IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CIVIL APPEAL NO.110 OF 2014

JUBILATE BENJAMIN ULOMI.....APPELLANT
VERSUS
MAKO MINING COMPANY.....RESPONDENT

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

(Massengi,J.)

dated 16th January, 2013
in
Civil Appeal No.24 of 2012
.....

JUDGMENT OF THE COURT

8th July & 15th July, 2015

KIMARO,J.A.:

The parties to the appeal entered into an agreement in which it was agreed that the respondent had to provide services to the appellant's mine. The appellant is an individual person, a businessman dealing with among others, mineral excavation and operating and providing services to mines. He owns a Tanzanite mine located at Mererani at Block D under PML 0002660. The respondent is a limited liability company.

A contest between the parties arose in respect of the renewal of the agreement. According to the pleadings, the agreement was for three years starting from 13th February, 2003 and it was to end on 14th April 2006. This

agreement was produced in court by the respondent who was the plaintiff in the trial court and was admitted as exhibit P1. The appellant who was the defendant in the trial court had challenged the authenticity of exhibit P1 contending that it was not the one which was executed by the parties. He had tendered in the trial court exhibit D1 which is the same in context with exhibit P1. The only difference being the dates for the commencement of the agreement and the date it ended. While the agreement was a written one, the dates appeared to have been changed by hand and with a pen of different ink. The evidence shows that the agreement was prepared by M/S Loomu Ojare & Co advocates. Coming from the firm of advocates to testify for the plaintiff was Mr. Eliufoo Loomu Ojare. He testified as PW2. He confirmed that he prepared exhibit P1 and the duration of the agreement was three years. He reaffirmed the genuiness of exhibit P1 in cross examination that the agreement was for three years starting from 13th February 2003. This means that the agreement had to come to an end not latter than 13th February, 2006. He also said that it was only the witnesses of the plaintiff who signed the agreement. This evidence supports the defendant's evidence who said that his witnesses did not sign the agreement. The title of the agreement reads as follows:

MKATABA WA KUHUDUMIA MGODI WA MADINI YA TANZANITE ULIOPO MERERANI UNAOMILIKIWA KWA PLM 0002626

MKATABA huu wa utoaji huduma za uchimbaji wa mgodi unaomilikiwa kwa PLM 0002626, uliofikiwa leo tarehe 13 February; 2003, hapa Arusha kati ya Bwana **JUBILATE BENJAMINI** (ambaye katika Mkataba huu ndiye "**MWENYE MGODI**") kwa upande mmoja na **MAKO MINING COMPANY LIMITED** wa **S.L.P. 15398, ARUSHA** (ambaye katika mkataba huu ataitwa "**MTOA HUDUMA**"kwa upande wa pili, ambapo pande zote mbili zinakubaliana kama ifuatavyo.

The grievance by the plaintiff was based on a letter the defendant wrote to the plaintiff on 14th February 2006 informing the respondent that the agreement had come to an end. It was on that basis that the respondent filed the case against the appellant claiming for compensation of Tshs 100,000,000/= which the appellant disputed.

The trial proceeded on the basis that the appellant breached the provision of paragraph 8 of exhibit P1 and awarded T shs 100,000,000/= to the respondent as compensation for the breach of the contract and T shs. 60,000,000/= as general damages and interest at 10% from the date of the judgment until full satisfaction. The appellant was aggrieved by the decision of the trial court and lodged an appeal in the High Court but he was not

successful. The High Court sustained the decision of the trial court. Still aggrieved he filed this appeal. His grounds of appeal are:-

1. The learned judge erred in law in failing to hold that the entire proceeding in the trial court (Resident Magistrates') Court were a nullity for want of jurisdiction.
2. That the learned judge erred in law in upholding that the trial Court's decree passed beyond its pecuniary jurisdiction on the basis that the item of general damages is not taken into account in determining the value of the suit.
3. That after holding that the signature on exhibit P1 was the genuine signature of PW1, the learned judge erred in law in failing to hold that the respondent's company's pleadings were signed by a person other than PW1 and thus were invalid in law.
4. That after holding that the parties were bound by the terms of the contract (exhibitP1), the learned judge erred in law in upholding the award of Tanzania Shillings sixty million as general damages which were not provided for in the said contract.
5. That the learned judge erred in law in failing to hold that PW2 was a witness with interest to serve for having prepared an ambiguous contract in his

computation of the three year contract period and failing to cause exhibit P1 to be signed on page 1.

It is proposed to ask this Honourable Court to declaire as nullity the proceedings in the High Court and the trial court and, IN THE ALTERNATIVE, set aside the judgment and the decree of both courts below and substitute for it judgment and decree in favour of both the plaintiff with costs of the appeal and costs in both courts below.

When the appeal was called on for the hearing, learned advocates Mr. Method Kimomogoro and Duncan Oola appeared for the appellant and the respondent respectively. In compliance with Rule 106 of the Court of Appeal Rules, 2009 both advocates filed written submissions to support their respective positions in the appeal.

Without any prejudice on the learned advocates for the efforts made in the preparation of the pleadings and their arguments in respect of the case, our considered opinion is that the appeal before us has merit because there was no evidence to prove that the appellant breached the contract. The case should have been dismissed by the first appellate court on this ground. We are going to show why we have come to that conclusion.

But before we embark on that one, there is one procedural irregularity which was committed by the trial court. This is the first ground of appeal. We appreciate the submissions made by the learned advocates on this ground. In the amended written statement of the defence, the Defendant had raised a preliminary objection on the question of the jurisdiction of the trial Court (Court of Resident Magistrate at Manyara), that the amount that was claimed exceeded the pecuniary jurisdiction of the trial court. With respect to the learned judge on first appeal she should have seen the irregularity that was committed by the trial Court. The trial magistrate allowed the amendment of the plaint after the appellant raised the preliminary objection. That was definitely wrong. The trial court should have heard the preliminary objection first. The Court has on several occasions held that an amendment sought after the other party has raised the preliminary objection aims at circumventing the preliminary objection and the courts should not allow it. See the case of **Thabit Ramadhan Maziku and another V Amina Khamisi Tyela** Civil Appeal No.98 of 2011 (unreported) at Zanzibar. In that case the defendant raised a preliminary objection in the written statement of defence. The trial magistrate heard the preliminary objection but did not make a ruling on the same. Instead he proceeded with the trial. The Court held that:

> *"...the failure by the learned magistrate with extended jurisdiction to deliver the ruling on the preliminary objection which he had scheduled to deliver on 16/9/2009 constituted a colossal procedural flaw that went to the root of the trial. It matters not whether it was inadvertent or not. The trial court was duty bound to dispose it fully, by pronouncement of the Ruling before dealing with the merits of the suit. This it did not do. The result is to render all subsequent proceedings a nullity."*

Other cases on the same principle are those of **Bank of Tanzania V Devram P. Valambia** Civil Application No. 15 of 2002 (unreported) and that of **Shahida Abdul Hassanali V Mahed Mohamed Gulamali Kanji** Civil appeal No. 42 of 1999 (unreported).

The trial court should have first determined the preliminary objection before it allowed the plaintiff (respondent in this appeal) to amend the plaint.

This point should have sufficed for the disposal of the appeal but we are of a considered view that the issue of whether the respondent breached the contract or not is very important in this case. The perusal of the entire evidence led by the witnesses in the case will show that there was no evidence to show that the appellant had breached any contract for reasons

to be stated. The issues that were framed for determination by the trial court were:

1. Which one of the two contracts M1, JB is the genuine contract executed by the parties.
2. Whether the contract between the Parties was for three yrs period or one for the period begin 14th February 2003 -14th April 2006.

The trial court held that the contract that was genuine between the parties was exhibit P1. It was on that basis that the trial court ordered compensation to the respondent and it was assessed at Tshs.100,000,000/=. The assessment of the compensation was based on paragraph 8 of that exhibit P1. The said paragraph reads:

> " *Kwamba endapo MWENYE MGODI ataamua kusitisha au kuvunja mkataba huu, bila sababu za msingi au za kisheria au kupuuza huduma anazostahili kwa kipindi cha wiki mbili (2) mfulilizo; basi atawajibika kumrudishia MTOA HUDUMA gharama zake zote alizotumia katika uchimbaji wa mgodi, pamoja na riba ya kibenki ya asilimia 30% pamoja na fidia ya adhabu isiyopungua T Shs. 100,000,000/= kabla ya MTOA HUDUMA kuondoka katika Mgodi husika.*"

We stated earlier in this judgment that what prompted the respondent to institute the case against the appellant was the letter he wrote to the Officer of the respondent, one Mr. Lengai Ole Mako informing him that the contract had come to an end. That letter was written on the basis of paragraph 4 of the agreement, exhibit P1. Part of the letter reads:

> *"Napenda kukuarifu kuwa mkataba wetu wa kuhudumia mgodi wangu unaomilikiwa kwa PML na. 0002626 uliopo Kitalu "B"-Mirerani ambao tuliusaini na kutumika tangu tarehe 13/02/2003 umemalizika muda wake rasmi baada ya kudumu kwa muda wa miaka mitatu (3). Rejea kifungu na 4 cha mkataba huo."*

The letter was admitted in court as exhibit P2. The appellant had intimated in that letter that in case the respondent wanted the contract to be renewed, he had to contact the appellant before 21/02/2006. It would appear that the parties could not agree on the renewal of the agreement. On 21 /03/2006 the appellant wrote another letter to the respondent saying that he was no longer interested to renew the agreement. He required the respondent to vacate the mine and remove all his facilities.

The respondent then filed the case against the appellant. We have already indicated that the respondent did not adduce evidence to prove the breach. Why? According to the respondent, the appellant breached

paragraph 8 of the agreement (exhibit P1). We have already shown what the content of paragraph 8 of exhibit P1 are. It talks of the appellant breaching the contract before the expiry of the contract. Exhibit P2 made reference to paragraph 4 of exhibit P1. That paragraph reads:

> *"Kwamba mkataba huu utadumu kwa kipindi cha miaka mitatu (3) kuanzia tarehe 13/2/2003 hadi tarehe 14/4/2006 na baada ya hapo mkataba utaweza kuongezewa muda wa uhai kwa makubaliano ya pande zote mbili."*

If the contract was for three years, it means the three years ended on 13/02/2006. The record of appeal at pages 53-55 shows the plaint that was filed by the plaintiff in the trial court. It was averred in paragraphs 4, 5, 6, 7 and 8 that:

> 4. THAT, the plaintiff and the defendant got into a contract of provision of services to the Tanzanite Mine located at Mererani Block B, owned under PML 0002660, the said contract dated 13th February, 2003, the additional contract to it dates 7th July 2004 and the last contract dated 27th July 2003 are annexed to form part of this Plaint and marked as annexture M1. collectively.
>
> 5. THAT, the Plaintiff and the Defendant agreed in their contract that the same should cover the period

of **three years starting from 13th February 2003 up to 14th April 2006** as witnessed under paragraph 4 of Annexture M1. (Emphasis added)

6. THAT, the Defendant wrote a letter to the Plaintiff dated 14th February 2006 notifying the Plaintiff that their contract which was signed on 13th April 2003 had expired on 13th February 2003 and proposed that they should sign another contract before 21st February 2006. The said letter with reference No.JB/MG/2006/03 is annexed to form part of this Plaint and marked as annexture M2.

7. **THAT, the defendant on 27th March 2006 wrote a letter to the Plaintiff demanding to vacate the Mines and shift all working equipments, further the defendant expressly stated that he does not want to enter in another contract with the Plaintiff. The said letter with Ref.No. JB/MG/06/04 is annexed and marked as annexture M3.** (Emphasis ours).

8. THAT, the Plaintiff through his lawyer sent a Demand Notice to the Defendant informing the Defendant about the breach he had committed in their contract and its consequences and **reminded the Defendant of his promise to enter into**

> **another contract which was to operate from 14th April 2006 but despite all this attempts the Defendant was stiff naked and kept on breaching the said Contract.** The demand Note is annexed with this Plaint and Marked as annexture M4 respectively. (Emphasis added)

Paragraph 7 of the plaint shows that the respondent sued the appellant because he was reluctant to renew the contract. But paragraph 4 of exhibit P1 was specific that the contract would be renewed by mutual consent. The letter which was written by the appellant informing the respondent that he was no longer interested to renew the contract expressed some dissatisfaction on the part of the respondent and he made a decision not to renew the agreement.

In addressing the Court on this issue the learned advocate for the respondent insisted that paragraphs seven and eight of the amended plaint showed that the respondent breached the agreement. As shown herein before, paragraph seven talks of the letter that was written by the appellant on 27th March, 2006 requiring the respondent to vacate the mine and remove all facilities therefrom. Mr. Oola agreed that the contract was for three years starting from 13th February, 2003. The letter by the respondent was

written after 13th February, 2006. He also agreed that the agreement had no provision for automatic renewal of the contract. The renewal had to be with the mutual consent of the parties. Reading through paragraph 8 of the plaint and paragraph 8 of exhibit P1, it does not give the impression that the respondent had any right to institute the suit against the appellant. He terminated the contract after the duration of the contract had expired and there was no mutual consent for the renewal of the contract. On his part Mr. Kimomogoro in his rejoinder said he was also of the view that the respondent wrongly sued the respondent.

Our firm position is that there was no redress which the respondent could claim from the appellant under the given facts. The company had therefore no right for any compensation because the appellant did not breach any valid contract between him and the respondent.

Given the facts on record, we allow the appeal with costs.

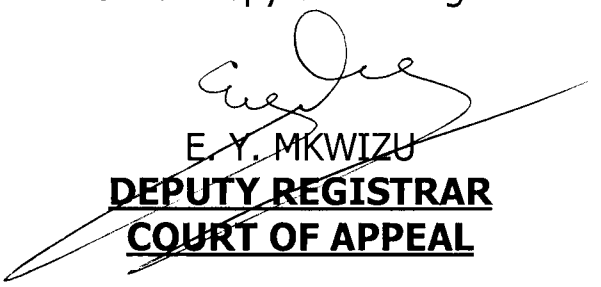
DATED at ARUSHA this 14th day of July, 2015.

N.P.KIMARO
JUSTICE OF APPEAL

B.M.LUANDA
JUSTICE OF APPEAL

S.MJASIRI
JUSTICE OF APPEAL

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



E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL