IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., MWANGESI, J.A., And KWARIKO, J.A.)

CIVIL APPEAL NO. 9 OF 2016

KHAISA ENTERPRISES LIMITED ---------- APPELLANT

VERSUS

1. **THE PRINCIPAL SECRETARY, MINISTRY OF DEFENCE AND NATIONAL SERVICE---------- 1st RESPONDENT**
2. **THE ATTORNEY GENERAL ----------2nd RESPONDENT**

(Appeal from the judgment and decree of the High Court of Tanzania at Dar es Salaam District Registry.)

(Muruke, J.)

dated the 31st day of March, 2014

in

Civil Case No. 74 of 2007

JUDGMENT OF THE COURT

7th & 21st June, 2019

MWANGESI, J.A.:

The basic issue which stands for our deliberation and determination in the appeal which is before us, is whether there was contractual relationship, express or implied, between the appellant and the first respondent. The issue arises from a two grounded memorandum of appeal, which has been preferred by the appellant to this Court, challenging the finding of the learned trial Judge, in a judgment that was handed down on the 31st March, 2014 wherein, she held that there existed no contractual relationship

between the two, which was breached by the first respondent and thereby, entitling the appellant to damages at the tune of Ten Million Euros (10,000,000), equivalent to Tanzanian Shillings Sixteen Billion and Eight Hundred Million (16,800,000,000) by then, which was claimed in the suit lodged against the respondents.

Before embarking on considering the merits and demerits of the grounds of appeal, we think it is apposite albeit in brief, to give the facts giving rise to the dispute which resulted to the impugned judgment, as gathered from the pleadings. It started with a letter (exhibit P1), which was written by the first respondent to the appellant, on the 14th November, 1997 responding to two letters which had been written earlier by the appellant to the first respondent, with Reference Numbers KHS/DEF/CONF/3/97 of the 22nd September, 1997 and KHS/BEL.97/Vol III/97 of the 25th September, 1997.

Even though, the gist of the two earlier letters written by the appellant to the first respondent, was not disclosed, one would vouch to say that they were related to a brochure which contained information of helicopters that

were being manufactured by Eurocopter. This could be inferred from the wording in the second paragraph of the letter wherein, it was stated thus:

> *"We have the interest of purchasing the cougar AS 532 U2/A2 helicopter with main specifications as described in your latest Eurocopter Brochures 1997. Together with the basic specifications, we would also like to have the following optional equipment mounted..."*

What followed thereafter was a series of correspondences between the appellant and the first respondent alongside Eurocopter, with a view of enabling Eurocopter supply to the first respondent, Cougar AS 532 U2/A2 helicopters to the first respondent. This fact is evidenced by exhibits P3, P4, P6, P7, P8, P9, P10, P11, P12 and P13. Meanwhile, a short moment after exhibit P1 had been written by the first respondent to the appellant, on the 28th day of November, 1997 to be specific, there was entered a memorandum of understanding between the appellant and Eurocopter, whereby, on agreed terms between them, the appellant had to facilitate the accomplishment of the interest of the first respondent in purchasing the cougar helicopters from Eurocopter.

Unfortunately, for reasons which were not clearly made known to the Court, the process by the first respondent to purchase the intended cougar helicopters from Eurocopter was not accomplished. It was such situation which led to the dispute between the appellant and the first respondent, whereby, the appellant contended that the failure by the first respondent to sign the contract of sale of cougar helicopters with Eurocopter, was a breach of the consultancy agreement which existed between the appellant and the first respondent and thereby, occasioning it to suffer the loss claimed in the suit against the respondents. In the said suit, the second respondent was impleaded by virtue of being the Chief Legal Adviser of the Government of the United Republic of Tanzania.

The main claim of the appellant against the respondents, could be gathered from paragraph 4 of the plaint where it was stated thus:

> *"Plaintiff claims against both defendants jointly and severally the sum of Euro 10,000,000 (Ten Million Euros) equivalent of Tanzanian Shillings 16,800,000/= (sixteen Billion and Eight Hundred Million) at the current exchange rate of 1 Euro = 1680/=Tanzanian Shillings, being compensation for unlawfully dishonouring and or discontinuing*

consultancy agreement services between the plaintiff, Eurocopter Company of France and Tanzania Defence Forces."

On the other hand, in their joint written statement of defence, the respondents strongly resisted the claim by the appellant, as reflected at paragraphs 4 and 5, where they stated in part that:

"4. The defendants aver that, the negotiations to purchase the helicopters was between the Government of the United Republic of Tanzania and Eurocopter, which negotiations aborted.

5. It is stated that the plaintiff, was acting for Eurocopter, under a different arrangement between him and Eurocopter. The defendants, further state that the said Memorandum of Understanding was between the plaintiff and Eurocopter only and hence, the defendants were not bound by it in anyway whatsoever."

As alluded earlier above, the learned trial Judge, after hearing evidence of three witnesses who testified for the plaintiff's case that is, Mouhidin Abdallah Ntukafo (PW1), Brigedia General (Retired) Reginald Chonjo (PW2), and Said Dola (PW3), which was supplemented by eighteen (18) exhibits, as

well as the testimonies of two witnesses that is, Retired Cornel Geofrey Isack Mbaga (DW1), and Vicent Mrisho (DW2), who testified for the defendants' case, was convinced on preponderance of probabilities that, the appellant had failed to establish its claim against the respondents. In its own words, the holding part of the judgment reads that:

> *"In the present case, the plaintiff has failed to prove that there was any contractual relationship between themselves and the defendants and therefore, a question of breach of contract which forms the basis of the plaintiff's claim cannot arise... In the final result, I find no merits in this suit and the same is hereby dismissed with costs."*

The two grounded memorandum of appeal which has been preferred by the appellant to contest the decision of the learned trial Judge, bears the following wording:

1. *The Honourable trial Judge erred in law and in fact, when she held that there was no any contractual relationship, express or implied, between the appellant and the first respondent, for the facilitation of purchase of cougar helicopters herein.*

2. *The Honourable trial Judge erred in law and in fact, when she held that the plaintiff did not suffer any damages as a result of the first respondent's action.*

In compliance with the requirement of Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 herein after referred to as **the Rules,** on the 14th March, 2016 the appellant lodged written submission to amplify the grounds of appeal, which was responded to by the respondents, In terms of Rule 106 (8) of **the Rules,** vide the joint written submission in reply lodged on the 23rd day of August, 2016.

On the date when the appeal was called on for hearing before us, the appellant was represented by Mr. Wilson Ogunde, learned counsel, whereas the respondents had the joint services of Ms. Mercy Kyamba, learned Principal State Attorney from the office of the Solicitor General, and Major Semeni Kaunda, learned Senior State Attorney, from the office of the Judge Advocate General, of the Defence Forces.

In his submission to expound the grounds of appeal, the learned counsel for the appellant, adopted the written submission to form part of his oral submission. It was the submission of Mr. Ogunde, that through exhibit

P1, the first respondent engaged the appellant to procure and supply helicopters for both defence and civil purposes and that due to the sensitivity of the procurement, no tender was advertised.

Mr. Ogunde, went on to submit that, acting on the instructions of the first respondent, the appellant's officers travelled worldwide looking for a supplier of the required cougar helicopters and ultimately located Eurocopter, who was notified to the first respondent. After some correspondences between the appellant, the first respondent and Eurocopter, a sale contract of the helicopters was prepared by Europcopter, and the appellant took it to the first respondent for signing. To their surprise and dismay, the contract was never signed by the first respondent, who went on to buy helicopters of inferior quality at a higher price from another supplier to the appellant's detriment. It was from such act of the first respondent that, the appellant was claiming compensation of TZS 16,800,000,000/=, which is equivalent to 8% commission of the sales of the cougar helicopters intended to be sold by Eurocopter.

It was firmly submitted by the learned counsel for the appellant, that by virtue of exhibit P1, a contractual relationship between the appellant and

the first respondent arose, of which, according to the testimonies of PW1, PW2 and PW3, read together with exhibits P1, P3, P4, P6, P7, P8, P9, P10 and P13, created an agency relationship whereby, the appellant was to make consultancy on behalf of the first respondent, look for a manufacturer and supplier of the needed cougar helicopters, look for a credible financier and ensure that, the sale contract between the first respondent and Eurocopter, went through as required.

Since the appellant, performed his assignment perfectly and that, it was the first respondent, who frustrated the accomplishment of the sale contract by its failure to it, then it was bound by the commitment made in exhibit P7, wherein in the last paragraph, the appellant was assured by the first respondent that, "*in the event of breach of the contract, the Government shall be responsible for costs attended to, unless, if the notice of termination was served or revoked.*" Mr. Ogunde, therefore, insisted that so far as it was the first respondent who breached the contract by its refusal to sign the sale contract, it entitled the appellant to the claimed amount of compensation.

The foregoing apart, the learned counsel for the appellant, seeking reliance from the previous decision of this Court, in the case of **China Henan**

International CO-operation Company Limited Vs Salvand K. A. Rwegasira, Civil Appeal No. 57 of 2011 (unreported) where, even though the respondent failed to establish the special damages which he was claiming for against the appellants, he was granted damages for the reason that, the evidence tendered for his suit, had established that he suffered damages. In the same vein, Mr. Ogunde, implored us that, in case we would not be convinced that the appellant satisfactorily established the special damages which he claimed against the respondents, then we be pleased to grant damages under the category of general damages on account of the available cogent evidence, which established that the appellant suffered serious damages in the course of processing the sale contract for cougar helicopters under discussion.

In regard to the second ground of appeal that is, as to whether the appellant suffered any damages from the first respondent's action, Mr. Ogunde challenged the learned trial Judge in holding that it did not, while there was ample evidence to establish that, the appellant incurred various and numerous costs in terms of travelling to and from abroad, Hotel accommodation, food and other related costs, all of which were meant to ensure that, the cougar helicopters needed by the first respondent were

secured. There were as well other expenses incurred by the appellant, in paying consultancy fees to NINA Trading Company of Canada, economists, financial experts, lawyers and other experts engaged in the accomplishment of the project. By any parity of reasoning, the appellant was entitled to reimbursement of such costs from the respondents, concluded Mr. Ogunde. He thus humbly prayed that the appeal be allowed with costs.

In rebuttal to the submission made by her learned friend, Ms Kyamba, also prayed to adopt the joint written submission in reply, lodged by the respondents on the 23rd August, 2016. It was the submission of the learned Principal State Attorney that exhibit P1, which constitutes the basis of the claims by the appellant against the respondents, did not create any binding agreement between the appellant and the first respondent. In her submission, it was a mere invitation to treat for the supply of cougar helicopters. As there was no offer advanced by the appellant and accepted by the first respondent, then it could not be said that there was any contract between the two which was breached.

Ms Kyamba, went on to submit that, for a claim of breach of contract to stand, the parties must have had agreed on fundamental terms of the

contract. To buttress her stance, she referred us to the decision of this Court in **Tanzania Fish Process Limited Vs Christopher Luhanyula,** Civil Appeal No. 21 of 2010 (unreported), where the Court held in brief that, there is no contract if there is no *consensus ad idem* or put in other words, there can only be a valid contract, where there has been meeting of the minds of the parties involved.

It was the further submission on behalf of the respondents that, the appellant could not claim to have entered into a binding contract with the first respondent while even his position was not certain. This was so for the reason that, at one moment he identified himself as a consultant, in another instance a supplier, and sometimes an agent, as reflected at pages 385 and 388 of the Record of Appeal. Under the circumstances, the first respondent could not have entered into a binding agreement with someone who had no clear identity and duty. Or else, the alleged contract would have ended up being void for uncertainty in terms of section 29 of the Law of Contract Act, Cap 345 R.E. 2002 **(the LOCA**) as observed in **Alfi E. A. Limited Vs Themi Industries and Distributors Agency Limited** [1984] TLR 256, and **Nitin Coffee Estates Limited and Others Vs United Engineering Works Limited and Another** [1988] TLR 203.

The learned Principal State Attorney, surmised her submission on this point by arguing that according to exhibit P2, there was consultancy agreement between the appellant and Eurocopter whereby, the appellant being the sole consultant of Eurocopter, was tasked to persuade the first respondent to buy cougar helicopters from Eurocopter, for a consideration stipulated therein. Ms Kyamba, wondered as to how the appellant, could have acted for both the first respondent and Eurocopter. It was therefore her submission that, whatever costs that might have been incurred by the appellant in the process as he alleged, the same should have arisen from its arrangement with Eurocopter and that, it was the one to compensate him the claimed compensation and not the respondents. She thus urged us to dismiss the appeal for want of merit with costs.

From the submissions of either counsel above, we now revert to the issue which was posed at the beginning of this judgement that is, as to whether there was any contractual relationship between the appellant and the first respondent. In case the answer will be in the affirmative, then will crop the second issue, as to whether as a result of the first respondent's action, the appellant suffered damages.

Our take off in resolving the main issue is the contents of exhibit P1, which initiated the whole process leading to the dispute between the two, which bears the following wording in *ipsissima verba*:

"Supply of Cougar AS 532 U2/A2

Helicopter for Defence use

I wish to thank you for your letters with references KHS/DEF/CONF/3/97 of 22 September, 1997 and KHS/BEL. 97/Vol III/97 of 25 September, 1997.

We have interest of purchasing the cougar AS 532 U2/A2 helicopter with main specifications as described in your latest Eurocopter Brochures 1997.

Together with the basic specifications, we would also like to have the following optional equipments mounted.

Axilial Armaments

. 2 x 12.7 mm Machine gun2.75" Rockets combined pods.

. 2 x 12. 7 mm Machine gun pods

. 2 x Rocket launchers

-22 Rockets 68 mm

- 19 Rockets 2. 75"

Lateral Armaments

. 20 mm gun with a magazine of 960 shells.

. 2 x pintle – mounted 7.62 mm machine guns.

Kindly give your most competitive package supply of quantity 4 units CIF Dar es Salaam.

These machines will be used in Tanzania for Civil/Defence purposes.

Yours faithfully.

R. N. Chonjo

Brigadier General

For: Chief of Defence Forces."

Mr. Ogunde strongly tried to convince us, to find that the document quoted above, was a letter of intent by the first respondent, which created contractual relationship between the first respondent and the appellant. On

the other hand, Ms Kyamba, was of the firm view that the document was nothing other than mere an invitation to treat, which did not in any way, create a binding contract between the first respondent and the appellant.

The general principle of contract is that, a contract can be formulated where there is a proposal on the one hand and unequivocal acceptance on the other hand with consideration. The construction which was given to the holding in the English case of **Pharmaceutical Society of Great Britain Vs Boots Cash Chemists (Southern) Limited** [1953] 1 QB 401, is very persuasive to us that:

> *"A statement of intention or interest in doing business does not amount to a firm offer and cannot in itself create legal relations. It is a mere invitation to treat. It invites offers to be made, and cannot form a contract through the acceptance of the invitation."*

What we note from exhibit P1 in the light of what was held above, is that it was, as submitted by the learned Principal State Attorney, a mere invitation to treat. What was expected to follow after exhibit P1, was an offer being extended by the appellant or Eurocopter, to the first respondent, and wait for its acceptance by the first respondent with consideration or counter

offer. Nevertheless, what followed is obtainable from the wording in paragraph 20 of the plaint thus:

> *"That, while the process was going on smoothly, plaintiff learned through officials of the first respondent (Tanzania Peoples Defence Forces) that, another company completely alien in the process has penetrated and in fact has introduced itself to the defendants with a view to supply the helicopters without prior notice and or consent from all concerned, namely the plaintiff as consultant for sales transaction of the planes, defendant and the manufacturer/supplier/financier as earlier agreed in the Memorandum of Understanding and letter of intent from the defendant . Letters dated the 28th April, 2004 and 3rd June, 2006 and detailed helicopter prices are hereby attached as annexures MN 46, 47, 48, 49, 50 and 51 respectively to form part of the plaint."*

What is apparent from what was pleaded by the appellant in the above quoted paragraph of the plaint, is the fact that the offer extended to the appellant by Eurocopter, through the appellant, was not accepted by the first respondent. As such, as it was held by the learned trial Judge, there was no

valid contract formulated between them. In the circumstances, the issue of breach of contract by the first respondent, could not arise.

There was also another argument fronted by the learned counsel for the appellant, from another angle that, there had been a contractual relationship created between the appellant and the first respondent whereby, the former was to perform consultancy activities in ensuring that, the latter purchases four Cuogar AS 532 helicopters, from Eurocopter. When we probed Mr. Ogunde, as to where we could find the agency agreement between the appellant and the first respondent, he requested us to construe it from the wording in exhibit P1 that by its contents, the first respondent committed the appellant, to work on its behalf to ensure that cougar helicopters with the specifications contained therein, were to be purchased from Eurocopter. In his view, that was a binding relationship between the two.

With due respect to the learned counsel for the appellant, we are unable to buy his proposal. As we stated earlier, exhibit P1, was an expression of interest by the first respondent, regarding the types of helicopters, which he was interested to purchase. Conversely, there was

exhibit P2, (the memorandum of understanding between the appellant and Eurocopter), which did not involve the respondents, as reflected at the last paragraph of the preamble, which reads that:

> *"Whereas the sole consulting company is a company registered and incorporated under the company laws of Tanzania, and the company is willing and desirous to work as consulting company to Tanzania, persuading the Government of United Republic of Tanzania, through its Ministry of Defence to purchase Cougar helicopters and others for military use..."*

The Memorandum of Understanding did further stipulate in *verbatim* in its articles 2 and 4, which we think are relevant in the determination of the appeal before us that:

> ***"ARTICLE 2***
>
> *2.0 SUPPLY OF COUGAR HELICOPTERS*
>
> *2.1 Acting on the interest shown by the Government of the United Republic of Tanzania through the Ministry of Defence, to purchase Cougar helicopters from Eurocopter,* ***the main obligation of the consulting company shall make the necessary follow up on behalf of the supplier to the good conclusion of the assignment*** *and*

2.2 ***The consulting company shall from time to time make available to the supplier, all correspondences made to the Government of the United Republic of Tanzania through its Ministry of Defence or any other relevant authorities responsible****, likewise the supplier shall avail the same to the consulting company.*

2.3 *That both parties covenant to each other that the said assignment shall be undertaken in accordance with the terms and conditions of the (MoU), and furthermore, the same shall observe high degree of confidentiality from the execution to the implementation and completion.*

ARTICLE 4

4.0 PAYMENT

4.1 Upon completion of the transaction ***the supplier shall pay the consulting company 5% of the net sell and 3% of the net sell shall be paid to Satelite Trading company (a subsidiary company) owned by the consulting company****. No other payment shall be made other than that."*

[Emphasis supplied]

It is evident from what is contained in the articles quoted above that, there was an undertaking made between the two whereby, the appellant was to act on behalf of Eurocopter, to facilitate accomplishment of the interest of the first respondent, in purchasing cougar helicopters from Eurocopter. We suppose this was meant to formalize the informal relationship that existed between them before, which had made the appellant to be in possession of the brochures containing adverts of Eurocopter's business in cougar helicopters, which the appellant presented before the first respondent, and thereby, moving the latter, to express its interest of purchasing them in exhibit P1. Be that as it might, what is apparent to us, is the fact that through exhibit P2, a consultancy relationship between the appellant and Eurocopter, was made and not between the appellant and the first respondent, as the appellant tried to put. In that regard, the contention by the appellant that, he acted on behalf of the first respondent, in the intended sale transaction between the first respondent and Eurocopter, is without merit, for there was no evidence tendered to establish so.

With regard to exhibit P7, wherein, it was forcefully argued by Mr. Ogunde, that there was commitment made by the first respondent to pay

compensation in case there was breach of the contract, we do not think it was of any assistance to the appellant. For better appreciation of what was contained therein, we take the liberty of reproducing it *in extenso*. It reads:

> ***"RE: SUPPLY OF FOUR (4) COUGAR HELICOPTERS***
>
> *The above subject matter refers and your several letter (sic) to us.*
>
> *The Ministry of Defence, is hereby confirmed (sic) that the draft contract for the above said 4 cougar army helicopters with reference 43- EV. S – 98 OF 1998 has already got a consent from the Attorney General allowing the execution of the said contract refer our letter – DNSS/E. 50/58/13 dated the 23rd March, 1999.*
>
> *Since the Government has consented the contract subject to availability of funds, you are therefore bound to make arrangement to supply the said helicopters immediately upon signing the contract.*
>
> *Regarding to TPDF letter with reference DFHQ/1030-1 dated the 25th November, 1998 addressed to Eurocopter requesting for a credit in support and repayment period of 24*

months, we would prefer this period to be extended to a period of 10 years instead of 24 months.

By this letter, you are also permitted to look for a financier who will accept to finance the purchase of 4 cougar helicopters on terms to be accepted by us. The Government shall not accept any interest charges above 4% per annum for loan amount.

Moreover, the Ministry of Defence shall not be held responsible for any cost to be involved in the whole transaction except to pay the purchase price of 4 cougar helicopters only.

In the event of breach, the Government shall be responsible for the costs attended to, unless, if the notice of termination was served or revoked."

The submission by the learned counsel, was pegged on the last paragraph of the letter quoted above, wherein the first respondent promised to pay costs in case of any breach of the contract. Our construction of the above letter holistically, is that, indeed by the last paragraph of the letter, the first respondent promised to pay costs in case of breach of contract. However, the said paragraph has to be read in tandem with the preceding

paragraphs, in which it is indicated that, everything had to await the availability of funds from the Government for signing the contract. The fact that the contract was not signed, there was nothing to bind the first respondent to the commitment which it had undertaken in the said last paragraph.

In view of the foregoing, there was no basis for Mr. Ogunde, to just pick the last paragraph of the letter and apply it in the claim for costs, from breach of a contract which had not yet been concluded. It is worthy being noted that, even if the contract were to have been signed, the commitment made by the first respondent, was in respect of Eurocopter, with whom they were to enter into sale contract of the cougar helicopters. Under the circumstances, it was quite unfounded and unjustified, for the appellant, in his personal capacity, to claim for the alleged compensation against the respondents, basing on a non-existent consultancy agreement between it and the first respondent.

Mr. Ogunde, had yet another last string to his bow. Placing reliance on the previous holding of this Court in **China Henan International Co-operation Group Company Limited Vs Salvand K. A. Rwegasira**

(supra), he implored us that, even if we would find that the appellant failed to establish the special damages which he claimed against the respondents, then we be pleased to grant some damages under the category of general damages, for the reason that he managed to establish that he suffered damages. We are again, reluctant to sail in the same boat with the learned counsel, on his proposal. Since we have held above that, by virtue of exhibit P2, all acts which were being done by the appellant in respect of the intended sale agreement of cougar helicopters, was on behalf of Eurocopter, then any damages claimed to have been suffered by the appellant in the course, have to be claimed from the said Eurocopter, and not the first respondent. As such, the authority relied upon by Mr. Ogunde, is distinguishable from the circumstances of the appeal at hand.

In view of what we have endevoured to traverse above, in no uncertain terms, we answer the issue which was posed at the beginning of this judgment in the negative that, there existed no any contractual relationship express or implied, between the appellant and the first respondent. And the fact that the second issue was subject to the first issue being answered in the affirmative, which has not been the case, the second issue dies a natural

death. To that end, the appeal by the appellant is hereby dismissed in its entirety, and we order the respondents, to have their costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 18th day of June, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL