IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., MWAMBEGELE, J.A., AND KEREFU, J.A.)

CIVIL APPEAL NO. 122 OF 2017

M/S UNIVERSAL ELECTRONICS AND HARDWARE (T) LIMITED ..... APPELLANT

VERSUS

STRABAG INTERNATIONAL GmbH (TANZANIA BRANCH) ..... RESPONDENT

[Appeal from the Judgment and Decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam]

(Songoro, J.)

Dated the 21st day of May, 2015
in
Commercial Case No. 14 of 2014
.....

JUDGMENT OF THE COURT

17th March & 19th April, 2021

MWAMBEGELE, J.A.:

The appellant was the plaintiff in Commercial Case No. 14 of 2014 in the High Court Commercial Division at Dar es Salaam in which the respondent was the defendant. It was established in the High Court that the duo had entered into an agreement in which the appellant was to manufacture an agreed quantity of kerbstones to be used by the respondent in the construction of the Dar es Salaam Bus Rapid Transit Project. The contract was initiated by a Local Purchase Order (LPO) issued by the respondent on 10.10.2012 and accepted by the appellant for

manufacture of a total of 223,500 kerbstones worth Tshs. 2,307,195,000/=. However, after the appellant had supplied the respondent with 73,949 units of kerbstones, the respondent cancelled the LPO and stopped the appellant from continuing to supply the kerbstones. The respondent then settled for the supplied quantity with Tshs. 93,823,742.27 through a cheque after the appellant had signed a note indicating that the amount was the full and final settlement for the kerbstones supplied.

The above notwithstanding, the appellant filed a suit in the Commercial Division of the High Court claiming for a declaration that the respondent breached the contract, payment of the remaining contractual sum amounting to Tshs. 1,747,576,573/= being the outstanding value of the contract as a result of the breach. The appellant also claimed for payment of Tshs. 17,029,760/=, being the value of kerbstones not approved but not returned to the appellant, interest at 28% per annum on Tshs 1,747,576,573/= and Tshs. 17,029,760/= above, general damages of Tshs 240,000,000/= which resulted from the breach of contract, decretal interest of 15% and costs of the suit and any other order(s) the court deemed fit to grant.

The High Court (Songoro, J.) entered judgment for the appellant having decided that, indeed, the respondent breached the contract and, in

the end, awarded the former Tshs. 48,000,000/= as general damages, interest on the decretal sum at the rate of 10% per annum from the date of judgment to the date of satisfaction in full. The claim for the remaining balance of the contract and payment for unapproved but unreturned kerbstones were refused on account of lack of proof. According to the respondent and not disputed by the appellant, the decretal amount has since been satisfied in full.

Even though the appellant received from the respondent the decretal sum in satisfaction of the decree, she was not happy with the judgment and decree of the High Court. She thus preferred an appeal to this Court on two grounds; **one**, that the learned trial Judge erred in law and fact in holding that the appellant was not entitled to any payment as an outstanding value of the contract as a result of breach of contract and; **two**, that the learned trial judge erred in law and fact in holding that the appellant was not entitled to payment of Tshs. 17,029,760/= as it was not proved that the said kerbstones were supplied.

When the appeal was placed for hearing before us, while Mr. Francis Stolla, learned advocate, appeared for the appellant, Mr. Sinare Zaharani and Mr. Obeid Mwandambo, also learned advocates, joined forces to represent the respondent.

When called upon to argue his appeal, Mr. Stolla did no more than adopting the written submissions earlier filed in support of the application as his oral submissions before us. He implored us to allow the appeal with costs on the strength of those submissions.

In the written submissions, Mr. Stolla had submitted that having rightly found that the respondent was in breach of the contract as appearing in the LPO (Exh. P1), the High Court Judge erred in holding that the appellant was not entitled to any payment of the outstanding value of the contract. Relying on the provisions of section 73 (1), (3) and (4) of the Law of Contract Act, Cap. 345 of the Revised Edition, 2002 (the Law of Contract) and the case of **Tanganyika Farmers Association Limited v. Njake Oil Company Limited**, Civil Appeal No. 40 of 2005 (unreported), Mr. Stolla argued that the High Court ought to have ordered the respondent to pay the appellant what she would have earned had the contract been performed. He added that the High Court ought to have awarded the appellant the amount of Tshs. 5.419/= times 149,551 unsupplied kerbstones which amounts to Tshs. 810,416,869/= plus 18% as Value Added Tax (VAT) which is the value the appellant would have earned had the contract been performed.

