IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., KITUSI J.A. And KAIRO, J.A.)

CIVIL APPEAL NO. 72 OF 2015

DR. A NKINI & ASSOCIATES LIMITED.....APPELLANT
VERSUS
NATIONAL HOUSING CORPORATION.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Tanzania, (Commercial Division) at Dar es Salaam)

(Makaramba, J.)

dated the 7th day of November, 2014
in
Commercial Case No. 40 of 2011

JUDGMENT OF THE COURT

15th July & 23rd September, 2021.

KITUSI, J.A.:

The proceedings, judgment and decree from which this appeal arises, commenced at the Commercial Division of the High Court, in which the appellant was seeking certain orders in relation to a contract she had concluded with the respondent in June, 1999. There was no dispute both at the trial and before us, that indeed there had existed such a contract.

It is common ground that one of the major legal mandates of the National Housing Corporation, the respondent, a Public Corporation established under the National Housing Corporation Act [Cap 205 R.E 2002] is acquisition and development of housing facilities. In that regard, at the time of the conclusion of the said contract, the respondent was the owner of

Plots No. 123 and 265/122 along Samora Avenue in the City of Dar es Salaam. On these plots there stood buildings which the respondent considered no longer worthy, and she wanted a 17- storey building to replace them. Thus, Dr. A Nkini and Associates Limited, the appellant, a privately-owned company established under the laws of the land, entered into a Joint Venture Agreement (JVA) with the respondent, the former undertaking to construct the envisaged 17- storey building (KIBO PLAZA) on the Plots owned by the latter, within 5 years effective from the signing of the contract.

The basis of the appellant's suit at the trial court was an allegation that the respondent issued her with a letter of termination of the JVA, dated February, 2007, while according to her, as of May, 2011, the time of instituting the suit, the JVA still subsisted. The appellant prayed for a declaration that the purported termination of the JVA by the respondent was void ab initio. A good part of the appellant's pleadings consisted of assertions tending to account for the delayed execution of the JVA, and showing that she is not to blame for it. At an appropriate moment in this judgment, we shall make reference to those reasons.

On the other hand, the respondent dismissed the alleged reasons for the delay and referred to them as lame excuses. According to the respondent, the reason for the delayed execution of the JVA was the

appellant's inability to finance the project, a fact that was alleged to be a cornerstone of the said agreement.

There lies the crux of the matter, in our view; whether the delayed execution of the project can be blamed on the appellant therefore constituting a breach of the contract on her part, or it was caused by the reasons explained by her, which then will justify a conclusion that the JVA still subsists. The learned trial Judge formulated one major issue at the commencement of the trial, namely; whether the purported termination of the joint venture agreement is a breach of the contract.

From the sporadic testimonies of Dr. Abel Nkini (PW1) the appellant's Managing Director, the delayed execution of the project was caused by mainly four factors, namely, interference by the respondent, delayed removal of the tenants, complications in removing underground electrical cables and the premises being listed as a historical site.

PW1 testified that removal of the tenants from the site was the respondent's duty under the JVA, but it was not until 2006 when the last tenant was removed. On the other hand, it was the appellant's duty to remove the underground power cables, but according to PW1, this took long because of technical snags that were beyond the appellant's control. He further raised the issue of delayed procurement of permits from relevant

authorities. PW1 testified that whenever the appellant sought to commence construction there was a hindrance of some sort.

Despite all these, according to PW1, the appellant was set to implement the 13-million-dollar project. He demonstrated this by showing that the appellant prepared the building designs (exhibit P2), hired a quantity surveyor known as Webb Uronu, paid professor Kiyulule of the University of Lands (UCLAS) to do soil analysis, entered into a contract of Design & Build (exhibit P5) and contracted a company known as MCC 20 Heinan International, to carry out the construction of the building.

PW1 further deposed that when all the preliminaries had been dealt with and the appellant was ready for commencement of the actual construction, the respondent served her with a termination letter dated 8th February, 2007, admitted during the trial as exhibit P9.

PW1 went on to testify that on receipt of that letter of termination, he approached the respondent's authorities in protest, but the CEO assured him that the matter would be sorted out in due course after finalization of a case that was pending in court. The case PW1 was referring to turned out to be Land Application No. 28 of 2009, and in the course of being cross-examined by Mr. Matunda, learned counsel for the respondent, PW1 later conceded that it could not bear any relevance to the instant case.

In opposition of PW1's testimony, one Ernest Celestine Kagwaba (DW1), an economist working with the respondent, testified that the reasons raised by PW1 to justify the delay were all mere excuses. He sought to prove that the real reason for the delayed commencement of the project was lack of finance on the part of the appellant. He testified that the respondent revoked the termination letter dated 8/02/2007 (Exhibit P9) and went on to point out that in the modified agreement, the appellant was given six months to prove availability of funds for the implementation of the project by making a meaningful start. DW1 stated that that proof was never provided by the appellant.

DW1 explained away some of the factors that allegedly caused the delay. He stated for instance, that the last tenant vacated from the premises in May, 2004, and that the application to remove underground electrical cables was dealt with within only 6 days, from the date of request on 5/7/2006 to the date of TANESCO's response on 11/7/2006. DW1 insisted that the delay was mainly caused by the appellant's lack of finance.

After considering those rival positions, the learned trial Judge's view was that the JVA created one fundamental obligation for each of the parties, that is, provision of the two plots of land by the respondent, on the one hand, and financing of the construction of the building on those plots by the appellant, on the other. The learned Judge considered as central, the issue

whether or not the appellant had the requisite funds to finance the construction. He treated the other reasons as secondary.

The learned Judge concluded that the appellant had not proved that he had the necessary funds for the planned construction, relying on, among other pieces of evidence, exhibits D5 and D9, letters dated 20/2/2007 and 26/03/2009 respectively, showing that as of those dates, the appellant was still working towards mobilization of finances for that construction.

Next, the learned Judge made findings in respect of the reasons cited by the appellant for the delayed construction. Beginning with the alleged delay in getting the tenants evicted, the learned Judge noted that the last tenant vacated in 2005, then concluded by referring to exhibits D5 and D9 again, that the delay was inconsequential because as of year 2009, the appellant was not ready to commence the construction due to financial constraints. The other reason was the fact that the government ordered the construction stopped because the old structures that were intended to be replaced, had been listed as a historical site. The learned Judge concluded that the appellant did not discharge her duty to prove that there was a stop order by the government. Neither did she explain how she later managed to demolish those buildings.

The third reason was the complication in removing the underground electrical cables. The learned Judge concluded that the appellant did not

prove how this delayed the project in view of the fact that TANESCO responded to her request within a very short time. The fourth reason was an alleged delay in ascertaining the boundaries. On this, the learned Judge concluded that the appellant did not lead evidence to prove the allegation, and that, in any event, no construction would have commenced without funds. Lastly, the learned Judge dismissed the contention that a building permit had not been processed. He took the view that the appellant had a duty to establish that she had obtained a building permit, which she failed even after the extension of six months.

In the end, the learned Judge found the appellant to be in breach of the contract, and dismissed the suit with costs. Aggrieved, the appellant initially raised five grounds of appeal for our consideration. We may as well state without ado, that none of the grounds of appeal that were initially lodged, specifically assails the finding of the High Court on the appellant's inability to finance the project. We shall demonstrate that by reproducing the first five grounds of appeal: -

1. *That the Judge erred in law and fact by failing to evaluate the evidence given by the Appellant/Plaintiff to the effect that the Respondent/Defendant failed to evict the tenants in time thus causing the construction not to commence in time.*
2. *That the Judge erred in law and fact by failing to evaluate the strength of the evidence given by the Appellant/Plaintiff to the effect that the*

properties sat on a historical site of national heritage value thus causing the construction not to commence in time.

3. *That the judge erred in law and fact by failing to evaluate the strength of the evidence given by the Appellant/Plaintiff to the effect that the underground high voltage electrical cables which posed real threat to security workers could not be removed before the tenants were evicted thus causing the construction not to commence in time.*
4. *That the judge erred in law and fact by failing to determine that the court lacked jurisdiction since the contract required parties to refer the matter to arbitration.*
5. *The learned Judge erred by condemning the Appellant to pay costs of the suit.*

Before us, the appellant was represented by Mr. Killey Mwitasi, learned counsel, while the respondent entered appearance through Mr. Aloyce Sekule, learned Principal State Attorney. Prior to the date of hearing, written submissions had been filed in support of the appeal, and the appellant seized that opportunity to raise 3 additional grounds in terms of Rule 106 (3) (b) (ii) of the Tanzania Court of Appeal Rules, 2009 (the Rules), and one more ground in terms of Rule 113 (1) of the Rules. No submissions were filed by the respondent's counsel. The four new grounds which, at the request of the appellant's counsel were renumbered as 6, 7, 8 and 9, are: -

6. *The trial judge was biased and failed to properly evaluate the testimonies tendered by the parties to the suit consequently he arrived at the wrong conclusion to the extent of dismissing the Plaintiff's suit.*

7. *The trial judge erred in law and facts by his failure to consider that the contract was automatically renewed by the conduct of the parties.*
8. *The issue as to whether there was proof of availability of funds or not was not among the issues framed for determination by the court, hence the trial judge misdirected himself in relying on the said issue.*
9. *That DW1 Ernest Kagwaba and the only witness for the Defendant/ respondent, being just an economist, was thus incompetent to testify on the issues relating to architectural science, civil engineering or science, thus the trial judge erred in law and facts to rely on the testimonies of DW1 as correct ones on behalf of the Respondent.*

For a proper chronology, we are tempted to begin with the 8th ground of appeal which was argued by the appellant's counsel in alternatives. First it was submitted that proof of availability of funds was not an issue, and that therefore, the learned Judge ought not to have considered that issue in the determination of the case. It was argued in the alternative, that if availability of funds had to be an issue, the learned Judge erred in concluding that the appellant failed to prove that fact. We will determine the first limb; whether availability of funds ought to have been considered by the court while it did not feature among the framed issues.

The appellant's counsel made a very brief submission on this ground, referring to the principle that the court has to confine itself to the issues framed. The respondent's counsel did not address this point, or did so superficially, we dare say. For us, we agree with Mr. Mwitasi that as a

general rule, determination of a civil matter has to be based on the framed issues, and that is the essence of Rule 5 of Order XX of the Civil Procedure Code [Cap 33 R.E 2002] (the CPC) which provides: -

> *"In suits in which issues have been framed, the court shall state its finding or decision with the reason therefore, upon each separate issue unless the finding upon any one or more of the issues is sufficient for the decision of the suit."*

However, there are exceptions to that rule, say where, though a matter was not framed as an issue, the parties were allowed to address it during the hearing as it has been decided in; **George J. Minja vs. The Attorney General,** Civil Appeal No 75 of 2013 and **Felician Muhandiki vs. Managing Director Barclays Bank Tanzania Limited**, Civil Appeal No. 82 of 2016 (both unreported). Or where it appears the parties left the issue to the trial court for its determination, in line with **Odd Jobs vs. Mubia** [1970] EA 476 cited by the Court in **Agro Industries Ltd vs. The Attorney General** [1994] T.L.R 43. In this case there is ample proof that the parties addressed the issue whether the appellant had the requisite finances or not. While the appellant tendered exhibit P10, a letter from IRICOL Investment addressed to PW1 on the financing of the project, the respondents tendered exhibit D5 D7 and D9 on the same. We are therefore satisfied that the

learned Judge was correct in considering the issue of availability of funds, more so because, as he said, that was a very fundamental term of the JVA.

We now turn to the second limb of ground 8, that is, whether the learned Judge's conclusion that the appellant did not prove that she had the funds, was correct or not.

Mr. Mwitasi submitted that the JVA required the appellant to secure funds, but not to prove that she had funds, thus he faulted the Judge's conclusion that the appellant failed to prove that she had funds. He referred to exhibit P10 which proved that there was a promise by the author of that letter, to provide funds for the construction. Submitting in response, Mr. Sekule pointed out that exhibit P10 is a letter that was written in the year 2008. He went on to submit that that evidence is proof that as late as 2008, the appellant was still grappling with financing the project.

We shall make our determination of the second limb of ground 8, right away. To begin with, the issue of financial ability was clear from both the contract and the pleadings. The JVA is very clear on the duties of the parties to that agreement and we think reference to paragraphs E and G of the JVA shall suffice: -

> *"**E**. The partner will **provide** 100% financing and NHC's participation will be in terms of Land, goodwill and the value of unexhausted improvement on the plot/plots offered for the construction of 17*

(seventeen) storey modern building for commercial use.

G. *The partner has such capability, capacity and access to the resources necessary to construct the building and is also willing to finance the whole project."*

We see in the above two paragraphs, the appellant's undertaking to provide funds, and an assurance to the respondent that she had the capacity to do so. In addition, under paragraph 6 of the plaint, the appellant alleged that one of the terms of the contract was for the appellant to 'secure' funds. In addition, the suit from which this appeal arises was essentially based on the appellant's assertion in the plaint that she had the funds for the project. Since it is an elementary principle of law that parties are bound by their own pleadings and that the one who alleges must prove, it was imperative in our view, for the appellant to prove that she had the requisite funds. We do not see how the learned Judge can be faulted on that. Now, the pivotal question was; whether there was proof that the appellant had the funds?

Mr. Mwitasi submitted in support of the appellant's position by referring to the costs that went into the preliminary works such as, soil testing and preparation of designs, and argued that they are proof that the appellant had the necessary funds. The learned counsel even submitted that by approaching financiers, the appellant was partly performing her contractual

duty of financing the project. Mr. Sekule submitted that the main reason for the failure to have the building constructed was lack of funds and the appellant failed to prove that she had any.

In this case the contract required the appellant to provide funds but, in the pleadings as well as in the testimonies, she has only cited the efforts she made to get funds. For instance, under paragraph 18 of the plaint, the appellant stated that on 19th June 2008 she communicated to the respondent through exhibit D7, about the Government's assurance to provide funds. As we have stated above, the law is settled that he who wants the court to consider that a certain fact exists, has the duty to adduce evidence to that effect. See the cases of **Godfrey Sayi vs. Anna Siame as Legal Representative of the Late Mary Mndolwa,** Civil Appeal No. 114 of 2012; **Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Government,** Civil Appeal No. 147 of 2006, **Anthony M. Masanga vs. Penina (Mama Mgesi) & Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014 (unreported), cited in our other decision in **Geita Gold Mining Ltd & Another vs. Ignas Athanas,** Civil Appeal No. 227 of 2017 (also unreported). However, in this case, instead of leading evidence to prove that she had the funds, the appellant took upon herself the duty to prove the efforts she made in securing promises for funding. In our view, what the appellant demonstrated was not proof that she had

funds, but it was proof that she had none even as of 19th June 2008, according to her own pleadings and the letter tendered by the respondent as exhibit D7. As we have stated above, it is settled law that parties are bound by their own pleadings. See also the case of **Paulina Samson Ndawavya vs. Theresia Thomas Madaha** Civil Appeal No. 45 of 2017 (unreported).

Mr. Mwitasi further submitted that the contract period was extended, and that in the letter of the extension of that contract (exhibit D8), there was a condition that the appellant should make a meaningful start. He submitted that there was no proof that there was no meaningful start, to justify a conclusion that the appellant was in breach. Mr. Sekule on the other hand submitted that the appellant was not ready to make a meaningful start because by a letter dated 26/3/2009 (exhibit D9) addressed to the appellant, she was blaming the delay on the said respondent for not allowing her use the land as collateral for a loan.

We think we have sufficiently demonstrated by case law that the one who alleges existence of a fact bears the duty of proof, which means the appellant who claims that there was a meaningful start, should have adduced evidence to prove that there was. With respect, counsel cited no law, and we are not aware of any, that places a duty on the respondent to prove a negative, that there was no meaningful start. That is what the Supreme Court of India decided in the case of **New India Insurance Company Ltd**

vs. Nusli Neville Wadia & Another Appeal Civil Case No 5879 of 2007 SC India. Referring to Sarkar on Law of Evidence 16th Edition Volume 2 at page 1584, commentary on section 101 of the India Evidence Act which is *in pari materia* with section 110 of the Tanzania Evidence Act, the Supreme Court held: -

> *"This section is based on the rule, i.e.* ***incumbit probation qui dicit, non qui negat****; the burden of proving a fact rests on the party who substantially asserts the issue and not upon the party who denies it; for a negative is usually incapable of proof. It is an ancient rule founded on consideration of good sense and should not be departed from without strong reasons."*

There is also the case of **Bombay Trading Stores (U) Limited and Another vs. Republic** [1962] 1 EA 589 on the difficulty in proving a negative. Likewise, in this case, it was not for the respondent to prove that the appellant made no meaningful start after the extension of the contract, rather it was for the appellant to prove that there was some. For those reasons we find no merit in ground 8 of appeal, so we dismiss it.

We shall now address the remaining grounds of appeal. Mr. Mwitasi abandoned ground 4 of appeal and combined grounds 1 and 7. Under the first ground of appeal, the appellant faults the learned Judge for failing to properly evaluate the evidence consequently failing to appreciate that the

respondent did not evict the tenants in time, which in turn, caused delay in the construction. Mr. Mwitasi submitted that the respondent was in breach of the contract by securing vacant possession of the premises beyond the lifespan of the contract, whether it was in 2006 as testified by PW1 or in 2004 according to DW1. He submitted that the High Court was wrong in concluding that the delay did not affect the implementation of the contract and in the end, it allowed the respondent to benefit from its own wrong, which is inappropriate. He cited the cases of **Bi Hawa Mohamed vs. Ally Seifu** [1983] T.L.R 32 and **Princess Nadia (1998) Ltd vs. Remency Shikusiry Tarimo and 2 Others,** Civil Appeal No. 242 of 2018 (unreported).

Under the 7th ground of appeal, the High Court is being faulted for not concluding that the contract had been automatically extended by the parties' conduct. Mr. Mwitasi cited to us a decision of the High Court in **Erick John Mmary vs. M/S Herkin Builders Ltd**, Commercial Case No. 138 of 2019 (unreported), to support his contention that actions and words by the parties to a contract may form a new contract after expiration of the first. The learned counsel submitted that since the respondent was in breach of the contract by failing to evict the tenants within time, and since subsequent to that the parties conducted themselves in a manner that suggested that the contract had not been terminated, then the contract was subsisting.

Responding to the submissions on grounds 1 and 7, Mr. Sekule submitted that the last tenant was evicted in 2004, but even assuming it was in 2005, the appellants did nothing on the site from 2006 to 2008. He pointed out that as of 5/7/2006, the high voltage electrical wires had been removed, yet the appellants did nothing thereafter.

It is clear from the pleadings that the contract was extended according to the respondent's letter (exhibit D8) written in response to the appellant's request (exhibit D7). The reason for the requested extension of time is seen on the title of those letters which reads; *Request for Extension of Time for Six Months Regarding Mobilization of Funds to finance the Joint Venture Re-Development of Plots No. 265/122 and 123 Samora Avenue,* Dar es Salam. We reiterate the principle that parties must be bound by their pleadings. As exhibits D7 and D8 which are part of the appellant's plaint as annextures, tell the reason for the requested extension of time to be mobilization of funds by the appellant, and that at the time of requesting for that extension on 19th June, 2008, two years had elapsed since the tenants had been evicted, there is no justification for blaming the delayed construction on the alleged delay in evicting the tenants, or even the removal of underground cable. We agree with Mr. Mwitasi that no party should benefit from his own wrong. In our view, however, if anyone was likely to benefit from own wrong in this case,

then it was the appellant. Thus, grounds 1 and 7 have no merit, so dismissed.

In ground 2, the Judge is faulted for not concluding that another reason for the delay was the government interference based on allegations that the properties stood on a historical site. As we earlier showed, the learned Judge dismissed this contention on the ground that the appellant did not demonstrate that fact by evidence. Mr. Mwitasi argued before us that proof of a fact need not be through documentary evidence in all cases, and cited the case of **Abas Kondo Gede vs. Republic,** Criminal Appeal No 472 of 2017 (unreported). With respect, we agree with Mr. Mwitasi because sections 61 and 62 our Evidence Act [Cap 6 R.E 2002] recognize the fact that proof of a fact may be through oral evidence. However, if the terms of an agreement are written, as it was in this case, then oral evidence suggesting variation of such terms may not be acceptable. See our decision in **UMICO Limited vs. SALU Limited** Civil Appeal No.91 of 2015 (unreported), where we stated: -

> *"We wish to begin by stating that it is trite principle of law that generally if the parties in dispute had reduced their agreement to a form of a document, then no evidence of oral agreement or statement shall be admitted for the purpose of contradicting, varying, adding to or subtracting from its terms (see Ss 100 and 101 of the Evidence Act, Cap 6 RE 2002)."*

We are of the view that in the absence of any written proof that the government made instructions to the appellant to stop works at the site, nor a government official to testify in support of those allegations by the appellant, a mere word of mouth would be hard to believe, especially as we cannot figure out the duration of that order. Again, as we have held in relation to grounds 1 and 7, this would not have affected the appellant anyhow because she had not surmounted the major hurdle of finances. Ground 2 is equally without merit, so we dismiss it.

Ground 3 is a complaint that the learned Judge erred in not finding that the high voltage cables contributed to the delay as they could not be removed before the tenants had vacated from the premises. The learned Judge concluded that the removal of the high voltage cables had nothing to do with the delayed construction because, he said, the letter of request to TANESCO dated 5/7/2006, was written by the appellant when the original project schedule was coming to an end and that even then, the permit was obtained within only six days of the request. We do not see how we can fault the learned Judge on that finding because the appellant did not lead evidence to establish whether and how the delayed removal of the cables which was the appellant's duty under the JVA, could be blamed on the respondent or anyone, for that matter. In addition, considering the way the matter was swiftly dealt with by TANESCO after the request, we are unable

to agree with the appellant that this aspect affected the schedule of the project. We find no merit in this complaint and dismiss it.

We shall skip ground 5 which seeks to challenge the order of costs which was made against the appellant, and reserve its determination for last. We shall now address ground 6 alleging that the Judge was biased in his evaluation of the evidence. We wish to start by stating that we have found this ground of appeal somehow unconventional, and the tone of the learned counsel's submissions supporting it, a bit impolite. We shall demonstrate this by reproducing part of the written submissions: -

> *"The trial judge always suppressed the Appellant throughout the judgment, the Respondent apart from breaches she had done to the JV, the inaction to the performance of JV, still the Respondent was looked at as a 'saint' instead all the alleged sins/breaches were placed on the Appellant..."*

We need to restate the fact that submissions by an advocate are not evidence as we have decided in **Republic vs. Donatus Dominic @ Ishengoma & 6 Others**, Criminal Appeal No. 262 of 2018 and **Morandi Rutakyamirwa vs. Petro Joseph** [1990] T.L.R 49]. Submissions are arguments based on the available evidence and the governing law. In **Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Government,** (*supra*) we stated the following in relation to submissions: -

> *"With respect however, submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered.* ***They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence".*** *(emphasis supplied).*

See also **Shadrack Balinago vs. Fikiri Mohamed @ Hamza and 2 Others**, Civil Application No. 25/8 of 2019 (unreported).

In the instant case, the learned counsel's submissions attack the learned Judge for not properly evaluating the evidence and for not apportioning blame to the respondent for allegedly not discharging some of its duties in the JVA. Mr. Sekule submitted that he who alleges must prove. He went on to submit that as there was no evidence to prove the appellant's case, the Judge had nothing to evaluate. We agree with the learned Principal State Attorney. While a lot was argued on those grounds which tended to justify the delay in construction, which the learned Judge considered to be secondary, very little was argued on the appellant's alleged inability to finance the project, which the Judge considered to be primary. Besides, the learned Judge gave reasons for his decision on every relevant aspect, but instead of attacking those reasons, the learned counsel has made allegations, without oath, that the learned Judge was biased and treated one party as a

saint. Justice is not for rationing, as the learned counsel would wish. See **Richard Wambura vs. Republic**, Criminal Appeal No. 167 of 2012 (unreported), cited in our other decision in **Amitabachan Machaga @ Gorong'ondo vs. Republic**, Criminal Appeal No. 271 of 2017 (also unreported). If the evidence showed, on a balance of probabilities, that the appellant was to blame for the non-performance of the JVA, the learned Judge had no duty to give a portion of the blame to the respondent, and by not doing so, that did not amount to the learned Judge treating one party as a saint and another a devil. Therefore, we find this ground to be devoid of merit, so we dismiss it.

The 9th ground of appeal was in relation to the competence of DW1, an economist, to testify on matters of architecture, engineering and science. Mr. Mwitasi submitted that since DW1 who was incompetent to testify on architecture and engineering was the only witness for the respondent, the trial Judge should have made a finding that the respondent did not adduce any evidence. Mr. Sekule responded by submitting that DW1 was a competent witness because he had custody of the documents which he testified on. He cited the case of **DPP vs. Mirzari Pirbakhshi @ Hadji & 3 Others,** Criminal Appeal No. 493 of 2016 (unreported) to buttress this proposition.

With respect, we agree with the learned Principal State Attorney again, that a person may competently testify on anything relevant to the case, if at one point he had possessed or controlled the piece of evidence in question. That was the Court's position in **DPP vs. Kristina Biskasevskaja**, Criminal Appeal No. 76 of 2016 (unreported). But on reflection, Mr. Mwitasi's criticism would be justified if DW1 had presented himself as an expert in those fields, which was not the case. This case is found on contract, and the main issue at the trial was whether or not there was failure by the parties to perform their respective obligations under it. If we have to repeat, the decision of the High Court was mainly that the appellant did not have the requisite funds to perform the contract, and in our view, it did not take an engineer to testify on that. The architectural and engineering aspects of the case did not form a basis of the court decision, so any attack by the appellant based on those sciences eludes us. This ground has no merit in our view, so we dismiss it too.

We shall lastly consider the complaint on the Judge's order of costs against the appellant. Mr. Mwitasi's argument is that the learned Judge did not exercise his discretion judiciously by awarding costs to the respondent who was blameworthy. He argued again that a party should not benefit from his own wrong, this time supporting his view with the case of **Watter Kamoli vs. International Commercial Bank (T) Ltd**, Miscellaneous

Application No. 267 of 2019, High Court, Labour Division (unreported). On the other hand, Mr. Sekule submitted that costs normally follow the event, and that in terms of section 30 (2) of the CPC, it is only when the court denies costs to a successful party, that it has to assign reasons.

The law on award of costs is fairly settled, in our view, that costs follow the event. We agree with the submissions of Mr. Sekule on the point because well before today, we stated in **Njoro Furniture Mart Ltd vs. Tanzania Electric Supply Co. Ltd** [1995] T.L.R 205 that: -

> *"Undoubtedly in our opinion, costs are within the discretion of the court as stated under s 30 of the Civil Procedure Code, 1966. It has, however long been established by the courts, that costs normally follow the event...Moreover, under ss (2) of s 30 of the Civil Procedure Code, it is expressly stated that, "Where the court directs that any costs shall not follow the event, the court shall state its reasons in writing."*

The same position has been followed in many of our subsequent decisions including **National Bank of Commerce Limited vs. National Oil Tanzania Limited & Another**, Civil Appeal No. 4 of 2010 (unreported). We find the 5th ground of appeal attempting to challenge that settled law, devoid of merits. Besides, the complaint under this ground is based on a wrong premise that the respondent is to blame for the delay of the project.

We have already attributed the delayed implementation of the project to the appellant's inability to finance it. We accordingly dismiss this ground.

For all those reasons, we find the whole appeal to be barren of merit and dismiss it with costs.

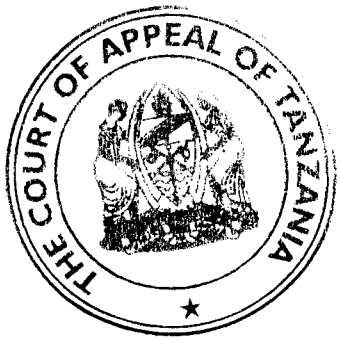
DATED at **DAR ES SALAAM** this 17th day of September, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Judgment delivered on 23rd day of September, 2021 in the presence of Mr. Killey Mwitasi, learned counsel for the Appellant and Ms. Elizabeth Kifai holding brief for Mr. Aloyce Sekule, Principal State Attorney for the Respondent, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL