

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

COMMERCIAL CASE NO. 162 OF 2013

BETWEEN

INSPECTORATE TESTING SERVICES  
LIMITED (ITS) -----

-----PLAINTIFF

VERSUS

LAKE OIL TANZANIA LIMITED-----DEFENDANT

JUDGMENT

Date of the Last Order: 17/4/2015  
Date of the Judgment: 18/6/2015

SONGORO, J

M/s Inspectorate Testing Services Limited (ITS), the Plaintiff filed a  
Plaint suing Lake Oil Tanzania Limited, the Defendant, claiming that  
in June, 2010, his company was contracted by the Defendant to  
render inspectorate services on the Defendant's trucks. The services  
included sealing of trucks , product analysis, and escorting of  
trucks and they discharge their work as per agreement.

Plaintiff claims that, the Defendant has breached the contract, by  
refusing to pay the contractual agreed sum, despite several  
demands.

The Plaintiff therefore is seeking a Court order for payment of USD 37,053 as an outstanding claim, on the oral contract, and other reliefs

In the Plaint, Plaintiff therefore claim following orders, and reliefs as follows;

- a. *The court be pleased to declare that, the Defendant has breached the agreement and the Defendant pay the Plaintiff the outstanding balance of United States Dollars Thirty Seven Thousand, and Fifty Three (USD 37,053.00).*
- b. *That, the Defendant pay the Plaintiff Commercial interest at 3% per month from 1<sup>st</sup> June 2011 to the filing date of this suit.*
- c. *That, the Defendant pay the Plaintiff interest on default amount at the court's rate from the date of Judgment, until the decree is satisfied in full.*
- d. *That, the Defendant pay the Plaintiff United States Dollars Twenty Thousand (USD 20,000.00) as general damages.*
- e. *The Defendant pay the costs, and incidentals to this suit.*
- f. *Any other relief(s) Honorable Court may deem fit and just to grant.*

In response, to the Plaint, and Plaintiff claims, Defendant filed a Written Statement of Defence, and opposed all claims.

In addition, the Defendant stated that, they just entered into a pre-contractual arrangement with the Defendant to render the said services, on trial basis for the Defendant's twenty (20) trucks only in order to test and ascertain the quality, and standards of such services. Defendant also said the Plaintiff was paid USD 20,000 for the services which he rendered on trial basis. He then stated that,

since there was no contract which existed between the two the Defendant pray for dismissal of the Plaintiff's suit with costs in his favour.

At the hearing of the suit, the Court in consultation with the parties framed, the following three issues for determination, being;-

1. *Whether the agreement to provide services on trial basis had an expiry period.*
2. *whether the amount of USD 20,000, Paid by the Defendant was full and final payment.*
3. *What are relief's are parties entitled too.*

In the light of the above mentioned agreed issues, the hearing of the suit commenced.

During the hearing, Capt Bendera Learned Advocate represented the Plaintiff; while the Defendant was represented by Mr. Mark, Learned Advocate.

To start with the Plaintiff with assistance of his Counsel Capt Bendera, called Francis Julius Ntapala who testified as PW1. Then relying on paragraph 5 of Witness statement, PW1 said his company deals with supervision of Ships, and Cargo.

Then relying on Paragraphs 5 and 6 of his statement the witness briefed the court that on the contract which was concluded, he first

had telephone conversation with Ally Awadhi, the Managing Director of Lake Oil Ltd and they agreed that, his company renders several services to the Defendant company, including road tracking, sealing of trucks, product analysis, and escorting of defendant's trucks from Dar es Salaam to the borders of Tanzania.

PW1, then stated in his Witness Statement that, after they have agreed, he issued a Price List of each service, and on the 18/6/2010, they started their services.

It was part of his evidence that, by 30<sup>th</sup> June, 2011 they offered 9 services, and in each service they rendered, Defendant was furnished with various reports, such as a survey reports, inspection report, certificates of quality, and invoices.

PW1, then said in Paragraphs 10 and 11 of his Statement that, the total costs of their services which was rendered to the Defendant was USD 57,053 as seen in the invoices. But Defendant had paid only USD 20,000 by two Banker's Cheques . The unpaid, and remaining balance which Defendant has refused, and neglected to pay is USD 37,053.

