IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MUNUO, J.A., KIMARO J.A., And MJASIRI, J.A.)

CIVIL APPEAL NO 29 OF 2012

KALYANGO CONSTRUCTION AND BUILDING CONTRACTORS LIMITED......................................APPELLANT

VERSUS

CHINA CHONGQUING INTERNATIONAL CONSTRUCTION CORPORATION (CICO)............................RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Tabora)

(Kaduri, J.)

dated 4th October, 2011

in

Civil Case No. 5 of 2004

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JUDMENT OF THE COURT

14 & 23 May, 2012

KIMARO, J.A.:

The parties in this appeal are both construction companies. In the year 2003 both had agreements with the Regional Manager, TANROADS KIGOMA, for construction of a road. The appellant's agreement was for Spot Improvement of the Mwandiga –Manyovu Trunk Road. The respondent on the other hand was engaged to construct a road from the

Burundi border to Mnanila. The appellant's agreement commenced on 3rd June and the contract had to be completed on 11th August, 2003. What the appellant had to do was road reshaping by drainage and covering the road surface with gravel. The work had to be done on a stretch of 5.5 kilometres.

The appellant who was the plaintiff in the trial court sued the respondent in the High Court as the defendant for the tort of conversion. The plaintiff averred in the plaint that after the execution of the contract with TANROADS, it started the work immediately. However, given the geographical location of the area in which the road under construction was located which was hilly, the plaintiff obtained with difficulty gravel for covering the road surface from the neighbouring country of Burundi. The plaintiff secured a bowl pit for extraction of gravel material at MGINA area in Burundi and it was sufficient for covering the whole road. The gravel was dug up and preserved at the plaintiff's highest price and costs because by then the plaintiff was still reshaping the road. It is averred further that the respondent through its servants or agents tortuously and by personating themselves at the Tanzania /Burundi border to the watchman at the bowl pit as belonging to the plaintiff's company exhaustively carried

away the said gravel material fraudulently and converted the same for the defendant's use in its own part of the road construction and benefits. According to the plaintiff, the defendant's tortuous act of conversion of the gravel made the plaintiff fail to complete the work within the contract period. Although the defendant promised to pay for the gravel it never honoured that promise. Consequently, the appellant failed to complete the contract in time. This failure made the Regional Manager TANROADS KIGOMA to cancel the plaintiff's contract. It was then that the plaintiff filed a suit in the High Court of Tanzania against the defendant /respondent claiming for:

(a) Payment of compensation of Tshs. 113, 292, 800/= for loss of income and profit accrued from the rescinded contracts.

(b) Payment of general damages of Tshs. 100,000,000/=

(c) Payment of interest at the court rate of 13% over decretal amount from the date of the judgment to the date of payment in full.

(d) Costs of the suit.

(e) Any other relief(s) as the Court will deem fit.

In the High Court the trial proceeded exparte after the respondent failed to file the written statement of defence within the twenty one days incompliance with Order VIII of the Civil Procedure Code 1966, as amended by Government Notice No. 422 of 1994. He also failed to request for an extension of time to file the same, in accordance with the said Order.

The evidence that was led in the trial court to support the plaintiff's case was that the gravel was bought for Tshs. 2, 500,000/=. Explaining why he failed to move the materials from the bowl pit to the construction site and preserve the materials there, PW1, Haidar Kassoma Kalyango, the Managing Director of the appellant said he was prevented from so doing because of rains. However, the problem was brought to the attention of the Kigoma Regional TANROADS Manager who agreed to extend the contract until after the rains were over. No evidence was led to show when exactly the work would be resumed for completion after the rains.

PW1 said he was also given another contract by the same authority/ institution for another road from Kibondo to Mabamba and Kakonko to Nyaronga. The first contract was for Tshs. 78, 270,000/=and the second one for the Kibondo road was for Tshs. 35,032,000/= and it was to be concluded between 3rd November, 2003 and 15th November, 2003. PW1 said because of his default to complete the construction of the road as agreed in the first contract, he was served with a notice for the termination of the contract. Explaining the loss his company suffered because of the termination of the contract, PW1 said he was not able to carry on the second contract because he was forbidden by clause 8 of the contract to move the working equipments namely grader, roller, 2 tippers, water browser with its pump and excavator from the Mwandiga-Manyovu road to the Mabanda road. This led to the cancellation of the second contract as well. According to PW1, the equipments were hired from BECCO for Tshs. 45,000,000/=. He also said that he had incurred Tshs. 20,000,000/= for transportation, Tshs. 11,739,000/=, a loan from the CRDB, Tshs. 5,500,000/= for fuel, Tshs. 3,500,000/= for hiring two motor vehicles from HABITAT, and Tshs. 4,000,000/= for hiring two motor vehicles from Feruzi and Bakunda and another Tshs. 7,200,000/= for buying fuel from Kihaga. This witness tendered in court various

documents to support his case. The first TANROADS contract was admitted as exhibit P1, the second one exhibit P2, notice and letter of termination of the contracts were admitted collectively as exhibits P3, agreements for hiring equipments exhibit P4, documents for hiring vehicles and paying labourers exhibit P5.

Further evidence to support the appellant's case came from No. C 1569 S/SGT Cleaphace PW2. His short evidence was that PW1 went to the Police station to complain about the conversion of the gravel by the defendant. He said in his investigation, one Long You of the defendant's company admitted taking the gravel and using it for the construction of the portion of the road the defendant was constructing and he promised to pay for the same. However, the said Young You never kept his promise. PW1 reported back to the police but this time he was advised to report the matter to TANROADS Kigoma. It was unfortunate for PW1 because he could not rescue the situation as the contract was terminated.

The watchman at the site where the bowl pit and the excavating machines were located was Mpilipili Harisson. He testified as PW3 that

some Chinese men went to that place and informed him that they were allowed by Kalyango to take the gravel. They went with their excavator and carried all the gravel from the site. The witness said he believed that they were genuinely sent by Kalyango because the Chinese men went to the site in April 2004 after Kalyango had visited the site with them in March 2004.

An employee of the respondent, one Seleman Hassan Butwengo (PW4) who was the driver of the defendant confirmed that the respondent did take the gravel from the plaintiff's bowl pit and took it to the construction site of the respondent. This was done after he had visited the same site earlier on. According to the witness, the gravel was carried for ten days.

The last witness for the plaintiff was Abnery John Mbago (PW5), a Supervisory Engineer of the appellant. His short evidence corroborated that of PW1 in respect of the contracts the plaintiff had with TANROADS, the failure to complete the same, the termination and the loss allegedly suffered by the plaintiff.

From that evidence the learned trial judge held that the plaintiff did not prove on the balance of probabilities that the contract was terminated because the respondent took his gravel. His reasoning was that the first contract was to commence on 3rd June , 2003 and was to be completed by 11th August, 2003. The notice for the termination of the contract was given on 29th April, 2004 while his complaint to the police was lodged on 24th July 2004 after the expiry of the contract period. The suit was then dismissed with costs.

Aggrieved by the decision of the High Court the appellant is before the Court with two grounds of appeal framed as follows:

1. That the learned trial judge misdirected himself in fact and in law in holding that there is no evidence to hold the defendant liable for the breach of the contract that was terminated by TANROADS.

2. That having regard to the totality of the evidence on record, the learned trial Judge misdirected himself in law and in fact in failing to find for the Appellant.

At the hearing of the appeal the appellant was represented by Mr. Method R.G. Kabuguza, learned advocate. He was also the one who represented the appellant in the trial court. The respondent was not present. Service could not be effected through the last address that was given for service. The hearing of the appeal before us proceeded exparte apparently because in the trial court the proceedings were conducted exparte . Earlier on the suit was heard inter-partes in the High Court but it was dismissed. (Mujulizi, J.). Aggrieved by that decision of the High Court, the appellant filed Civil Appeal No. 85 of 2009. The appeal was found defective on the ground of defective record. However, the Court using its powers of revision under section 4(2) of the Appellate Jurisdiction Act, [CAP 141 R.E. 2002] , remanded the case to the High Court for hearing the case exparte after noting the respondent's failure to comply with the provisions of Order V111 of the Civil Procedure Code 1966 as afore said. As already indicated, after the trial was conducted exparte, the appellant lost the case again.

In compliance with Rule 106(1) of the Court of Appeal Rules 2009 the learned advocate for the appellant filed written submissions to support his appeal which he adopted during the hearing of the appeal.

Expounding on the submission which he filed, the learned advocate for the appellant said issues arising from the appeal are three. One, whether on the strength of the evidence on the record, the tort of unlawful conversion was proved by the plaintiff/ appellant against the Defendant/ Respondent. Two, whether on the strength of the evidence on record the Respondent /Defendant is legally liable for the consequences emanating from termination of the Appellant's contracts. Three, whether the plaintiff/Appellant is entitled to the claimed or any compensation, general damages and other relief as prayed for in the plaint on account of its suit gravel materials being unlawfully converted by the Respondent.

On the first issue the learned advocate for the appellant submitted that there is cogent evidence to prove that the tort of conversion was committed. He referred the Court to the evidence adduced in support of the appellant's case and said that it sufficiently established the tort of

conversion. He urged the Court to find that the tort of conversion was proved.

The position of the law on proof of cases is given in section 110(1) of the Law of Evidence Act [CAP 6 R.E.2002] which provides thus:

> *"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."Section 110(2) says 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 appellant was the one who sued the respondent. Regardless of whether the matter preceded exparte or not, he had the duty of proving the case against the respondent on the standard required.

The first issue framed requires the Court to determine whether the tort of conversion was proved. Unfortunately the learned advocate for the appellant did not give us the definition of what constitutes the tort of conversion.

Conversion is defined in Winfield and Jolowicz on Tort Tenth Edition by W.H.V.Rogers at page 412 as follows:

> *"Any act in relation to the goods of a person which constitutes an unjustifiable denial of his title to them...dealing with goods in a manner inconsistent with the right of the person entitled to them, and an intention in so doing is to deny that person's right or to assert a right which is inconsistent with such right."*

The evidence that was led to prove the conversion was that the respondent went to the site where the gravel was excavated and loaded it in his lorries after the respondent reported to the appellant's watchman that he had permission from the appellant. According to the watchman of the appellant, (PW3) the gravel was taken around April 2004 after the appellant visited the place with the respondent in March 2004. But no clarification was given by PW3 on how he identified the persons as being the ones coming from the respondent. This aspect attracted our attention because PW1 did not say anything on this aspect. Another shortfall in the evidence of the plaintiff was that, much as PW1 said that the contract was

extended, he did not specify the period of extension. Even the Police Officer who came to give evidence never made any record of the appellant's complaint , apart from his oral evidence that one Long You from the respondent's company admitted taking the gravel. Even the person from whom the appellant said he bought the bowl pit in Burundi was not summoned in Court to give evidence and the trial court was not told how the respondent went to Burundi to collect the gravel. There was not even a complaint from the Burundi side to give weight to the appellant's case. Moreover, the contract was to be executed from June to August 2003. The gravel if at all it was taken without the appellant's permission was taken in April 2004 after the expiry of the contract. Even PW4 who testified that the respondent took the gravel was not in a position to say whether the gravel was taken without the permission of the appellant. Furthermore, the contract was terminated more than six months after the period of the contract had expired. Even the gravel is also said to have been taken after the expiry of the contract.

As first appellate court, the Court has power and is entitled to have its own evaluation of the evidence. In the case of **Mbogo and Another Vs Shah** [1968] 1 EA 93 the Court held that:

> *"A Court of Appeal should not interfere with the the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been a misjustice."*

See also the case of **Kulwa Kabuzi and others V R** [1994] T.L.R. 210

From the definition of the tort of conversion as given above, and the evidence that was adduced to support the appellant's case, we are satisfied that the appellant did not prove the tort of conversion on the balance of probabilities as required in civil cases.

Since we have made a finding that the tort of conversion was not proved by the appellant, the first ground of appeal must fail. From the evidence on record and the decision of the Court in the case of

Mbogo and Another (supra), we cannot fault the learned judge on his finding that the tort of conversion was not proved by the appellant and hence he could not blame the respondent for of the cancellation of the contracts by TANROADS.

Since the first issue that was raised in the appeal has been determined against the appellant, the rest of the issues similarly fail.

Consequently, the appeal is dismissed. As the appeal was heard exparte, we make no order for costs.

DATED at **TABORA** this 17th day of May, 2012.

E. N. MUNUO
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(Z. A. Maruma)
DEPUTY REGISTRAR
COURT OF APPEAL