

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL CASE NO. 159 OF 2019

SAID MGANGA.....	1ST PLAINTIFF
MDOE ALLY	2ND PLAINTIFF
ATHIMANI HASSAN	3RD PLAINTIFF
SELEMANI SEIF	4TH PLAINTIFF
ALEXANDER LWALA	5TH PLAINTIFF
SAIDI SHAHA	6TH PLAINTIFF
THOMAS MKEKA.....	7TH PLAINTIFF
PETER NGONYANI	8TH PLAINTIFF
HUSSEIN ISSA	9TH PLAINTIFF
FRANK	10TH PLAINTIFF
YASMIN RAJABU	11TH PLAINTIFF
OMARI NDEDELE	12TH PLAINTIFF
HALIMA SHINYAMBALA	13TH PLAINTIFF
LEONARD HAULE	14TH PLAINTIFF
NESTOR CHIMBUGA	15TH PLAINTIFF
WILSON BURTON	16TH PLAINTIFF
ABDALLAH AYUBU	17TH PLAINTIFF
SAID JOHARI	18TH PLAINTIFF
BUTALO KIVUGO	19TH PLAINTIFF

KASIMU SOZIGWA20TH PLAINTIFF

JUMA SAIDI21ST PLAINTIFF

VERSUS

JETHRO TURYAMWESIGADEFENDANT

Date of last order: 18/03/2022

Date of Judgement: 05/05/2023

JUDGEMENT

L. E. MGONYA, J.

This is the one of those cases where clients are seriously suspecting their Advocate for malpractice. The plaintiffs herein are suing the Defendant for acting without their consent by entering into Settlement deed with TANROADS of **Tshs. 298,000,000/=** as a total terminal benefit for work they did while working with TANROADS in a Road Project Phase IV (Dar Es Salaam- Kibiti Road). And the same money has not been advanced to them up to this moment.

The brief facts to this case is that, the Plaintiffs were employed by TANROAD to construct the road from Dar es Salaam to Kibiti. It is claimed that TANRODS failed to pay them their final benefits accordingly, hence they hired the Defendant to represent them in various matters against TANROADS including the **Revision No. 47 of 2008** which was determined by the **High Court of**

Tanzania, Labour Division at Dar es salaam and which it appear the matter end up in settlement.

The Plaintiffs under this suit prays for the judgment and decree against the Defendant as follows:

- a)The defendant to pay compensation of Tshs. 298,000,000/=to the Plaintiffs as the amount which was given to the Defendants by TANROADS;***
- b)Payment of general damages as shall be determined by the court;***
- c) Costs of the suit be paid to the plaintiff;***
- d)Any other relief (s)as this honourable court shall deem it for to grant.***

According to paragraph 5, 7 and 8 of the Plaint, the Plaintiffs' claims that, the settlement money of **Tshs. 298,000,000/=** are their intitles as terminal benefit from their former employer TANROADS and they hired Defendant to represent them. As indicated above, the matter ended in settlement deed. According to them, the settlement amount was **Tshs. 298,000,000/=**. However, the same has not been availed to them. Furthermore, the Defendant did not seek their consent to settle the suit. The Settlement Deed was done and they were not being informed over the said progress. That they came to realize that information when

they were making follow-up direct to TANROADS and that is when they were informed about Settlement Deed and the same amount being received by Defendants on their behalf.

It has been allowed further that, Plaintiffs tried every means to gain their payment from the Defendants including filing complaint to different authorities namely Tanganyika Law Societies (TLS) and to Executive Leaders among them being, the President of the United Republic of Tanzania. Henceforth they were advised to file this suit in court of law.

On his Written Statement of Defence particularly paragraph **3, 4, 5** and **6**. The Defendant denied to have received Settlement Deed amounted to **Tshs. of 298,000,000/=** from TANROADS as claimed by the Plaintiffs. On his defence he claimed the amount settled was **Tshs. 18,594,326** as per the order of the court. And according to him there were 280 Plaintiffs in **Revision No. 47 of 2008** before the High Court who were represented by two representatives from the Plaintiff's group who were always attended court session. And they were aware of the settlement and acknowledge the receipt of the Settlement amounted to **Tshs. 18,594, 326**.

On the date of hearing this matter, Plaintiffs were represented by advocate **Hashim Mziray** and Defendant was represented by Advocate **John Chogolo**. When the plaintiffs

case was open, they had two witness namely **Said Mganga (PW1)** and **Athuman Hassan (PW2)**. And the following exhibits were tendered during Plaintiff case, **Exhibit P1** which is complaint letter to TLS and **Exhibits P2** which is which is a letter to TANROAD drafted by the Defendant as proof of engagement.

According to **(PW1)** Said Mganga testimony, that they were employed by TANROADS to work on **Dar es Salaam-Kibiti** Road Project and the same was finalized on **2008**. TANROADS failed to pay them their last entitlement hence they seek the service of the Defendant and engaged him for legal representation on claim against their former employer. Due to lack of information on progress of their case, they decided to go to TANROADS and that is when they were informed about the Settlement Deed done by the Defendant in their absence. That is when they decided to go after Defendant for their entitlement and failed amicably hence, they took the matter to different Authorities until it reached this court.

During cross examination PW1 told the court that, Defendant represented them in two case. The 1st case was of **Tshs. 18,000,000/=** and the second case was on

transportation to their respective homes which was **Tshs. 200,000,000/=**.

Those two cases were of **2006** and **2008** respectively. Furthermore, he was not sure if the **Tshs. 298,000,000/=** was received by the Defendant as settlement money for their case. And he acknowledges to have known **Deogratus Justice** and **Almas Mdoe Kijangwa** as the ones nominated to follow-up the case against TANROADS on their behalf.

Further **(PW2)** Athuman Hassani testimony was not far from PW1 that they employed Defendant through **DOMINIC KASHUMBUGU & CO. ADVOCATES** to represent them on matters against TANROADS. During Cross examination he denied to have gone to TANROADS or witness the amount paid during settlement.

When Defence case was open, the Defendant brought two witness as who were **Jethro Turyamwesiga (the Defendant himself)** as **DW1** and Paul John Mnkai as **DW2**. Furthermore two exhibits were admitted for defence namely **Exhibit D1** which is Exparte Judgement from District Court of Temeke in Employment Cause No. 14 of 2006 and **exhibit D2** which is Drawn Order on **Revision No. 47 of 2008** before the High Court.

According to **DW1** Jethro's testimony, he stated that in 2008 he came before this court before Hon. Makuru J. and that is when Deogratus Justice and Almasi Mdoe Kijangwa approached him seeking for legal representation that they had before the same Judge and would like to be represented by him. They showed him the papers and it was **Civil Revision No. 47 of 2008**. He agreed to their request and they paid him **Tshs. 300,000/=** as consideration. And he went on representing them until it was shifted from Makuru J. to Mruke J.

The witness further testified that, it appears that the said Revision originated from the Temeke District Court Decision in Employment **Cause No. 14 of 2006 which was Deogratus Justice and 120 others against Project Manager Dar es Salaam – Kibiti Road** where the plaintiffs who won a decree of **Tshs. 23,000,000/=**. It is from there TANROAD decided to file Revision against it and that is when the matter reached the High Court. Dw1 informed the court that before the High Court it was settled for **Tshs 18,000,000/=** and the Settlement was between Representatives of the Plaintiffs who was **Deogratus Justice** on behalf of 280 and the Manager Dar es Salaam - Kibiti Project. It was further testified by DW1 that, Deogratus was with Almasi Mdoe Kajagwa representing others. After the

said settlement, it was ordered the said amount be paid through the Defendant and distribute the said money through to all 280 Employees or through their representative. Moreover, it is said that, after the said order DW1 filed affidavit that the said money be paid to Deogratius and Almasi on behalf of others. The settlement was finalized on 2012. Since then, he was surprised to have been called by Tanganyika Law Society for failure to pay the workers while in his knowledge it was paid through their representatives.

During cross examination **DW1** stated that many files have been destroyed so he has no record of the case expect that is in court's files and during the entire case proceedings, he was dealing with the two representatives only.

According to **(DW2)** Paul John Mnkai's testimony, he stated that being the clerk of the Defendant's office he witnessed what transpired in **Revision 47 of 2008** before the High Court. In his testimony he said there were two persons representing others in the case against TANROADS and he witnessed to have seen the representatives being handled over **Tshs. 18,000,000/=** as Settlement for the suit.

Having gone through the pleadings and the above evidences, I will thus proceed to determine the instant suit on the basis of the matters I have identified above.

It is trite law that whoever desires a Court to give Judgment in his/her favour, he/she must prove that those facts exist. This is provided under **Section 110 (1) (2) and 112 of the Evidence Act, Cap. 6 [R. E. 2019]**. These provisions place the burden of proof to whoever desires the court to give judgment as to any legal right or liability dependent on existence of facts which he/she ascertain. In the case of **ANTHONY M. MASANGA VS. PENINA (MAMA MGESI) AND LUCIA (MAMA ANNA), CIVIL APPEAL NO. 118 OF 2014 CAT** (Unreported), it was held that the party with legal burden also bears the evidential burden on the balance of probabilities. Also, in the case of **HEMED SAID VS. MOHAMED MBILU (1984) TLR 113**, it was held that:

"According to the law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win"

It is also settled law that parties are bound by their own pleadings and that a party shall not be allowed to depart from his pleadings to change its case from what was originally

pleaded. This presupposes that a party should parade evidence to prove or support what he has pleaded. See ***Agatha Mshote vs Edson Emmanuel & Others (Civil Appeal No. 121 of 2019) [2021] TZCA 323; (20 July 2021 TANZLII)***.

As indicated above, the law requires that whoever alleges must prove. On the record, the evidence available for the court to determine do not go far from witness testimonies and exhibits tendered before this Court which are **Exhibit P1** the complaint letter to TLS, **Exhibits P2** a letter to TANROD drafted by the Defendant as proof of engagement. Further for the Defendant there is **Exhibit D1**, Exparte Judgement from District Court of Temeke Employment **Cause No. 14 of 2006** and **Exhibit D2** which is Drawn Order of the High court on **Revision No. 47 of 2008**. These are the available evidences for determination.

I am aware that before the trial commence, four issues were framed. However going through the said issues, I am very convinced that the main issue for determination over this suit is whether there was a Settlement Deed and Order reflecting the claimed amount of **Tshs 298,000,000/=**. Since there is no dispute that the plaintiffs engaged the Defendant for legal representation on the matter against TANROADS in my opinion the main issue remains for determination is **whether there was a Settlement Decree** as mentioned above.

According to the matter at hand, the only evidence comes to an aid of this Judgment are the proceedings of the courts that led to the Settlement Order. It is from the evidence before this court that The Plaintiffs herein Claims **Tshs. 298,000,000/=** being amount settlements amount arose from the **Revision No. 47 of 2008**. Going through the said order of the court which is **Exhibit D2** without labour much, there is no doubt that the **REVISION NO. 47 OF 2008 BETWEEN THE PROJECT MANAGER OF DAR KIBITI ROAD VS DEOGRATIUS JUSTICE AND 280 OTHERS** ended in settlement. However, the said amount which Plaintiff herein are claiming is not reflected. For the purpose of understanding I feel the need to reproduce the said Order dated **13th February 2012** as hereunder:

"And whereas the parties agreed to settle the matter as follows.

a. Amount payable to the Employees. The Employer hereby agrees to pay the employees the total amount of Tshs. 18,594,32/= in full satisfaction of the entire claim and the same shall be acknowledged its receipts by signing this deed by the advocate and the employees

'representatives who were authorized to represent the rest of the employees.

b. Mode of payment; the full amount shall be paid by the employer and in the manner desirable for him to the employee's representative above named and this payment and acknowledgement will discharge the Employer from any liability arising after payment in relation to the subject matter of this suit.

c. Final and Conclusive: upon the receipt of that payment from the employer. Both parties shall cause the signed deed of settlement to be filed in court and the filing will finally conclude this case. The employer shall not be liable in the manner the payment reaches respective employees in so far as payment was made to their counsel on their behalf.

d. Undertaking by the counsel: the counsel hereby undertakes to distribute or their representatives as shall be directed or as the case may be....

THE COURT DOTH HEREBY ORDER THAT

1. The matter is hereby marked settled in terms of deed of settlement dated 31/01/2012 and filed on 13/02/2012.

2. Decree to be issued in terms of deed settlement”

As indicated above, ***Civil Revision No. 47 of 2008*** originated from ***Employment Cause No. 14 of 2006*** where Plaintiffs claimed ***Tshs. 23, 955, 590/=*** which is unpaid wages by Defendants by then the Project manager Dar- Kibiti Road since the suit was uncontested the Plaintiffs were awarded the said amount by the Temeke District Court. Being aggrieved by the said Award, the Defendant to the Suit filed Revision before the High Court hence the above settlement order. There is nowhere on record that prove the amount of settlement order apart from **Exhibit D1 and D2.**

Having gone through the evidence in record, I am on opinion that claimed amount of **Tsh. 298,000,000/=** as settlement was not proved. that the said amount was informed by TANROAD to Plaintiffs lacks strength since there is no back up proof to the said claim. In addition to that , the Plaintiffs have failed to prove even by bringing any witness from TANRODS to prove the said allegation regarding the claimed settlement which could exonerate **Exhibit DI and D2.** It is my opinion that The claim amount remains to be speculation with no justification.

Since the Plaintiffs have failed to provide a sufficient proof on the existence of Settlement Decree by the Court amounted to **Tshs. 298,000,000/=** claimed under this suit. On the way forward, I find no better guidance than the instructive decision of the Court of Appeal in **AGATHA MSHOTE VS EDSON EMMANUEL & OTHERS** (Supra) where the Court (Mugasha J.A)

" view of what we have endeavoured to discuss, the appellant failed to prove her case on the balance of probabilities and It cannot be safely vouched that she had discharged the burden as required under section 110 of the Evidence Act. That said, since the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges that burden, as earlier stated, the weakness of the respondents' case. If any, cannot salvage the plight of the unproven appellant's case. In our considered view, we agree with the manner in which the trial Judge addressed the second issue as to whether the respondents had trespassed into the land in disputed. We are fortified in that account because since

the burden of proof was on the Appellant and not the respondents, and in the event she did not discharge the onus, the credibility of the respondents' account was irrelevant"

Further, I have gone through the evidence of the Plaintiffs who claimed that Defendant entered in Settlement Agreement with TANROADS. Unfortunately, I could not find any evidence to prove their claim. Unfortunately, there is no any other independent or any other corroborative evidence to back up their claims that the said settlement was made by Defendant in respect of the said amount. In absence of any other corroborative evidence or documentary evidence to prove the claim, how does the court believe to its satisfaction that the Plaintiff's claim is valid?

That being the case, it is the finding this of **this Honorable court that the Plaintiffs have not managed to prove their case on balance of probability as the Plaintiff's evidence appears weaker to that of the Defendant.**

On the foregoing, the **Suit is dismissed with costs for want of sufficient evidence.**

It is so ordered.

Right of Appeal explained.



L. E. MGONYA

JUDGE

05/05/2023

ORIGINAL