To support his claim, PW1 tendered the following exhibits, invoice rate was admitted as Exhibit P1, Inspection Report of Gas oil and Mogas, Ref Report No 403/Insp/Jul/11-LOL dated 1<sup>st</sup> -30<sup>th</sup> June,

2011, was admitted as Exhibit P2, Certificate of Analysis was admitted as Exhibit P3, Invoice was admitted as Exhibit P4, Several Truck Inspection Reports at Loading were collectively admitted as Exhibit P5, A Photocopy of CRDB Bank Pay slip of 10/11/2010 of USD 10,000 paid to the Plaintiff by the Defendant was admitted as Exhibit P6, and a Demand Letter for Payment of USD 37,053 was admitted as Exhibit P7.

Upon tendering the said exhibits PW1 cross examined by Defendant's Counsel, and he explained to the court that, is a marine surveyor by profession, and one of the Directors of the Plaintiff Company.

He further explained that the Second Director is one Mr. Kyalo Simaugi IIunga who is a Kenyan. On their assignments with the Defendant company, he explained that, they were supposed to inspect Plaintiff Oil tankers before loading of petroleum products, taking samples petroleum products and submitting them to their office in Mombasa for testing inspection, and certification. PW1 said all the above-mentioned tasks were performed at the Defendant's depot at Kigamboni area.

Another task which were assigned, was to escort trucks to borders. On the agreed services, PW1 elaborated that, they were paid for their services. On the scope of agreed work, PW1 while being cross examined at page 19 of the recorded statement said their

assignment was from 18/6/2010 to 30/6/2010 and that, is the time they provides the services.

Finally, PW1 prayed to the Court to order the Defendant to pay the remaining balance and relief's claimed in the plaint and he closed his testimony, and it was the end of the plaintiff case.

After the Plaintiff closed his case, Defendant also presented his defence, and called two witnesses who testified in his favour.

To start with the Defendant called Raphael Smaug IIunga Kyalo who testified as DW1.

Relying on his witness statement DW1 told the court that, he is a Director of Inspectorate Testing Services, of the Plaintiff's Company and is based at Mombasa. He also said in his statement that, is the Technical Director of the Plaintiff Company.

Further, DW1 said in Paragraphs 4 and 5 of his statement that, he knew personally Ally Edha Awadhi of Lake Oil Tanzania Limited who is the Managing Director of the Defendant's company. Then DW1 said Ally Awadhi offered them an assignments of conducting inspection of 20 trucks on trial basis arrangement which they did.

He then added in Paragraph 5 of his statement that, before they negotiated of another arrangement their company proceeded with

the inspection work beyond what was agreed upon. DW 1 then said in paragraph 6.0 of his statement that, their effort to demand for payment of USD 37,053 for work which they performed did not materialize for reasons that, the work was done without the knowledge, and approval of the Managing Director of the Defendant Company.

Regarding an outstanding claim of USD 37,053 which the Plaintiff company was demanding, DW1 who is the director of the Plaintiff's company, told the court that, he on behalf of the Plaintiff company negotiated with Ally Edha Awadhi, and they unanimously agreed that, the payment of USD 20,000 already paid to the Plaintiff company was full, and final settlement in respect of all services rendered by the Plaintiff's company.

Finally, DW1 in his statement briefed the court that, his company claims in court are misconceived because the amount of USD 20,000 paid by the defendant's company and accepted by the Plaintiff was final and full settlement on all services which was rendered. He also added that, as a Board Member of the Plaintiff Company they did not make any resolution of filing this suit in the court.

To support his assertion that, is a director of the Plaintiff's Company he tendered a copy of Memorandum and Articles of Associations of M/s Inspectorate Testing Services Limited dated 11<sup>th</sup> September, 2008 which was admitted as Exhibit D1. The Exhibit shows that,

Francis Julius Ntapala and Raphael Smaug IIunga Kyalo are both directors of the Plaintiff Company.

After DW1 testified another witness Ally Edha Awadhi also testified as DW2.

In his testimony DW2 relying on his witness statement told the court that, he is the Managing Director of the Defendant's Company. Further, DW2 briefed the court that, he entered into pre-contractual agreement with the Plaintiff's company to render inspectorate services to his 20 trucks on trial basis, at least to ascertain the quality, and standard of inspection services.

The witness said the inspection services were rendered and discontinued, and the information was communicated to DW1 who is the Director of the Plaintiff's Company.

On whom he talked about on pre-contractual arrangement, DW2 while being cross examined by Capt Bendera, said, he talked with two officials of the Plaintiff's Company about the services to be rendered. Also, he added that, Francis Julius Ntapala -PW1 was known to him, as a representative of the Plaintiff's Company, in Tanzania.



On the Plaintiff claim of **USD 37,053**, DW2 maintained in Paragraph 6.0 of his statement, that, it was in relation to inspection services which were conducted, after they terminated their pre-contractual arrangement with the Plaintiff, without their knowledge, and approval.

Then DW2 said in Paragraphs 6 , and 7 of his statement narrated to that, all plaintiffs claims were amicably settled with DW1 who is the Director of the Plaintiff company, and USD 20,000 was full, and final payment for all plaintiff's claims.

To support his assertion, DW2 tendered a Letter from Inspectorate Testing Services signed by Raphael Smaug IIunga Kyalo dated 25<sup>th</sup> May, 2014. The letter confirmed that, the Plaintiff's claims before the court is misconceived because it was already unanimously agreed that, the amount of USD 20,000 paid to the Plaintiff Company was final, and full payment of services rendered . The Plaintiff letter was admitted as Exhibit D2.

Finally, DW2 prayed for the dismissal of the suit and closed his testimony and that was the end of the Defendant case, and Mr. Mark closed his case.

After the closure of the Plaintiff, and Defendants cases, Capt Bendera, Learned Advocate for the Plaintiff, and Mr. Mark Counsel for

Defendant, made their submissions. In their submission they consistently supported the position stated by their parties.

On the part of Capt Bendera, he strongly submitted that, from the presented evidence, it well established that, there was an agreement to render inspectorate services to the Defendant's company, and there was no expiry period which was agreed upon. He then insisted that is the reasons the inspectorate services were rendered from 9<sup>th</sup> October, 2010, until 10<sup>th</sup> June 2011.

The Learned Advocate then maintained that, from Exhibit P2 - a survey report, Certificate of Analysis -Exhibit P3, Inspection Reports from the Defendant Depot Exhibit, P5 and invoices Exhibit P4 the Plaintiff has fully established that the services were rendered as per the Agreement and the claim of USD 37,053 was based on the rate stipulated in the invoice and were due and payable.

Relying on Exhibit P5 which was also signed by the Defendant's officials at Depot, Capt Bendera submitted that, the explanation offered by the Defendant that, the agreement was just for trial basis is not true. The truth of the matter is that, the Defendant authorized the Plaintiff, and his officials to conduct inspection services.

Responding to the testimony of DW1, who is the director and shareholder of the Plaintiff company, Capt Bendera submitted that he admitted that the services which was rendered exceeded 20 trucks. On the statement that inspectorate services proceeded without a knowledge, and information of the Defendant's Managing Director, he submitted that, is not true.

Responding to the testimonies of DW1 and DW2 that, USD 20,000 was paid as full and final settlement the Learned Counsel for the Plaintiff submitted since there is no agreement which confirms that, then their testimonies on the point of "amicable settlement" of the claim is not convincing at all.

It was the views of the Plaintiff's Counsel that, the presented evidence proved the claim and Plaintiff is entitled to relief claimed in the Plaint.

On his part Mr. Mark for the Defendant relying on the testimonies of DW1 and DW2 submitted that, their testimonies established that, the inspectorate services were to be rendered on trial basis for 20 trucks and from 18/6/2010 to 30/6/2010, but the Plaintiff proceeded to provide services beyond 20 trucks.

While on this point, the Learned Advocate for the Defendant drew the attention of the Court to the testimony of DW1, the Director of

the Plaintiff Company, who confirmed that the agreed inspectorate services, to be rendered was on trial basis, for 20 trucks only. He then insisted that, it is obvious going by the testimony of DW1 who is the Plaintiff Director, the agreement for inspectorate services expired after 20 trucks were inspected.

Thus on the first legal issue of whether the agreement to provide services to the Defendant had expiry period, the Counsel submitted that DW1 has proved that it had agreed expiry period, of 20 trucks, That means after inspection of 20 trucks, that was the end of the agreement.

Turning on the second issue of whether the amount of USD 20,000 paid to the Defendant was final, and full payment, Counsel submitted that, the testimony of DW1 established that, the Plaintiff claims nothing.

Moving to the third point of what relief's are parties entitled too, Defendant counsel submitted that, the suit has no basis because DW1 said the suit was filed even without the authority of Board as required by Article 43 of Memorandum and Articles of Association of the Plaintiff Company- Exhibit D1.

Next, the Defendant's Counsel submitted that, since the Plaintiff has failed to prove his claim in the Plaint, he prayed that the suit be dismissed with costs in favour of the Defendant .

The court has carefully considered the Plaintiff claims, Defendant Defence, testimonies of witnesses from both sides and submission and find the central issues in the Plaintiff suit is what was agreed upon between the Plaintiff, and Defendant on whether the agreement to provide inspectorate services to the Defendant had an expiry time, and whether the amount of USD 20,000 paid to the Plaintiff was final and full payment on services rendered. Last issue is what relief's are parties entitled too.

Turning to the first issue whether the agreement to provide inspection service to the Defendant had an expiry time, I find from the presented evidence there are two lines of arguments.

The first line of argument is presented by the Plaintiff and is supported by PW1, which insist that, there was no expiry time of the agreement which was agreed upon.

The second line of argument is the one presented by the Defendant's Company and testimonies of DW1 and DW2 that, there was pre-contractual arrangement to inspect 20 oil tankers, not more than that.

The Court carefully followed the testimony of PW1, that there was no agreed time for inspection services, and find his evidence was based on telephone conversations, which PW1 claims he made to

DW2. But, Defendant company denied and put that Plaintiff into strict proof, to prove all his allegations including telephones conversation and what was orally agreed.

Thus when the court revisited the testimony of PW1 on the so called telephone conversation between PW1 and DW1, it noted that the Plaintiff did not furnish to the court, evidential details which would assist the court to weigh and assess his evidence, of whether there was a telephone conversation between PW1 and DW2, and whether they agreed that, there was no time frame of their oral contract or it was agreed that the inspection services was on trial basis and limited for 20 trucks only.

While assessing the PW1's testimony on alleged oral contract, the court found that, it is a fact that, currently there are several contracts which are negotiated, and concluded via telephone conversations, around the world.

Also, the court found as a matter of fact, a party like the Plaintiff who relies on *telephone conversations* as a basis of his contract, and payments due has a burden furnishing the court with credible, and convincing evidence on what was agreed was upon on their telephone conversation.

In view of the above, it seems to me that, the Plaintiff was under obligation, to lead evidence which established, he made telephone conversation to DW2 by disclosing in his testimony before the court, a telephone number which he used to communicate with the DW2. Secondly, to disclose in his evidence before the court, the telephone number of the DW2 which he was communicating with Thirdly informing the court in his evidence the actual date, and time which he communicated with DW2, and fourthly to disclose to the court the actual words used or made by DW2 while accepting the services and the duration of the contract.

The court perused the testimony of PW1, and his Witness Statement filed in Court on the 28/4/2014, plus documentary exhibits which he tendered, and find PW1 and the Plaintiff's Company did not furnish the above-mentioned details in order for the Court to make an assessment, if the telephone communication on oral contract, was made by PW1 as he alleges, and if the duration of contract was agreed upon between PW1, and DW2 as alleged.

Honestly, I find a mere allegations by the Plaintiff and PW1 in the dock not substantiated with credible and convincing evidence that there was a telephone conversation on the contract and duration of the contract was not agreed upon, such allegations are not sufficient enough to convince and prove to the court on what was

agreed upon, and if the duration of the Contract was agreed upon or not.

It seems to me, since the Plaintiff was put to strict proof, and had a burden of proof there was a need for PW1 to disclose their telephone details, with DW2 as he alleged in the Plaint.

In the absence of "such crucial details of telephone conversation" then the credibility and reliability of PW1 testimony that he had telephone conversations with DW 2, and DW2 did not admit, it, remains to be unsubstantiated.

