IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: NDIKA, J.A., MWANDAMBO, J.A., And KAIRO, J.A.)

CIVIL APPEAL NO. 453 OF 2020

RENI INTERNATIONAL COMPANY LIMITED ..... APPELLANT

VERSUS

GEITA GOLD MINING LIMITED ..... RESPONDENT

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

(Philip, J.)

dated the 26th day of May, 2020

in

Commercial Case No. 168 of 2018

JUDGMENT OF THE COURT

25th October, 2021, & 6th May, 2022

KAIRO, J.A.:

This is a first appeal. The appellant, Reni International Company Limited, challenges the judgment and decree of the High Court of Tanzania (Commercial Division) sitting at Dar es Salaam dated 26th day of May, 2020 in Commercial Cas No. 168 of 2018.

In that case, the trial court ordered the respondent to pay the appellant an amount of TZS. 20,000,000.00 as general damages at an interest rate of 7% on the decretal sum from the date of the judgment to the date of full payment. The trial court further awarded cots of the case to the appellant.

The factual background to this appeal is as follows: the appellant and the respondent executed contract Number 4501301787 (exhibit P1) on 18th June, 2018. The contract entailed the supply and installation of solar street lights in Geita Township financed by the respondent being part of the Corporate Social Responsibility Projects (CSR Projects). According to the appellant, the said contract was not effectively implemented due to frustration caused by the respondent.

In her plaint, the appellant contended that she was engaged by the respondent to supply and install solar street lights worth TZS. 4,200,000.00 per unit for a distance of 12 Kilometers on both sides that made up a total of 606 street lights. The appellant further averred that she entered into contracts with other suppliers of all of the materials needed for the work and paid for the same, but ended up installing lights over a stretch of 3 kilometers only. She further averred that, she could not proceed with the execution of the contract to its end as the respondent allowed political interference from regional authorities which changed the agreed terms by reducing the scope of works, the number of street lights that were supposed to be installed and the type of street lights to be installed which happened to be of outdated technology.

The appellant further pleaded that, the respondent advertised a new tender for the works which were already contracted to her without following the termination procedure as per the contract. The appellant thus sued the respondent claiming constructive breach of the contract by the respondent praying for the following reliefs;

(i) Payment of the sum of TZS. 763,560, 000.00 being 30% of the contract value which would have been a profit obtained out of the contract.

(ii) Payment of the sum of USD. 65,000.00 being the amount paid to the suppliers of the materials for the work.

(iii) Payment of general damages as may be assessed by the trial court.

(iv) Costs and other reliefs the trial court would deem just to order.

In her written statement of defence, the respondent denied the allegation by the appellant and stated that the contract between them was neither frustrated nor terminated. The respondent contended that the said contract was subject to changes and variations. That, the parties had negotiations which culminated into the changes in some of the terms, scope of work, specifications and the mode of executing the contract. She denied to have allowed any interference from regional

political authorities and also refuted the appellant's allegation that she awarded a tender to another contractor for the works assigned to the appellant. She further pleaded that, she had paid the appellant all her entitlements under the contract and the unpaid sum, if any, was in the process of payment.

Four issues were framed before the trial court but the ones the trial court hinged its decision on where: - **one,** whether the defendant frustrated or caused to be frustrated the performance of the contract by allowing political interference, thus constructively terminated the contract; and **two,** whether there was a breach of the contract by either party.

In its findings, the trial court resolved the first issue affirmatively and held that the appellant had managed to prove that the respondent allowed political interference that changed the terms of the contract and turned the appellant the supervisor for the project instead of the contractor as per exhibit P1. As such, the trial court concluded that the respondent breached the contract. The trial court further found that the respondent frustrated the contract and constructively terminated it by entering into another contract for the same works.

Regarding the reliefs sought by the appellant, the trial court found that, the specific damages pleaded and claimed by the appellant quoted as no (i) and (ii) above were not specifically proved by the appellant in his evidence. As for the general damages, the trial court found that, since breach of the contract was established, general damages cannot be ruled out. The court therefore condemned the respondent to pay the appellant TZS. 20,000,000.00 as general damages with an interest of 7% on the decretal sum together with costs as earlier intimated. The appellant was not satisfied with the said decision and decided to lodge the appeal armed with five grounds.

When the appeal was called for hearing, the appellant was represented by Ms. Mary Lamwai, learned counsel while Mr. Silwani Galati Mwentembe, learned counsel represented the respondent. Ms. Lamwai abandoned the 2nd ground of appeal and argued the remaining four which we have renumbered and paraphrased them as follows: -

(1) *That the learned Judge erred in law and fact by holding that the appellant has failed to prove his claim for the payment of TZS. 763,560,000.00 despite admitting that there was a breach of contract by the respondent.*

(2) The learned Judge erred in law and fact by failing to give weight and consider the exhibits tendered by the plaintiff (the appellant herein) whereby exhibits P2 and P3 tendered by PW1 proves the costs partly incurred by the appellant in the course of executing the contract.

(3) That the learned Judge erred in law by holding that there was no sufficient evidence on the authenticity of exhibit 'P5' despite admitting the same during the trial, thereby flouting the law as to the admission of documents.

(4) That the learned Judge misdirected herself as to the applicability of the provisions of section 110 (1) and (2) of the Evidence Act No. 6 RE 2019 (the Evidence Act), by holding that the appellant had a burden to prove the claim which was not disputed by the respondent. Besides, the respondent did not dispute the existence of the contract between the appellant and the respondent herein (exhibit 'P1') during the hearing.

Amplifying the grounds of appeal, Ms. Lamwai argued the 1st and 4th grounds collectively and then tackled the rest separately.

In the 1st ground of appeal Ms. Lamwai faulted the trial court for holding that the appellant has failed to prove his claim of TZS. 763,560,000.00 being a profit of 30% of the contract value despite its

finding that there was breach of contract by the respondent. She elaborated that, in his testimony, PW1 stated the value of the contract and the profit which the appellant would have gained had the contract been executed. Ms. Lamwai argued that, it was the finding of the learned trial Judge that the above testimony was not controverted by the respondent despite having a chance to do so. She argued that, the doctrine of estoppel should therefore operate against the respondent and that she be stopped from questioning the same in this appeal.

As for the 4th ground of appeal, Ms. Lamwai submitted that the trial Judge misdirected herself on the application of the provision of section 110 (1) and (2) of the Evidence Act [Cap 6 R.E. 2019] which provides for the burden of proof. She elaborated that the provision is applicable only if the concerned fact is disputed, but in this matter, that was not the case. She therefore argued that, it was not proper on the part of the trial court to question how the appellant had arrived at the said 30% while the same was not disputed by the respondent. She added that the appellant was denied the amount unfairly as she had fully discharged her burden of proof. Ms. Lamwai referred us to the case of **Jacob Mayani v. Republic** [2020] T.L.R. 397 to support her arguments.

In rebuttal, Mr. Mwantembe submitted that the decision of the trial court denying the appellant the claimed amount of TZS. 763,560,000.00 is well founded and in accordance with the law and evidence brought before it. He invited us to note that, the appellant had two sets of claims in paragraphs 8 and 9 of the plaint which she both failed to prove.

In further elaboration, Mr. Mwantembe attacked Ms. Lamwai's argument which suggests that the breach of the contract gave the appellant an automatic right to be paid the claimed amount. According to him, the claim of TZS. 763,560,000.00 falls under special damages being claimed as loss of profit. He went on to argue that as a matter of law, special damages must be specifically pleaded and strictly proved. He referred us to the cases of **Masolele General Agencies vs. African Inland Church of Tanzania** [1994] T.L.R. 192 and **Siree vs. Lake Turkana El Molo Lodge** [2000] 2 E.A 521 to substantiate his argument.

Mr. Mwantembe went on to submit that there was no admission to the effect that the appellant breached the contract, rather the same was frustrated. He, however, argued that even if there was such an admission, the appellant did not prove the amount claimed as loss of profit. It was his further contention that none of the appellant's

witnesses testified as to how much the appellant would have incurred in executing the contract and how much would have been earned as profit. According to Mr. Mwantembe, that would have been a proper way to prove the special damages being claimed by the appellant.

Regarding the misapplication of section 110 (1) and (2) of the Evidence Act, Mr. Mwantembe argued that the trial court was correct to cite and apply the said provision when discussing the issue as to whether the appellant was entitled to an award of 30% of the contract value claimed to be loss of profit. He argued that, the appellant did not discharge her burden of proof to the required standard which is strict proof and thus, there is nothing to fault the trial court for denying the appellant the said amount.

On the argument based on admission of exhibit P1 without objection and the undisputed amount claimed by the respondent, Mr. Mwantembe stated that, admissibility and weight are not one and the same thing. It was his argument that the trial court was still required to analyse the weight the exhibit carries and determine its relevance. He went on arguing that even if there was evidence on the amount claimed, the appellant was still required to prove it. He added that the claim was denied by the respondent in paragraph 7 of her amended written

statement of defence at page 74 of the record of appeal, and thus, the same ought to have been proved by the appellant. Mr. Mwantembe thus implored the Court to find both the 1st and 4th ground of appeal without merit.

