

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

CIVIL CASE NO. 9 OF 2022

(Originating from High Court of Tanzania(Original jurisdiction)

CHARLES ALFRED MARWA PLAINTIFF

VERSUS

THE SKY HORSE GROUP COMPANY LIMITED ...1ST DEFENDANT

MATHIAS MUGENDI BISENDO 2ND DEFENDANT

ALLY SAMA 3RD DEFENDANT

EXPARTE-JUDGEMENT

Date of Last Order: 08/11/2023

Date of Judgement: 14/11/2023

B.E.K. Mganga, J.

On 05th October 2022, Charles Alfred Marwa, the above-named plaintiff, filed this suit against Sky Horse group Company Limited, Mathias Mugendi Bisendo and Ally Sama, the 1st, 2nd, and 3rd defendants respectively. Brief facts of this case are that, Plaintiff is a businessman resident of Kahama dealing with mining activities within Kahama district in Shinyanga region. It is said that, both the 2nd and 3rd defendants are Managing Directors of the 1st defendant. It is alleged that, on 29th November 2021, plaintiff entered a contract with the 2nd and 3rd

defendants on behalf of the 1st defendant so that he can be supplied with (i) brand new J5P290HP*4 Dump truck make few model No. CA3224P2K2TIYA80 Engine No. WEICHAI290HP, (ii) brand new JCB Backhoe Loader 3DX super engine JCB diesel Max 4.4 lit, 92hp (68.6 Kw) engine Turbo charged, and (iii) brand new Air compressor machine XAS 138KD, ENGINE TYPE: Kubota/v2403. It is said that, in order to get money for purchasing the aforementioned machines/ equipment, plaintiff approached NMB Bank PLC at Kahama for loan facility and the later directed him to submit proforma invoice as a condition to be given loan. It is said that, on 11th November 2021, plaintiff entered loan agreement with NMB Bank PLC for the loan facility of TZS 300,000,000/= for 18 months at the interest rate of 18% and 1% interest gain for the period of 12 months interest and was supposed to pay TZS 58,633,535 monthly with effect from 26th February 2022. It is also said that, defendants served NMB Bank PLC with two proforma invoices namely, No. 225 and 226, as a result, on 01st December 2021, NMB Bank PLC after has confirmed with the 2nd defendant, transferred money in bank account No. 0150545071200 maintained by the 1st defendant at CRDB Bank.

It is further said that, as collateral for the abovementioned loan, plaintiff surrendered (i) his landed property on plot No. 156 Block "B"

with Certificate of Title No. 95826 LR Mwanza located at Magaka area within Mwanza City and (ii) landed property on plot No. 935 Block "A" with Certificate of Title No. 89261 LR Mwanza located at Semba street within the Mwanza city. It is also said that, plaintiff was required to surrender original cards for (i) brand new J5P290HP*4 Dump truck make few Model No. CA3224P2K2TIYA80 Engine No. WEICHAI290HP, (ii) brand new JCB Backhoe Loader 3DX super engine JCB diesel Max 4.4 lit, 92hp (68.6 Kw) engine Turbo charged and (iii) brand new Air compressor machine XAS 138KD, ENGINE TYPE: Kubota/v2403 as security for the said loan.

It is alleged by the plaintiff that, defendants did not honour the agreement for supplying three machines /equipment purchased by the plaintiff despite that money was credited in bank account of the 1st defendant. It is further said that, loan payment has turned due, but plaintiff has failed to pay because defendants did not honour their agreement. It is also said that, NMB Bank intends to dispose the aforementioned landed property to recover the loan advanced to the plaintiff.

Based on the foregoing, plaintiff demands physical delivery of the aforementioned equipment with their original cards containing their description particulars entered in the loan agreement. In addition to the

foregoing, plaintiff prays judgement and decree be entered in his favour and (i) defendants be ordered to pay TZS. 500,000,000/= being the recovery of the consideration and loss incurred, (ii) defendants be ordered to pay TZS. 150,000,000/= being general damages, (iii) interest at 8% from the date of judgement until final payment, (iv) costs of this suit and (v) any other relief(s) this honourable Court deems fit and just to grant.

It happened that defendants filed their written statement of defence but did not enter appearance in court. Due to non-appearance, on 5th September 2023, Mr. Dotto Bija, advocate for the plaintiff prayed the case be heard ex-parte, as a result, an order was issued to that effect. It is with that background, the case was heard ex-parte hence this ex-parte judgment.

When the case was called on for final pretrial conference and hearing, four issues were drafted and agreed namely, (i) whether there was an agreement between plaintiff and defendants, (ii) whether defendants breached the agreement, (iii) whether defendants are liable to pay the claimed amount to the plaintiff and (iv) to what relief (s) the parties are entitled to.