It is trite law under Section 110(1) and (2) that of the Evidence Act, Cap. 6 (R.E. 2002) who wants the court to give judgment in his favour on existence of any fact must prove it. Indeed Section 110 (1) of the Evidence Act, 1967, Cap 6 [R.E. 2002] provides that;

*whoever desires any Court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.*

And Subsection (2) of Section 110 of Cap 6 states that;

*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 same legal position of the was emphasized by the Court of Appeal in the case of Wolfing Dourado V. Tito Da Costa, ZNZ Civil Appeal No. 102 (CA) (unreported) that:

*whoever alleges a fact, unless it is unequivocally admitted by the adversary has to prove it, albeit on the balance of probability"*

And on the meaning of "proof on the balance of probability" Lord Denning(MR) in Miller versus Minister of Pension (1937) 2 ALL ER 372 at Page 374 said its a proof which;

it must carry a reasonable degree of probability but not so high as required in Criminal Case. If the evidence is such that the Tribunal can say he think it is more probably than not the burden of proof has been discharged, but if the probabilities are equal it is not"

Again in the case of Re-Minor (1966) AC 536 AT 586, the court clarified on proof of the "balance of probability" by stating that ;

The balance of probability means, a court is satisfied an event occurred. if the court consider the evidence the occurrence of the event was more likely than, not. It means the balance was not discharged

Thus guided by Section 110(1) and (2) of the Evidence Act, Cap 6 [R.E.2002] and decisions in the cases of Miller versus Minister of Pension and Re-Minor (1966) AC 536, the court find in the absence of telephone numbers, which were used in conversation between

PW1 and DW2, and absence of date and time when the alleged conversations on oral contract was made, it follows therefore that, there is a probability that DW2 talked with DW1 who is the Director of the Plaintiff company and not PW1 as plaintiff claims, and agreed on inspection of 20 trucks, as claimed by the Defendant.

More on the duration of the contract, the court find there is a testimony of Raphael Smaug IIunga Kyalo DW1, the Director of the Plaintiff Company, who in his testimony, and paragraph 5 of his statement supported the testimony of DW2 by saying that their inspection assignment on defendant trucks was a pre-contractual assignment involving 20 trucks only. But before negotiation of the Agreement was concluded, the Plaintiff company continued to render the services in total disregard of what was previously agreed.

DW1 who is a Director of the Plaintiff's company, like PW1, his evidence on the Plaintiff's company which supported DW2 testimony, carries weight.

For reasons, explained above, I find that, PW1's assertion that, the agreed agreement of rendering inspection service did not have time frame was not substantiated, and proved by the Plaintiff.

Regarding PW1 assertion that in June 2010, had a Meeting with DW2 and it was agreed to render inspection services to the Defendant's

Company and no time frame was agreed upon, again I find this point was just stated in Paragraph 6. of PW1's statement. But PW1 did not explain in his statement and testimony in court on a date, time and place where he met and discussed, with DW2 about the Agreement and its duration.

I therefore find his assertion that he met with DW1 was not substantially proved. So, in nutshell taking into account the testimonies of DW1 who is the Director of the Plaintiff's company, I find there is no proof if the Agreement was intended to last forever.

Turning on second issue if the amount of USD 20,000 paid to the Defendant was final and full payment, honestly, I find that is what exactly was said by DW1 and DW2 in their witnesses statement and even in their testimonies.

DW1 is a Director of Plaintiff Inspectorate Company, and his name appears at Page 24 of Exhibit D2 a Memorandum and Articles of Association of the Plaintiff Company

Currently the court has no good and weighty reasons to doubt what was said by DW1 who is the director of the Plaintiff's Company, that is the one who negotiated on behalf of the Plaintiff's Company a settlement which lead to a payment of USD 20,000 as final and full payment.

Also, the court has no reasons, to doubt DW1`s evidence that the Plaintiff company continued with inspectorate work without the approval of DW1.

It is in this respect I find that, there was an agreement between the Plaintiff Company represented by DW1 and Defendant company that the amount of USD 20,000 was paid as final and full settlement of Inspectorate services which were rendered. That is all the court may say in respect of issue No 2.

Turning to the third agreed issue of what relief's are parties entitled too, the court find relief's claimed in paragraph 11 (a)(b)(c) (e) (d) and (f) of the Plaint were not proved on the balance of probability. Consequently, I hereby dismiss the Plaintiff suit with costs in favour of the Defendant. The Right of Appeal is fully explained to the parties.

Dated at Dar es Salaam on this 18<sup>th</sup> day of June, 2015

H.T. SONGORO  
(JUDGE)

Delivered at Dar es Salaam on this 18<sup>th</sup> day of June, 2015

H.T. SONGORO  
(JUDGE)

The Judgment was delivered in the presence of Capt Bendera, Learned Advocate for Plaintiff and Plaintiff himself and absence of the Defendant and his Counsel.