank, it was dishonoured and returned with an endorsement "*Refer to Drawer*" and "*Account Dormant*" respectively. The notice for the dishonoured cheque was duly issued and served to the Defendants but the Defendants have failed to make good for the said cheques. PW1 tendered in this Court another original cheque No.273730 dated 16th day of May 2004 for the payment of Tshs. 10,000,000/= to Kombe Building Material which was admitted and marked as **Exh.P3**. This cheque was also signed by Mr.

Mohamed Lwiza and Evarani Mtungi. PW1 presented the cheque to the bank. It was also dishonored as the account had no money and was already closed. On such circumstances, PW1 through his lawyer decided to draft a demand notice which was duly served to the 3rd Defendant and copied to the 1st and 2nd Defendants. The demand notice dated 23rd day of July 2009 titled "*DISHONoured CHEQUES NO.273730 AND 273731 AGAINST KOMBE BUILDING MATERIALS*" was tendered, admitted and marked as **Exh.P4**. Despite the demand notice issued to the Defendants, the Defendant, no payment was made.

During cross-examination, PW1 testified that he entered into contract with only two people, Mr. Mohamed Lwiza and Mr. Evarani Mtungi. PW1 testified further that, he does not have any claim over the first contract but the second contract. The contract marked as **Exh.P1** was entered between General Service Construction Ltd and Kombe Building Material. PW1 testified further that, any delivery of bricks which was made at the site was recorded and signed by his driver in a book. The bricks supplied were purposely for building a wall at Abdallah Twalipo Camp. Mr. Mohamed Lwiza from General Services & Construction Ltd was the one who entered into a contract to build the wall at the Camp. PW1 testified further that, apart from the post dated cheques, he was also handed the registration card of a Mercedes Benz with registration No. T291 ADR as guarantee. PW1 testified further that, he merely possessed the registration card without a car and that the said car cannot be subject to sale as it is now written off, and after all it did not belong to either Defendants.

When cross examined by Mr. Tibanyendera, PW1 said that, his claim is based on the second contract whereby, out of a debt of T.shs.14,000,000/= Mohamed Lwiza paid only 4,700,000/=. The cheque for T.shs. 10,000,000/= was issued on 16 day of May 2004, was for the payment of the outstanding amount and presented into the bank on 16th day of November 2004 while the contract on which the cheque was issued was entered and signed on 13th July 2004. PW1 told this Court further that, the contract was drafted on 14 July 2004 and mistakenly signed by PW1 on 13 July 2004 instead of 15 July 2004. He signed the said contract after having been signed by his lawyer. In re-examination, PW1 testified that, the Mercedes Benz does not belongs to any of the Defendants in this case so could not fit for sell.

The second witness to be summoned by the Plaintiff as **PW2** was Mr. **Geoffrey Felician**, a Lorry driver employed by Mr. Hussein Zezeli. He knew Mr. Charles Kombe since 2000. Sometimes in 2004 Mr. Charles Kombe hired PW2's truck in order to transport bricks from Mwananyamala to Mgulani Camp. He testified that, PW1 kept a book in which he signed for every trip of bricks delivered at Mgulani site. He further testified that, he had seen Mr. Mohamed Lwiza inspecting bricks delivered at the site so as to satisfy himself on whether the cargo had been properly delivered. When cross-examined by Mr. Blashi, PW2 affirmed that the delivery book was kept by Mr. Kombe. When cross-examined by Mr. Tibanyendera, PW2 testified that, he was not able to state before this Court the total number

of bricks supplied to the Defendants, but remembers that there was an order for 3,000 bricks.

The third and last witness summoned on the Plaintiff side as **PW3** was **MR. KARIM AYUBU KANDOTA**. He is a broker for more than seven years and at the same time, he worked as a turn boy. In his testimony he said that he knew Mr. Kombe since 2000. Between 2004 and 2005 he was working with Mr. Kombe as turnboy loading and unloading bricks which were transported to Mgulani JKT which were used for building the a fence. They made three or four trips a day and he remembers seeing Mr. Mohamed Lwiza at the site. When cross examined as to how many bricks were supplied, he averred that, he could not remember since there were othe vehicles which supplied the bricks.

Detailing their side of the story, **DW1, EVARAN MTUNGI** deposed that, he is a businessman and has a company by the name of General Services & Construction Company dealing with construction activities. The directors of General Services & Construction Company are Evarani Mtungi, Mr. Thabiti Salum Kalwani and Mr. Herman Mutungi. He knows Mr. Charles Richard Kombe who used to supply him with building materials such as bricks and cement. He had known Mr. Mohamed Lwiza since when he was given a tender for construction at the national stadium at JKT Twalipo; that, at the request of DW2, their company guaranteed DW2 so that he could get supplies (bricks) on credit from PW1, the Plaintiff in this case. DW1 went on to state that, when PW1 required some sort of guarantee,

General Services and Construction Limited issued two postdated cheques to the Plaintiff. The said cheques were signed by Mr. Evaran Mtungi and Mr. Herman Mtungi who are directors of the company.

Not only that, DW1 stated further that, Both the bricks from Kombe Building Materials were supposed to be supplied to Trust Building Services, a company owned jointly by Mr. Mohamed Lwiza, and Mary Mtae who is now deceased. He testified further that, Trust Building Services were the ones who entered into contract of constructing the fence at the Mgulani Camp, and that the Plaintiff was paid in full for the bricks supplied during the first delivery but nothing was paid for the bricks supplied in the second delivery because the bricks were not supplied in full as agreed. When cross-examined by Mr. Tibanyendera, DW1 admitted that, in 2004, he signed a contract to supply 60,000 bricks valued at T.shs. 36,000,000/=. The cheques issued by the Defendant's company have nothing to do with Mr. Mohamed Lwiza, and that, DW2 was not a director of the Third Defendant.

The second witness summoned by the Defendant as **DW2** was **MR. MOHAMED LWIZA**. He was in Keko remand since 19 June 2009 from an order of the Resident Magistrates Court of Kisumu in Criminal Case No. 631 of 2008 but according to him, he is residing at Mbezi beach. He is the Managing Director of Trust Building Service since 2001. Other Directors of Trust Building Services are Mary Emmanuel Mtae and Haji Haruna Hussein. Mary Emmanuel Mtae has passed away. DW2 testified further that he knew

General Services & Construction Company Ltd. It was Ms. Mtae who introduced him to the said Company. He also knew Kombe Building Materials Company because his director is very famous "Mtu maarufu". Vigorously protesting the liability, DW2 testified that, he has never entered into any agreement with the two companies, nor trading with them. He vehemently denied the signature which appears in the contract for the supply of 60,000 bricks in that, it does not belong to him and that he is not a director of General Services & Construction Co. Ltd. DW2 further testified that, at the time when the Plaintiff filed this suit, he was already committed in remand prison. On being asked about the erection of the fence at Abdalla Twalipo JKT camp, DW2 admitted that, his company was given that tender. However, construction of the fence was not completed because a technical problem was detected by the army Officers in that, the tender for the construction work they performed was not sanctioned by the Military Tender Board as required and therefore they could not be paid for the work done.

He further testified that, the matter was referred to the Public Procurement Regulatory Authority for determination and therefore they decided to stop the construction works, awaiting for the PPRA's decision. DW2 testified further that he is not among the persons who signed the cheques tendered in this Court. General Service Construction Ltd. did not issue any guarantee to Trust Building Services for the work they did at JKT Mgulani.

When cross examined by Mr. Blashi, DW2 testified that his Company had a tender for constructing a wall at Abdallah Twalipo Camp and that the materials for the work was always purchased paid for in cash by the late Mary Mtae. DW2 had no knowledge as to where Mary Mtae purchased the bricks.

Briefly, that was the evidence which was tendered during the trial.

I should start by observing that, this is one of those controversies which find their way into courts because of either stubbornness/uncaring attitude of parties. This is an issue which could easily be resolved by reconciling the bricks supplied and those purported to have not been supplied. PW1 and PW2 both explained the procedure (which was corroborated by DW1) to have been as simple as follows:-

" The procedure was that, the bricks were supplied by PW1 and taken to Mgulani JKT where they were unloaded and the driver of the lorry who supplied the bricks signed on a delivery book and also the one who received the bricks also signed on the book".

Now, in such a situation, should the supplies made, and for that matter, those alleged to have been made vide the lorry trips generate any heat? Is it not a question of looking at the delivery book, which will in turn ascertaining how many bricks were actually supplied? Was this book hard to recover?

With the above observation notwithstanding, let us now exalt our minds on the evidence tendered.

I will start with tackling the first issue which is, *whether the Defendants entered into an agreement with the Plaintiff*. PW1 and DW1 both had testified that, the agreement entered (**Exh.P1**) was between General Services & Construction Ltd and Kombe Building Materials and was executed by Mr Kombe (PW1) as Director of his company on the one side and Evarani Mtungi (DW1) and Mohamed Lwiza (DW2) as Directors of General Services & Construction Ltd for themselves and on behalf of the 3rd Defendant. In short, the 1st Defendant is not disputing the existence of the contract between PW1 and the 3rd Defendant. He has admitted that, he has signed and entered into the contract with the Plaintiff on behalf of General Services & Construction Ltd.

The situation is different with regard to the 2nd Defendant. The 2nd Defendant vehemently disputed to have entered into any contract with the Plaintiff. He also denied to have signed the contract and/or the cheques tendered in this Court. He has averred that, the signature which appears in **Exh.P1** and which is purported to be his, does not belong to him. It has been forged.

Let me pause here and first expose the position of the law regarding the burden of proof. This is provided in sections 110-113 of the Law of Evidence Act as follows:

"110- (i) Whoever desires any court to give judgment as to any legal rights or liability dependent on the existence of facts which he asserts must prove that those facts exists.

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

111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence were given on either side.

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

113. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Of course, the burden of proof shifts depending on what is established by a party against the other.

Sarkar on Evidence, 14th edition 1993 at pg. 1339 aptly paints the shifting nature of the burden of proof on provisions of the law which is similar to ours:

"As the case proceeds the onus must shift from time to time. But the judge should not be blind about the facts established before him.....

In most cases the burden of proof is divided accordingly as each party has one or more of the issues cast on him. The party on whom the burden lies in the first instance, may shift it to the other by providing facts giving rise to the presumptions in his favour.....

..... The elementary rule in S. 101 is inflexible and must apply to all cases. S. 102 makes it clear that the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to relief, the onus shifts on to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same".

In my opinion the above note from **Sakar** can be a reminder to most of the parties and their advocates. Most do loose this important legal aspect thus ending up failing to organize properly the prosecution of their respective cases by producing either irrelevant evidence or omitting glaring evidence which from the look of things is at their disposal. The elementary principle that he who alleges must prove seems to have evaporated.

Now back to the facts. In his evidence, DW2 told this Court that, he was not a Director of the 3rd Defendants' Company. This testimony has been corroborated with that of DW1. Now, the burden is on the Plaintiff to show that in actual fact, DW2 also signed the agreement. What has been produced by PW1 in this, is only **Exh.P1**. For whatever happened, the name of the witnessing Advocate who witnessed the agreement is not visible to allow recognition. Unfortunately, the Plaintiff did not take any trouble to prove before this Court that the signature which appears in **Exh.P1** belongs to DW2 and therefore it leaves this Court with only the testimonies of PW1 and DW1 to rely on. In the absence of any corroborating evidence and upon denial by DW2 that he never signed the agreement, can it be said that there was collusion between PW1 and DW1 to implicate DW2? I say so because in his testimony, DW1 testified that he and PW1 are long time business partners. It is my conviction and on the balance of probabilities that I find the Plaintiff has failed to prove his case against DW2. Moreover, even if I was to find that DW2 did sign **Exh.P1** , still liability could befall 3rd Defendant. It had been held in a number of cases including **Salomon v Salomon & Co Ltd. (1897) A.C. 22** that, a *company is a legal person different from its member*. A company can be sued. So, the answer to the first issue is to the effect that, it is the 3rd defendant who entered into agreement with the plaintiff, and that 1st defendant was a mere signatory to it.

The second issue is *whether Plaintiff fulfilled the terms of the agreement*. PW1 testified that, he had supplied sixty thousands (60,000)

bricks at Mgulani Camp site as per the agreement. PW1 testified further that, for any trip of bricks which was delivered at site, it was recorded in the delivery book and signed by the driver. The same has been testified by PW2 that, he signed in a book on every trip of bricks which he delivered at Mgulani Camp. PW2 testified further that, the said book was kept by Mr. Kombe. However, when asked the quantity of bricks he supplied, PW2 failed to tell this Court the total number of bricks which had been supplied by the Plaintiff. Both PW1 and DW2 admit that, there was an installment which was paid for, and the problem is on the second installment whereby PW1 testified that, out of T.shs.14,000,000/=he was claiming, DW2 paid him only T.shs.4,700,000/= leaving a balance of T.shs. 10,000,000, which forms the genesis of one of the bounced cheques in question.

In answering this, I will rely on the testimonies of PW1 and DW1. Both admitted that, payment was made on the first installment. I have a problem here. According to the testimonies and the submissions made, I get an impression that, there was business being transacted by the parties prior to the agreement entered into on 14 July, 2004 (**Exh.P1**). Otherwise, how could one have issued a post dated cheque on 16th May, 2004 while the agreement in question was signed on 13 or 14th of July, 2004. For that matter, it puts me into crossroads to understand which installments is which in terms of **Exh.P1** tendered in court. To make matters worse, PW1 testified that, he does not have any claim on the first agreement but he is claiming on the second agreement. To me it is not clear as to which one is the first and which one is the second agreement.

All along the trial and the submissions in this case neither party has shown other agreements to exist except **Exh.P1**.

In his final submission, Mr. Blashi for the DW1 submitted that Plaintiff did not bring any document which could prove that really the bricks were supplied. In the absence of any evidence, the Plaintiff did not supply the consignment as per the contract. He cited the case of **Bolton v. Mahadeva (1972) ALL ER 1322** in which the Court held that, *the Plaintiff could recover nothing from the work done insufficiently*.

Having gone through evidences in records, the picture painted is such that, the said bricks were not supplied at once but on various trips by using trucks; it also seems this transaction started prior to entering into the agreement only that, prior to the agreement, they were paying on case basis and that is why there was no problem. The mode of delivery as explained by PW1 and PW2 was through signing a delivery book which was not tendered in this Court. It is my considered opinion that, the purported delivery book was very vital to be tendered in this court so as to prove whether the Plaintiff fulfilled the terms of the contract or not. It is a cardinal rule of evidence not one of technicality, but of substance that, where written document exists, they shall be produced as being the best evidence of their own contents. It is the Plaintiff who alleged on the existence of such book, therefore under section 110(1) of evidence Act, [Cap. 6 R.E 2002] the burden of proving such allegation lies on the Plaintiff himself. In the case of **Hemed Said V. Mohamed Mbilu (1984) TLR**

113, it was held that, failure to call material evidence by a party, entitles the court to draw adverse inference. The Court had this to say:

"Where for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witness were called they would have given evidence contrary to the parties interest".

I should add or they (the alleged witnesses or the documentary evidence) do not exist at all. This principle stands true of failure to call witnesses as well as failure to tender relevant documentary evidence. In this case neither of the parties had tendered as evidence the said delivery book. Again, It is trite law under section 111 of the Evidence Act, Cap.6 R.E 2002 that, the burden of proof in a suit proceedings lies on that person who would fail if no evidence at all were given on either side. In absence of any evidence to corroborate PW1 and PW2's testimonies, and considering that parties had prior transactions before the agreement this Court cannot with certainty be at a better position to determine whether the Plaintiff has fulfilled the terms of their agreement. It is for this reasons, the second issue *whether Plaintiff fulfilled the terms of agreement* is answered in the negative.

The third issue is *whether the Defendant issued dishonoured cheques*. This issue need not detain me much. It is a fact that PW1 tendered in this court postdated cheques marked as **Exh.P2** and **Exh.P3**

which were endorsed as "*refer to drawer*" and "*Account dormant*" respectively. In his testimony DW1 admitted to have issued the cheques on behalf of the 3rd Defendant, and maintained that, the cheques were meant to guarantee DW2 hoping that upon him being supplied with bricks, and once payment is effected, the post dated cheques would be returned to the company.

Having considered evidences on record, it is my considered opinion that, the drawer of the dishonoured cheques marked as **Exh.P2** and **Exh.P3**. is the 3rd Defendant. And, according to the testimony of DW1 the said cheques was dully signed by Mr. Evarani Mtungi and Mr. Herman Mtungi being the directors of the 3rd Defendant. DW2 did not sign the said cheques. In the light of the above reason the 3rd issue *whether the Defendants issued the dishonoured cheques* is answered in the affirmative to the extent that, the second defendant is exonerated from issuing the cheques.

The fourth issue is *whether there was justification for not paying the cheques amounts*. As matters are, this issue is closely linked with the second issue above discussed. The issue of payment of the cheques goes hand in glove with fulfillment of the contract. In his closing statement, Mr. Blashi for the 1st and 3rd Defendant submitted that, DW1 testified that he blocked payment after he was informed that no supply was effected by the Plaintiff. In the evidence submitted by DW1 there is no where to show that they blocked payment. The issue of justification or otherwise for not

paying the cheques amount depended upon whether the Plaintiff fulfilled the terms of the agreement. Since Plaintiff failed to prove beyond reasonable doubt that he supplied all the 60,000 bricks according to the terms of the agreement, it will be undoubtedly difficult for this court to determine the basis for payment. Under such circumstances, it is the opinion of this court that, there was justification for non payment of cheques.

Looking at it from another angle, the agreement was for the payment of T.shs. 36,000,000/= with compensation of T.shs. 200,000.00 for late payment. The cheques tendered were for the amount of T.shs. 46,000,000/=. There is a difference of T.shs 10.0 million which has gone unexplained! This means that, what was claimed was more than that which was in the agreement. Under those circumstances, and in the light of the above, the fourth issue *whether there was justification for not paying the cheques amounts*, has been answered in the affirmative.

The last issue is, *to what reliefs are the parties entitled*. Mr. Kalolo for the Plaintiff submitted that, according to the case of **Hamisi Mlezi vs. Umoja Printers (1968) HCD 350**, *a signatory to cheques and the insurer are liable on the cheque amount if the cheque is dishonoured*. Therefore, the 1st and 3rd Defendant are liable on the cheques amounts and that since the 2nd Defendant signed the agreement, **Exh.P1** he cannot escape liability. As for 1st and 3rd Defendants, they pray this suit be dismissed with costs as the Plaintiff has failed to supply the bricks as

agreed. While on its part, Mr. Tibanyendera for the 2nd Defendant submitted that, the Plaintiff has failed to execute his burden of proof as required by law under sections 110, 111 and 112 of the Evidence Act, Cap.6 R.E 2002. Neither of the issues have been proved in favour of the Plaintiff against the 2nd Defendant, and therefore it is his humble submission that, this Court be pleased to dismiss this case against the 2nd Defendant and award costs together with any other relief(s) that this court may deem fit to grant.

Before I determine the issue of relief, I have this to add in passing. Under normal circumstances, the evidence of most of the witnesses is a mixture of truth and falsehood, or half-truth and If the decision is to be based solely on oral testimony, the task of extracting truth will be most difficult, and sometimes impossible. It is not infrequently seen that persons of the same station make contradictory statements in respect of an event to which they were witnesses. Interest or partnership is a strong element that weans one away unconsciously from truth. In weighing the evidence of the witnesses who testified, I had regard to their demeanor, the discrepancies in their evidence, admitted facts together with their interestedness in the case. Having that in mind, it is my considered opinion that, My observation is that there is more to it than what has been testified and adduced in evidence. In my opinion, the testimonies of PW1 and DW1 are pregnant with secrecy, half disclosure and hence supporting an inference that they have knowledge of what was happening. It is my

inference that, in this case, some party were more smarter than the others. I am saying so because, It doesn't get into one's mind why, a company decides to guarantee another company which it hardly knows, and as collateral that other company accepts postdated cheques; Again, it does not click into my mind what the motive of the 3rd Defendant was. Nothing was said as to what gain they were to benefit by guaranteeing DW2. But it has always been the testimony of DW1 that, when they saw goods are not forthcoming, they decided to stop payment. In his words he said:

"Kilichofuata ni kuwa, hatukupokea mzigo wa aina kama ilivyokuwa imekubalika kwa hiyo, ilibidi tuzuie malipo kwamba yasitoke."

What were those goods which were expected? Because all along we were told that, the agreement was for the supply of bricks to be used for erecting a fence, and this work was being undertaken by DW2's company and DW1 himself confirmed it! Therefore, one expected that, if at all the bricks were supposed to be taken to the building site and not to the 3rd Defendant's company. Again DW1 reiterated his position by saying:

"Baada ya kuona kwamba muda umepita hamna chohote ambacho kilitolewa kwa Kampuni ya General Service tukaamua kwamba hizo cheques zisilipwe".

What was that "chochote" which was being awaited and which prompted DW1 to stop payment? This was not revealed even after DW1

was crossed examined. The other issue is that, why was the dispatch book not tendered as evidence. PW1 testified that, his office was vandalized. Fine. What about the Police Report to collaborate his story. As earlier on, hinted, failure to call material evidence by the party, entitles the court to draw adverse inference. The other issue which leaves a lot to be desired is on the cheques. According to the agreement, payment was to be effected after 30/08/2004 and that, late payment would attract compensation of T.shs 200,000.00 after that date. The agreement was silent as to the said amount whether it was to be paid in one lump sum or monthly. But what is glaring is that, while one of the cheques is dated 16/05/2004, before the agreement was even signed, it was presented for encashment on 16th November, 2004 almost six months later. When the bank dishonoured it, the Plaintiff did not take the trouble of notifying the drawer of that cheque up and until 23rd of July, 2009 some four and a half years later! Under normal circumstances, the Plaintiff could have immediately instituted a summary suit to claim his monies. This also was not done. There is no vivid explanation with regard to the cheque which was issued on 22nd July, 2009, just one day before notice of default was issued.

Traversing through the evidence tendered, there is nothing to show that Plaintiff was vigorously pursuing up his claim. No reminder letters no nothing! The only time he mentioned was when he said that

DW2 took him to the JKT and was introduced to the Officers of JKT who promised him that DW'2 company will be paid, and that was why he was

issued with the second cheque dated 22 July, 2009. He could even have called one of those officers to testify for him if at all they promised him payment. There is also the Mercedeze Benz car registration which Plaintiff alleged to have been given as collateral. In his testimony, PW1 informed this court that the said car never belonged to neither Defendants'. How then did he accept such collateral. Was he not aware of the state in which the collateral was. All these questions leave a lot to be desired. One wonders, what was happening in between the five years between July, 2004 when the agreement was signed and 23 July, 2009 when the notice was issued.


I have, I hope, amply demonstrated above that the Plaintiff herein, has failed to prove and satisfy the Court, on a balance of probabilities that, he indeed supplied 60,000 bricks to the Defendants. He failed to produce documents to show the deliveries if any.

Now, back to the relief(s). In awarding relief(s), to a party, the general position is that, where injury has been pleaded and proved, the law must be able to provide a remedy to the injured party. In this particular case, the plaintiff has not been able to prove beyond reasonable doubt, that he suffered loss due from and owing to the defendants, on account of

the dishonored cheques amounting to T.shs. 46.0 Million. Indeed, the plaintiff has failed to prove his case on a balance of probabilities.

Consequently, the suit is devoid of substance and thus judgment is hereby entered against the plaintiff with costs.

It is ordered accordingly.


.....
A. E. BUKUKU
JUDGE
5 SEPTEMBER, 2011

Judgment delivered in chambers this 5th day of September, 2011 in the presence of Mr. Kalolo, Advocate for the Plaintiff, Mr. Evaran Mtungi, 1st Defendant and also representing 3rd Defendant; and Mr. Tibanyendera, Advocate for the 2nd Defendant:


.....
A.E. BUKUKU
JUDGE
5 SEPTEMBER 2011