Regarding Tshs. 17,029,760/= being the value of kerbstones not approved but not returned to the appellant, the subject of the second

ground of appeal, Mr. Stolla had submitted that the appellant proved that she supplied the said kerbstones. He contended that the appellant's witness testified and tendered a list of invoices evidencing the costs of kerbstones supplied to the respondent and marked Exh. P3 and the respondent did not dispute that fact. The learned counsel relied on **Tanganyika Farmers Association Limited v. Njake Oil Company Limited** (supra) to contend that the High Court ought to have ordered payment of Tshs. 17,029,760/= plus 18% VAT which would have been earned by the appellant had the contract not been breached.

In rebuttal, Mr. Zaharani, having adopted the reply written submissions earlier filed as part of his oral submissions, kick-started by submitting that the decision of the High Court was well founded according to the law and evidence brought before it. He contended that the appellant did not bring any proof that the kerbstones as per Exh. P1 were manufactured at the appellant's costs so as to justify the outstanding value of the contract. That is the reason why the High Court held that the appellant's claim of Tshs. 1,747,576,573/= as an outstanding claim was not maintainable. He argued that the award made by the High Court was so made on the principle of *restitutio integrum*; to place the appellant in a position that he would have been had the respondent not breached the contract.

With regard to the prayer by the appellant's counsel to award the appellant with Tshs. 810,416,869/= as total costs for unsupplied kerbstones, Mr. Zaharani invited us to disregard the prayer as it is even contrary to the testimony of PW1.

On the award of damages the learned counsel implored us not to interfere as that is within the discretionary powers of the trial court and the appellant has not established that the same was made injudiciously. The Court can only interfere when satisfied that certain conditions were not met, he submitted, and referred us to the cases of **The Cooper Motor Corporation v. Moshi/Arusha Occupational Health Services** [1990] T.L.R. 96 in which the Court cited with approval the case of **Nance v. British Columbia Electric Raily Co. Ltd** [1951] A.C 601, at 613:

> *"... before the appellate court can properly intervene, it must be satisfied either that the Judge in assessing damages, applied a wrong principle of law (as taking into account some irrelevant factor or leaving out of account some relevant one); or short of this that the amount awarded is so ino0rdinately low or so inordinately high that it must be wholly erroneous estimate of damage."*

For the same proposition, the learned counsel also cited **Gulbanu Rajabali Kassam v. Kampala Aerated Water Co. Ltd** [1965] E.A 587,

at 589 wherein the following statement of Lord Wright in **Davies v. Powell Duffryn Associated Collieries Ltd.** [1942] A.C 601 at p. 617; [1942] 1 All E.R. 657 was reproduced:

> *"In effect the court before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimates of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attached if the appellate court is to interfere, whether on ground of excess or insufficiency."*

In view of the above submissions, the learned counsel for the respondent invited us to dismiss the first ground of appeal.

On the second ground of appeal, Mr. Zaharani submitted that the High Court correctly held that the appellant was not entitled to the claim under paragraph 17 (c) of the plaint; the claim of Tshs. 17,029,760/=. The appellant did not bring any evidence to prove it thus abrogating the principle under section 110 (1) and (2) of the Evidence Act, Cap. 6 of the Revised Edition, 2019 (henceforth the Evidence Act), he argued.

Basing on the above submissions, Mr. Zaharani implored us to dismiss the appeal with costs.

In a short rejoinder, Mr. Stolla submitted that the figure of Tshs. 810,416,869/= was pegged on the calculations based on Exh. P2. He reiterated that on the authority of **Tanganyika Farmers Association Limited v. Njake Oil Company Limited** (supra) the appellant was supposed to be paid the balance of what she should have earned had the contract not been breached.

Having summarized the background to the appeal and the submissions of the learned counsel for the parties, the ball is now in our court to consider and determine the issues of contention in the appeal before us. We think there are two issues for our determination. The first one is whether the appellant was entitled to payment of the outstanding value of the contract and the second is whether the appellant was entitled to payment of Tshs. 17,029,760/= being the value of supplied but not returned kerbstones. These two issues are the subject of the first and second grounds of appeal referred to at the beginning of this judgment.

Our starting point will be the provisions of section 73 of the Law of Contract. The section reads:

> ***"73.-(****1) Where a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the*

usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

(2) The compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

(3) Where an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract.

(4) In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."

We are bringing into sight the above provisions of the Law of Contract because it is not disputed that the respondent was in breach of the contract. The High Court so found and the respondent does not dispute this finding. In the actual fact, even the decretal amount has already been satisfied in full by the respondent. Thus, that the appellant was entitled to compensation after the respondent breached the contract in terms of section 73 of the Law of Contract reproduced above, is not at

issue. The kernel of contention is to what extent. The High Court found and held, rightly in our view, that the appellant was entitled to general damages, court interest thereon and costs of the suit.

In our considered view, the appellant will only be entitled to any award for the remaining part of the contract upon strict proof. This claim falls under the head of specific damages which must be specifically pleaded and strictly proved. That this is the law in this jurisdiction has been pronounced in a number of decisions of the Court – see: **Zuberi Augustino v. Anicet Mugabe** [1992] T.L.R. 137 at p. 139, **Stanbic Bank Tanzania Limited v. Abercrombie & Kent (T) Limited**, Civil Appeal No. 21 of 2001 and **Nyakato Soap Industries Ltd v. Consolidated Holding Corporation**, Civil Appeal No. 54 of 2009 (both unreported). In **Stanbic Bank Tanzania Limited v. Abercrombie & Kent (T) Limited** (supra) and **Nyakato Soap Industries Ltd v. Consolidated Holding Corporation** (supra), the Court endorsed the following definition of special damages by Lord McNaughten in **Bolag v. Hutchson** [1950] A.C. 515 as a correct statement of the law:

> *"Such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and, therefore, they must be claimed specially and proved strictly."*

Likewise, in **Harith Said Brothers Company v. Martin Ngao** [1987] T.L.R. 12 the Court concurred with the findings of the trial High Court (Samatta, J. as he then was) in **Harith Said Brothers Company v. Martin Ngao** [1981] T.L.R. 327, at p. 332, wherein it was held:

> *"Unlike general damages, special damages must be strictly proved. I cannot allow the claim for special damages on the basis of the defendant's bare assertion, when he could, if his claim was well founded easily corroborate his assertion with some documentary evidence .... The claim for special damages must be, and is dismissed."*

In the case at hand, the terms of the contract were that all the materials for manufacturing of the kerbstones were supplied by the respondent. The appellant's obligation under the contract was to use the materials to manufacture kerbstones. The appellant's costs were to mobilize machinery and labour. As such, at the time of breach, it was natural that both machinery and labour would no longer be used; hence the only thing that the appellant was in a position to lose was the price of kerbstones supplied. Since it was clear that all the kerbstones supplied were paid for and there was no proof of further specific loss occasioned as a result of the breach, no further claim can be laid by the appellant than that of general damages which was duly considered by the High Court. In

our view, awarding the sum for the remaining part of the contract would be tantamount to enriching the appellant unjustly. We are aware that the appellant made heavy reliance on **Tanganyika Farmers Association Limited v. Njake Oil Company Limited** (supra) that the appellant should be paid what she should have earned had the contract not been breached. However, we haste the remark that the case is distinguishable in that, there, unlike here, the respondent/plaintiff had incurred and proved all expenses needed to set up the petrol station ready to discharge its contractual obligations.

We are satisfied that the appellant specially pleaded, but did not strictly prove, special damages. Like was the case in **Harith Said Brothers Company v. Martin Ngao** (supra), we cannot allow the claim for special damages on the basis of the appellant's bare assertion in the circumstances where she, if her claim was well founded, easily corroborate his assertion with some documentary evidence. We are satisfied that the High Court made a proper analysis and verdict which we need not interfere. This claim for special damages must be, and is dismissed.

We shall now discuss the second issue in relation to the claim for supplied but unpaid kerbstones valued at Tshs. 17,029,760/=. However, like in the first issue, the appellant did not lead evidence to prove that fact. In view of the fact that the appellant received settlement which they

agreed to be final and full payment for kerbstones supplied, it goes without saying that the award cannot be maintainable. The document relied upon by the appellant as evidencing such supply is Exh. P3 appearing at p. 288 (v) of the record of appeal which is however, as admitted by the appellant at p. 128, is a list of payments made by the respondent to the appellant. It does not show that additional kerbstones were supplied by the appellant for which payment was not made. The appellant who had a duty to prove this fact did not discharge his burden. It is the law under section 110 of the Evidence Act that he who alleges must prove and the standard is one on a balance of probabilities. As the Court held in **Paulina Samson Ndawavya v. Theresia Thomasi Madaha**, Civil Appeal No. 53 of 2017 (unreported), at page 14:

> *"It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R.E 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other...."*

The appellant in the case at hand failed to discharge this burden. The High Court thus correctly found and held that she was not entitled to

the claim of Tshs. 17,029,760/=. The second ground of appeal fails as well.

Given the above discussion, we find nowhere to fault the decision of the High Court. This appeal without merit is dismissed with costs.

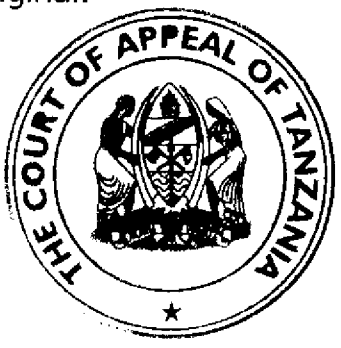
DATED at **DAR ES SALAAM** this 15th day of April, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The judgment delivered this 19th day of April, 2021 in the presence of Mr. Francis Stolla, learned counsel for the Appellant and Mr. Abdallah Hussein, learned counsel for the Respondent is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL