

IN THE HIGH COURT OF TANZANIA
AT TANGA
CIVIL APPEAL NO.23 OF 2007
(Originating from civil case No.29/05 of
District Court of Tanga)

TANGA CEMENT CO.LTD.....APPELLANT

VERSUS

FURAHU ENGINEERING LTD.....RESPONDENT

4/2/09 & 30/4/09

JUDGMENT

Mussa, J;

This appeal originates from a decision of the Resident Magistrate's Court of Tanga comprised in civil case No.29 of 2005. The respondent, a private Limited company, was the plaintiff there, whereas, the appellants, also a private legal entity, stood as the defendant. The claim was for payment of a total sum of shs.63,758,760/= plus general damages and interest; allegedly, made up of services rendered and unpaid for. The appellant, on the main, denied the claim in a monumental reply into which were also comprised a set off and a counter-claim. Upon full enquiry, judgment was handed down in favour of the respondent and; as it were, the set off and counter-claim were thrown overboard. Dissatisfied, the appellant is now appealing upon a petition comprised of five grounds. At the hearing, the appellant had the services of Dr. Nguluma, learned advocate, whereas, the respondent was resisting through Mr. Waisaka, also learned advocate. A lot was said either in support of the points of grievance or to counter them but; as is customary, I should first explore the factual setting.

To testify in support of the claim was Moshi Polnad Mbuyambuye (PW.1), Managing Director of the respondent, who spoke of his company rendering engineering services to the appellant on various dates between the 18th day of May, 2005 and the 10th day of August, 2005. Supportive tax invoices making up

to the claim were collectively produced and marked exhibit P.1. The Managing Director, would further suggest that, at the height of the claims, an appellant Financial Manager, rather, contemptuously refused to honour payments and; hence the suit giving rise to this appeal.

This claim, the appellant did not quite dispute, as it were, conceding to having procured engineering services from the respondent but; as to what the claims are conceived about, I will let a portion of the written statement of defence speak for itself, and it is an extract from paragraph 11:-

*In this connection as of 15th September, 2005 when the suit was filed,
The amount due and owing to the plaintiff as per Tax invoices raised was
Tshs.63,758,760/= which amount is already settled through payments
Made by the Defendant to the plaintiff on account of double invoicing
By the plaintiff.*

So, the appellant does not, additionally, dispute the amount raised in the claim only the same are counter-claimed, allegedly, upon over invoicing, out of which, it was expected, the appellants would have been entitled to a set-off. As to the particulars, of the set-off and the counter-claim, again, paragraphs 12 and 13 are called into aid:-

*12. In the premise, the Defendant is entitled to a set-off on the overpaid
amount of Tshs.122,080,968.00 against the liability for Tshs.63,758,760/=*

13. By way of counter-claim the Defendant repeats its defence herein.

The Defendant therefore counter-claims:

*1. The sum of Tshs.58,325,208.00 being amounts paid to the plaintiff
as per paragraph 11 herein for no lawful consideration.*

2. Interest at commercial rate of twenty (20%) percent per annum.

I shall soon revert to a consideration as to what this so-called set-off and/or counter-claim is all about. In the meantime, let it be said that the

appellant went to painful details in the written statement of defence to elaborate how this amount of shs.122,080,968/= was fraudulently paid to the respondent. Three witnesses were featured by the appellant, if anything, to testify in support of this double invoicing allegation. but; as hinted upon, the learned trial Magistrate was disinclined and judgment was entered in favour of the respondent.

The appeal is upon an array of points of grievance which were thoroughly canvassed by both counsel but; my considerable anxiety is upon the set-off and/or counter-claim raised. That travels us aback to afford it a more deserving consideration. To start with, although the appellant claimed in the written defence that it was counter-claiming a sum of shs.58,325,208.30; that figure can only be arrived at upon subtracting the respondents' claim from the sum of shs.122,080,968.00, allegedly, made up of over invoiced claims. The actual state of affairs is that, if the trial court were to grant the appellants' claims; it first had to consider and accept the double invoicing claims amounting to a sum of shs.122,080,968/=. Essentially, therefore, the counter-claim was for a sum of shs.122,080,960.00 from which the respondents claim was sought to be set-off and; which is where the catch lies. Granted; a defendant who has a claim against the plaintiff for a sum exceeding the plaintiffs' claim can assert that claim by way of a set-off and counter-claim provided, inter alia; the amount is within the pecuniary jurisdiction of the court in which the suit is brought (**J.A. Dias V. Ahmed Salum Swedan (1960) EA 984**). It is commonplace that in terms of section 40(2)(b) of the Magistrates' Court Act, as amended by Act No.25 of 2002, the pecuniary limit of a District Court upon a proceeding in the nature of the present is one hundred million. Clearly, therefore, the court below was not properly seized to adjudicate on the set-off and/or counter-claim.

To me the pecuniary limit of the jurisdiction of a court stands on a critical footing much as it goes to the very root of the competence of a court to try the matter and; where a matter is beyond the pecuniary limit, it is essentially one to which the court is incompetent to venture upon. Needless to have to beat about

the bush, the set-off and counter-claim being beyond the pecuniary limits of the trial court; was one into which the court incompetently ventured into. What the trial court ought to have strictly done with respect to it, of which I do, was to have it struck off. Now, without the set-off and counter-claim the respondents' claims stand uncontested and; indeed, there are no valid grounds upon which to fault the decision below. The appeal is dismissed with costs. Order accordingly.

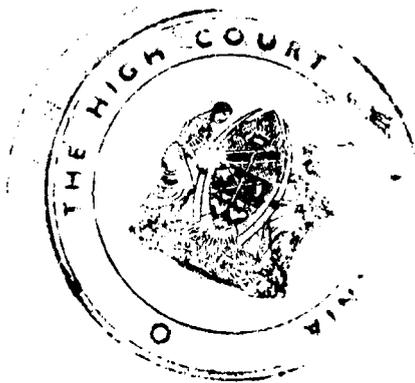

K.M. MUSSA, J.
16/04/2009

Coram: Mussa, J;

For the appellant: Absent

For the respondent: Mr. Waisaka

Judgment delivered in the presence of advocate for the respondent.




K.M. MUSSA, J.
30/04/2009.