In proving his case, plaintiff (PW1) stated that, he resides at Kahole village within Msalala district. He also testified that he is a

businessperson dealing with mining of gold at Kahole village and Busulwagili village both within No. PML 0681 KHM(exhibit P1). He testified further that, in 2021, NMB officers visited him at his place of work and helped him to apply for a loan from NMB Kahama so that he can buy backhoe loader, dump truck and compressor. He added that, NMB Bank officials advised him to find a company that can supply the said backhoe loader, dump truck and compressor. He went on that, NMB Bank officials told him that the loan shall be transferred to the company and not to an individual or himself. PW1 stated further that, he entered a contract with NMB (exhibit P2) to be issued a loan of Three Hundred Fifty-One Tanzanian Shillings (TZS. 351,000,000/=) and that, the said loan was payable by instalments after three months of signing the contract. He added that amounts payable by installments was ranging from TZS. 48,000,000/= to 51,000,000/=. PW1 stated further that, he agreed with NMB Bank that, money for repayment of the said loan will be obtained from his use of the said backhoe loader, dump truck and compressor. He went on that, as collateral for the said loan, he surrendered certificate of title for his house at Buhongwa Mwanza and at Kahama street within Ilemela district in Mwanza region and was supposed to surrender original cards of the said backhoe loader, dump truck and compressor.

It was further evidence of PW1 that, in compliance with the directives of NMB Bank that he should find the company dealing with mining machines, he contacted his brother namely, Yohana Alfred Marwa who resides in Dar es Salaam so that the later can find the company that can supply him the machines he needed. He added that, the later informed him that he secured Sky Horse Group Co. Ltd(1st defendant) that is situated at Machimbo Dar es Salaam. PW1 went on that, on 26th November 2021, he was in Dar es Salaam verifying the 1st defendant has machines he needed and proved that she had. PW1 stated further that, while in Dar salaam, he agreed with Ally Sama and Mathias Bisendo, the directors of the 1st defendant that, (i) backhoe loader make JCD, model 777A yellow in colour with no registration number will be supplied at TZS. 112,100,000/=, (ii) dump truck make HOWO, red in colour, with registration No. T 135 DR will be supplied at TZS. 140,001,100/= VAT inclusive and that the same will be delivered within two months and handed over to him at Kahole village.

PW1 testified further that, after the said agreement with the defendants, he went back to NMB bank and informed them that he has secured a company that can supply him with machines. He went on that, 1st defendant gave him proforma invoice No. 225 and 225 valued at 112,100,000/= and 140,001,100/= (exhibit P3 and P4 respectively)

for the backhoe loader and dump truck respectively and sent them to NMB Bank. PW1 testified further that, NMB Bank contacted the 1st defendant and that the later verified the two proformer invoices (exhibits P3 and P4). PW1 went on that, on 30th November 2021, he signed withdrawal forms(exhibit P5 and P6) as a result, money was transferred to the bank account of the 1st defendant for purposes of purchasing the said backhoe loader and dump truck. PW1 testified further that, after transferer of money to the bank account of the 1st defendant, the later did not deliver the said backhoe loader and dump truck within two weeks. He added that, after failure of the defendants to deliver backhoe loader and dump truck, he reported to the NMB bank and the later wrote a letter(exhibit D7) to the 1st defendant and to himself (exhibit P8). He added that, defendants were supposed to deliver the said backhoe loader and dumper truck so that he can send original cards to NMB as collateral.

PW1 stated further that, after the defendants were served with exhibit P7, they sent him copies of the card for backhoe loader (exhibit P9) and a card for dump truck with registration No.T. 810 DPW while his dump truck was T. 135 DRC red in colour. He added that, defendants have failed to deliver the said backhoe loader and dump truck he ordered. He added that, in March 2023, while in Dar es Salaam, he had

a meeting with 2nd and 3rd defendants and one Frank, also a director of the 1st defendant and that, the said directors were ready to supply the said backhoe loader and dump truck but up to now, they have not. PW1 stated further that, he was expecting to repay NMB Bank loan by money generated by the said backhoe loader and dump truck. He went on that, because defendants have failed to deliver the said backhoe loader and dump truck, his business has stopped and has failed to repay the loan from NMB Bank. PW1 further stated that, due to stoppage of his business, he has secured more loans for his survival but interest on NMB Bank loan is growing up. He added that, on 3rd November 2023 NMB Bank informed him that, they will sale his property within two weeks.

In his evidence, PW1 prayed the court to order the 1st defendant to pay him TZS 500,000,000/= so that he can repay NMB Bank loan cover loss he has incurred for two years. He also prayed to be paid TZS 150,000,000/= being costs for this case and general damages. In his evidence, PW1 admitted that, both the agreement with the 1st defendant to deliver the said backhoe loader and the dumper truck and the March 2023 meeting in which defendants stated that they are ready to supply the said backhoe loader and dump truck was held in Dar es Salaam.

Testifying in support of the plaintiff's case, Yohana Alfred Marwa (PW2) the resident of Dar es Salaam being older biological brother of

the plaintiff, stated that in November 2021, PW1 contacted him over the phone and informed him that he has sought a loan from bank so that he can buy backhoe loader and dump truck for his mining activities. PW2 added that, with that information from PW1, he went to the office of the 1st defendant at Machimbo area Ukonga within Ilala district where he met Mathias Mwinga and Ally, the directors of the 1st defendant. He added that, the said persons showed him backhoe loader and dump truck, as a result, he informed the plaintiff(PW1) that he has secured the company.

It was further evidence of PW2 that, himself and the Plaintiff went to the office of 1st defendant in Dar es Salaam and entered an agreement with the defendants. PW2 stated further that, they agreed that defendants will sale to the plaintiff backhoe loader and dumper truck at the price of TZS. 112,000,000/= and TZS. 140,001,100/= respectively. PW2 added that, after the said agreement with the defendants, plaintiff went to Kahama to finalize loan process with NMB Bank. PW2 went on that, on 29th November 2021, NMB bank communicated to the 1st defendant that payment have already been effected by NMB Bank at Kahama to the 1st defendant. It was evidence of PW2 that, an agreement between the 1st defendant and NMB bank was done at Kahama.

It was further evidence of PW2 that, 1st defendant promised to deliver the said backhoe loader and dump truck within 14 days at Kakola Kahama. It was evidence of PW2 that, agreement between the plaintiff and the 1st defendant was done at Kahama but the later have not delivered the said backhoe loader and dump truck. PW2 stated further that, due to that failure, Plaintiff has failed to repay the loan because he is not producing. He added that, plaintiff has failed to send his children to school and has been notified by the bank that his property will be sold within 14 days.

In his evidence, PW2 prayed the court to order the 1st defendant to repay the NMB Bank loan. He further prayed that, the Court should issue an order stopping NMB Bank from disposing plaintiff's property that he surrendered as collateral. In his evidence, PW2 also admitted that NMB bank is not part to this case.

After closure of plaintiff's case, the court asked counsel for the plaintiff to submit whether the court has jurisdiction over the matter or not.

Responding to the jurisdictional issue raised by the court, Mr. Baraka Dishon, learned counsel for the plaintiff submitted that, the Court has jurisdiction because initial and final agreement was held at Kahama. He submitted further that, Sky Horse Group Co. Ltd, the 1st defendant,

came to Kahama to conclude price and verify that they can be paid upon delivery of the said backhoe loader and dump truck. He added that, while at Kahama, plaintiff sent the defendants to NMB bank at Kahama. He submitted further that, after their agreement while in Kahama, plaintiff consented to the bank for transfer of money to the 1st defendant and that the said transfer of money was witnessed by the parties. Learned counsel for the plaintiff concluded that, had the initial and final agreement done in Dar es Salaam, plaintiff could have filed this suit in Dar es Salaam.

In order to beef up submissions on jurisdictional issue, Mr. Dotto Bija, learned counsel for the plaintiff submitted that, PW1 testified that prior to go to Dar es Salaam, he communicated with PW2 and Sky Horse Group Co. Ltd and that, defendants sent photo of the said backhoe loader and dump truck to the plaintiff through WhatsApp. He submitted further that, defendants went to Kahama and presented proforma invoices and thereafter the parties entered a contract while at Kahama. In his submissions, Mr. Bija conceded that plaintiff did not tender the contract between the parties showing that the said contract was entered while at Kahama. He concluded that, invoices and phone communication are the ones that led to bindingness of the contract between the parties.

I have considered evidence that was adduced in support of the case by the plaintiff and submissions by both Mr. Dishon and Mr. Bija, learned counsel for the plaintiff on the jurisdiction issue that was raised by the court. In disposing this case, I will therefore, start with jurisdiction issue before discussing issues that were drafted and agreed by the parties.

It is clear from evidence of the plaintiff(PW1) that, prior to entering in agreement with the defendants, he communicated with PW2 for the later to find a company that can supply him backhoe loader, dump truck and a compressor. Evidence by PW1 clearly shows that the agreement with the defendant was entered while in Dar es Salaam and that delivery only was to be done in Kahama. PW1 said nothing in relation to entering in agreement with the defendants while in Kahama. In fact, evidence of PW1 is corroborated with that of PW2 that the agreement was entered while in Dar es Salaam. According to PW2 it is the contract between plaintiff and NMB Bank that was concluded in Kahama. The contract between plaintiff and NMB Bank has nothing to do with the case at hand because, NMB Bank is not a party to this case.

Submissions by Mr. Bija learned advocate for the plaintiff in support that the court has territorial jurisdiction over the matter cannot be valid. Throughout his evidence, PW1 did not state that while in

Kahama he communicated with the defendant for this court to hold that phone communication between the plaintiff and the defendant led to existence of a binding contract between the two. More so, submissions by Mr. Bija that photos of the said backhoe loader and dump truck were sent to the plaintiff by the defendants through WhatsApp message is not supported by evidence on record.

Again, submissions by Mr. Dishon that initial and final agreements were held at Kahama and that, defendants went to Kahama to conclude price and verify with NMB Bank that they can be paid upon delivery of the said backhoe loader and dump truck is not supported by evidence on record. Similarly, submissions that plaintiff took the defendants to NMB bank at Kahama where they signed an agreement and witnessed transfer of money into their account is not supported by evidence on record.

What was submitted by both counsel to convince the court to hold that the dispute arose within its territorial jurisdiction are mere submissions from the bar, which, at any rate, have no evidential value. This court cannot take those submissions from the bar as evidence. In fact, there is a litany of case laws that, submissions are not evidence. See the case of [Bruno Wenceslaus Nyalifa vs Permanent Secretary Ministry of Home Affairs & Another](#) (Civil Appeal 82 of

2017) [2018] TZCA 297 Tanzlii, [2018] T.L.R. 58 [CA], **Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman, Bunju Village Government & 11 Others**, Civil Appeal No. 147 of 2006, [Drtc Trading Company Ltd vs Malimi Lubatula Ng'holo & Another](#) (Civil Application 89 of 2020) [2022] TZCA 352(unreported), [Attorney General vs Mkongo Building & Civil Works Contractors Ltd & Another](#) (Civil Application 81 of 2019) [2019] TZCA 229 Tanzlii, [2019] 1 T.L.R. 109 [CA], [Zuberi Athumani Mbuguni vs National Bank of Commerce Limited](#) (Civil Application No.311/12 of 2020) [2023] TZCA 17290 (unreported), to mention but a few. In the **Bunju Village case** (supra) it was held:-

" ... submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."

In [Mkongo's case](#) (supra), the Court of Appeal held *inter-alia* that:-

"...information being synonymous to oral evidence could not by any means be established by mere submission by the learned counsel from the bar."

It is my view that, if counsel for the plaintiff knew that, what they submitted was actually what happened, of which it is not, then, they

were supposed to lead plaintiff to state so in his evidence. Since plaintiff testified that an agreement with the defendants was entered while in Dar es Salaam and there is nothing showing presence of the defendants in the territorial jurisdiction of this court, I hold that, this case was filed in a wrong jurisdiction. It was correctly conceded by Mr. Bija that plaintiff did not tender the contract he entered with the defendants. In my view, the said contract would have shown as to when and where the agreement between the two was entered. Evidence of PW1 shows that the initial and final agreements were done in Dar es Salaam, therefore, plaintiff was supposed to file his case in Dar es Salaam, the area where the cause of action arose. My conclusion is fortified by what was held by the Court of Appeal in the case of [Abdallah Ally Selemani t/a Ottawa Enterprises \(1987\) vs Tabata Petrol Station Co. Ltd & Another](#) (Civil Appeal 89 of 2017) [2019] TZCA 310 Tanzlii, [2019] 1 T.L.R. 1 [CA] that:-

*"...We firmly think that only suits for immovable property were meant to be filed within the local limits in which such properties are situated. **Any other suits as provided under section 18 of the CPC are to be filed where the cause of action arose or where the defendant resides or works for gain.**"* (Emphasis is mine).

For all discussed hereinabove, I find that the court has no jurisdiction. For that reason, I will not discuss merit or otherwise of

evidence of both PW1 and PW2 pointed hereinabove. In the upshot and for the foregoing, hereby strike out this case for want of jurisdiction. Costs shall be borne by each party.

Dated at Shinyanga on this 14th November, 2023.



B. E. K. Mganga
JUDGE

Judgment delivered on this 14th November 2023 in chambers in the presence of Baraka Dishon, Advocate for the Plaintiff and Chrisantus Chengula, Advocate holding brief of Onesmo Stambuli, Advocate for the Defendant.



B. E. K. Mganga
JUDGE

