

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO.203 OF 2017

JCDECAUX TANZANIA

LIMITED.....PLAINTIFF

VERSUS

IMPERIAL MEDIA AGENCIES

LIMITED.....1ST DEFENDANT

FRANK JOHN NICODEMUS.....2ND DEFENDANT

JUDGMENT.

Date Last Order: 16/02/2022.

Date of Judgment: 16/05/2022.

Z.A MARUMA J.

The dispute in this suit is in respect to a breach of contract arose from the broken contractual relationships between the plaintiff, a media advertising Company Jcdecaux Tanzania Limited and the 2nd defendant, Frank John Nicodemus which at the result incorporated the 2nd Defendant, Imperial Media Agencies Limited by virtual of the 2nd defendant being a stakeholder with 90% shares.

The brief plaintiff's claim against the 2nd defendant is that, on 1st August 2006, the 2nd Defendant was employed by the Plaintiff as a Development Manager with the terms provided under the Contract. Among the contract terms required the Second Defendant to devote all his time and attention to the affairs of the Plaintiff; not to engage in any business other than that of the Plaintiff; to use his best endeavors to conduct, improve, and develop the business of the Plaintiff; to demonstrate loyalty and honesty to the Plaintiff. It also contained the terms that upon termination the 2nd Defendant was prohibited for a period of 12 months from engaging in any business concerned with transit and outdoor advertising, the obtaining of outdoor advertising rights and the sale of outdoor and transit advertising to third parties in any country in which the Plaintiff conducts business, including Tanzania.

All these terms were to protect the plaintiff's interests, business secrets and rights as the fact that by virtue of his position the 2nd Defendant had into possession of or had acquired trade secrets and confidential information of the Plaintiff. Therefore, the 2nd Defendant owed the Plaintiff a duty of good faith to avoid allow conflict of interests to arise between his personal interests and the interests of the Plaintiff;

not to solicit customers of the Plaintiff to do business with competitors of the Plaintiff or to divert customers of the Plaintiff to third parties.

It is alleged that the 2nd Defendant had committed a breach of contract by being incorporated in the 1st Defendant company, having a 90% shareholder, being a director, and a company secretary of the 1st Defendant while he was still employed by the Plaintiff contrary to the terms of the Contract. Moreover, the 1st Defendant was established to engage in direct competition with the Plaintiff as a media advertising company. Being incorporation and dealings with the 1st Defendant. It is also alleged that the 2nd Defendant had revealed confidential and proprietary information belonging to the Plaintiff to the 1st Defendant. To be used the Plaintiff's resources to do mock-ups which were sent to the 1st Defendant by the 2nd Defendant to use for 1st Defendant's clients. The 2nd Defendant also was doing work for 1st Defendant during working hours and whilst in the employ of the Plaintiff. The 2nd Defendant unlawfully used information of the Plaintiff (to the knowledge of the First Defendant), to solicit clients of the Plaintiff and to divert them to the First Defendant.

Before this Court, the Plaintiff is praying for judgment and decree against the 1st and 2nd Defendants jointly and severally as follows:

1. Payment of the sum USD 906.017.30 being specific damages suffered by the Plaintiff for breach of contract.
2. Interest of 8.85% being commercial rate from the date of filing the suit to the date of judgment.
3. Interest at 12% being court's rate from the date of judgment to the date of payment in full.
4. As against the Second Defendant, for aggravated damages to be assessed by the Court.
5. Costs of the suit.
6. Any other relief that this Honourable Court may deem just and fit to grant.



In supporting of the Plaintiff's claim, (PW1) represented by the learned advocate Mr. Francis Kamuzora adduced evidence through his witness statement adopted by the Court and the fourteen exhibits (P1-14) the evidence which were subjected for cross examination.

Contesting the plaintiff's claims, the 1st and 2nd defendants represented by Makubi Kunju Makubi, the learned advocate, support their defence through the testimonies from DW1, David Makala Mnyeramba and DW2, Frank John Nicodemus.

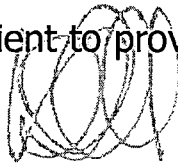
To determine the plaintiff's claims and prayers made and

arguments contesting the claims, the Court framed five issues as produced here under;

1. Whether the 2nd Defendant was employed a general Manager of the Plaintiff.
2. Whether there was a breach of contract by the Second Defendant against the Plaintiff.
3. Whether the First Defendant was complicit in the breach of contract by the Second Defendant against the Plaintiff.
4. Whether the Plaintiff suffered the claimed damages because of breach of contract.
5. To what reliefs are the parties entitled.

Starting with the 1st issue on whether the 2nd Defendant was employed as a general Manager of the Plaintiff. In relation to this issue, PW1 testified that the 2nd defendant was employed since 1st August 2006 as assistant manager who later on his position was changed to development manager tendered a contract of Employment Between Continental Outdoor Media Tanzania LTD Reg. No. 26155 ("The Company") and Fank John Nicodemus ID No. 11752/AD/2003 ("The Employee") (**Exhibit P2**). In his witness statement under paragraph 10 – 12, PW1 gave the evidence that during or in February 2016 the

2nd Defendant was promoted to Deputy General Manager however he retained his previous position of Development Manager so he worked under the two positions. This was done by the plaintiff for the purpose of retaining him upon his submission of a letter to resign. This was also stated in paragraph 6 (six) of the plaint that the plaintiff and defendant entered into a written contract of employment. However, PW1 did not evidence this fact with a copy of the said contract to prove. During his cross examination, he admitted that he did not bring the contract which promoted the 2nd Defendant to the position of Deputy General Manager. He said **"exhibit P2"** is sufficient to prove that the 2nd defendant was employed by the plaintiff.



This fact has been strongly disputed by the 2nd defendant that it was not proved at all that the 2nd defendant was employed by the plaintiff in the position of the Deputy General Manager. Instead, PW 1 tender a contract admitted as **"Exhibit P2"** which shows it is a contract between Continental Outdoor media and the 2nd defendant. The plaintiff is not reflected at any part of this contract. He argued further to that, in this contract, the second defendant's position is not Deputy General Manager but Development Manager. Therefore, since nothing was brought before the court as evidence showing that the 2nd defendant

was promoted to the position of Deputy General Manager. That is to say, the plaintiff brought in court a contract which was used by a different company not a party to this case. He further argued that in the absence of the said contract which was not brought in court on the reasons best known to the plaintiff, nothing else can prove that the 2nd defendant was employed by the plaintiff. He argued that as PW 1 admitted that the plaintiff and 2nd defendant entered into a written contract, then it was mandatory for him to bring the said document in court as evidence. He said on existence of a document, oral evidence cannot be considered in place of documentary evidence.

Analyzing the argument in support of and against the 1st issue on whether the 2nd defendant was employed as a general or deputy general manager of the Plaintiff's company to establish his liabilities on the alleged breach of contract. I directed myself to the position of the law in that aspect.

There is no dispute that the 2nd defendant was employed by the Plaintiff in the year 2016 as evidenced by **(exhibit P2)** under the capacity of the Development Manager. There is also evidence that the 2nd defendant was promoted to the position of the Deputy General Manager as established by oral evidence of PW1. However, PW1 did

not tender the second contract to prove this position. Moreover, it is very clear that the alleged plaintiff's claims based on the breach of contract resulted from non-compliance of the terms and conditions in respect of the promoted position of the 2nd Defendant as the Deputy General Manager.

I am aware of the law that, the law of evidence recognizes oral evidence and its value in proving the case as provided under section 61 of the Law of Evidence Act (Supra). The question at this point is on the weight of oral evidence over the documentary evidence?.

The fact that the basis of cause of action against the 2nd defendant is based on the breach of contract terms between him and the defendant, the best evidence could be of the contract which established the terms alleged to be breached. It is on his own statement of PW1 that the 2nd Defendant entered into a contract with the plaintiff around February 2016 by virtue of his position of the Deputy General Manager. He also admitted to have a contract in respect of that position however, he did not tender it to prove as he did for the 1st position of the development Manager (**exhibit P2**) a contract signed in 2011. The plaintiff's argument that "**exhibit P2**" is sufficient to prove that the 2nd defendant was employed by the plaintiff, in the eyes of law cannot be

applied that fact is not disputed but to use **"exhibit 2"** to establish liabilities against the 2nd Defendant on the breach of contract terms under the capacity of Deputy General Manager is mostly a strange practice and will surprise the eyes of the laws of contract, company law as well as the law of evidence. This is said so on the basis that the position of the development manager and that of deputy general manager under the eyes of law are two different positions with difference in terms of capacities and contractual obligations. Also, looking on the clauses alleged to be breached under paragraph 7 of the witness statement of PW1 even though look like the same as the one referred in the **"exhibit P2"** still these cannot establish a cause of action against the 2nd defendant as they are under the different contract with the different capacity with that of the deputy general manager.

Then the quick question comes into any reasonable person's mind is whether the plaintiff and the 2nd defendant working relationship was reduced into the said written contract under the capacity of the deputy general manager.

The second question is on whether the said oral evidence in the absence of documentary evidence can prove that there is the existence of contract between the plaintiff and the 2nd defendant under the

capacity of the Deputy General Manager.

At this juncture I agree with the defendant on the position of the law on conditions and circumstances like in the present case on the need of documentary evidence as provided under section 100 (1) of the evidence Act, Cap. 6 R.E.2019. I produce hereunder:

"Section 100(1)"When the terms of a contract, grant, or any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act".

Also, the cited case of **Agatha Mshote Versus Edson Emmanuel (unreported)**, Civil Case No. 121 of 2019 the Court of Appeal (at page 25) decided on the like position whereby a written agreement was not brought in court. The Court was of the position that, ***"since the disposition was reduced into writing it could not be***

overridden by an oral account...."

Therefore, since PW1 admitted that the contract was entered between the Plaintiff and the 2nd Defendant on the capacity of the Deputy General Manager, the best evidence will be the contract itself to prove contractual liabilities against the 2nd defendant as the Deputy General Manager.

It is a trite law that the one who asserts must prove as provided under section 110 of the Evidence Act, Cap 6 R.E 2019 that:-

"110 (1) 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."

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

As it was held in the case of **Paulina Samson Ndawavya Versus Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017. At page 14,15 and 16 it was held that,

"It is again trite law that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his and the burden of proof is not diluted on account of the weakness of the opposite party's case"

Also, the case of **Umico Limited Versus Salu Limited**, Civil Appeal No. 91 OF 2015 at page 15, The Court of Appeal directed very clear that,

“So long as the lease agreement was in writing there is no room for oral evidence to come in.”

Therefore, since PW1 admitted there is a contract signed between the plaintiff and the 2nd defendant, PW1's oral evidence has no room to prove the existence of the contract to amount the alleged claims by the plaintiff.

Based on the above positions of the law and the findings made in respect to the oral evidence to prove the existence of contract between the plaintiff and the 2nd defendant under the capacity of the deputy general manager to amount the alleged claim of breach of contract. The plaintiff is to be blamed for failure to prove his case. Since the answer is not in affirmative on the 1st issue which is the basis for determination of the remaining issues to prove the plaintiff's claims. The hands of this Courts are constricted to proceed with the determination of the remaining issue as the stand to establish the cause of action against the 2nd defendant has not been proved. In the event the plaintiff's case is dismissed for the lack of cause of action against

the 2nd defendant. The plaintiff is ordered to pay costs to both defendants. It is so ordered.

Dated at Dar es Salaam this 16th day of May, 2022.



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Z.A. MARUMA,

JUDGE.

16/05/2022

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