In her rejoinder, Ms. Lamwai contended that, what was argued by Mr. Mwantembe should be considered as an afterthought as the same was supposed to be raised during trial, but it was not. She went on to argue that his failure to controvert the claims justified the award of the same to the appellant. She distinguished the cited case of **Masolele General Agencies** (supra) arguing that the case was heard ex parte, as such there was no one to contradict the evidence through cross examination.

Ms. Lamwai also contended that, the respondent's argument that she disputed the claim in her amended written statement of defence does not salvage the situation as she was supposed to rebut the claim during the trial as well. She distinguished the case of **Siree v. Lake Turkana El Molo Lodge** (supra) arguing that special damages were not pleaded in the cited case while in the case at hand, the amount was specifically pleaded. She continued to argue that the respondent's contention that she did not understand how the claim was reached at, is

misleading as the respondent was aware of the value of the contract as rightly observed by the trial Judge. Further to that, she argued the respondent had ample opportunity to cross examine the appellant on the issue but she did not. The learned counsel repeated her submission in chief on the other grounds and reiterated her prayer to have the appeal allowed.

Having heard the rival submissions from the counsel of the parties on the 1st and 4th grounds, the issue for determination is whether the appellant was entitled to the award of TZS. 763,560,000.00 claimed as loss of profit. It is the argument by the appellant that the respondent has breached the contract they entered on 18th June 2018. On the other hand, the respondent has denied the said breach and termed it "frustration" of the said contract. We wish to state from the onset that we respectfully agree with the trial court's finding that the respondent was in breach of the contract the parties executed. We find it apposite to start with reference to the provisions of section 73 (1) and (2) of the Law of Contract Cap 334 R.E. 2019 (the Law of Contract) which prescribes the rights of an innocent party when a breach of contract occurs: It states: -

"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 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".

In her submissions, Ms. Lamwai argued that, it was not correct for the trial court to deny the appellant the amount claimed as loss of profit which she would have gained but for the breach of the contract by the respondent. According to her, the amount claimed is 30% of the contract value and that the amount was neither disputed nor controverted by the respondent during the hearing, which she argued is an admission of the claim. However, the respondent on her part argued that the amount claimed being loss of profit falls under special damages which needs to be pleaded specifically and proved strictly regardless of whether the amount was disputed during the hearing or not.

According to the trial court's finding, loss of profit falls under specific damages which is required to be specifically pleaded and strictly

proved. Mr. Mwantembe argued that despite being pleaded, the stated amount was not strictly proved by the appellant as required. We agree that the stated amount was not proved as found by the trial court. Be it as it may, upon an examination of the pleadings and the evidence adduced before the trial court and mindful of the principles governing damages expressed in various cases including **Siree vs. Lake Turkana El Molo Lodge** (supra) and **Sylvester Lwegira Bandio & Another vs. National Bank of Commerce Limited,** Civil Appeal No. 125 of 2018 (unreported), the amount claimed falls under general rather than special damages. In **Sylvester Lwegira Bandio** (supra) the Court stated: -

> *"...we have no hesitation to hold that, though pleaded as special damages,* ***the claim as to loss of expected earnings was nothing but a claim for general damages which was within the discretion of the trial court.*** *As the law requires therefore, we would be reluctant to disturb the exercise of civil discretion by the trial court. We can only do so if we establish non-consideration of or omission to consider a pertinent principle of law"* [Emphasis added].

In the circumstance we find that the trial court was correct to decline awarding the appellant the claim of TZS. 763,500,000.00 as special damages because it did not qualify to be so.

Having found the claim falls under general damages, the extent of award was entirely in the discretion of the trial court. It is settled law that an appellate Court can only interfere with the awarded amount if it is satisfied that in assessing the damages, the trial court applied a wrong principle of law or the amount awarded is so inordinately low or so inordinately high to render it wholly erroneous estimate of damage. See: **The Cooper Motor Corporation vs. Moshi/Arusha Occupation Health Services** [1990] T.L.R 96. For the same proposition, **Ms. Universal Electronics and Hardware (T) Limited vs. Strabag International** (Tanzania Branch,) Civil Appeal No. 122 of 2017 (unreported) referred to the statement of Lord Wright in **Davies vs. Powell Duffryn Associated Collieries Ltd** [1942] A.C. 601 Page 617, [1942] 1 All E.R. 657 wherein he stated: -

> *"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."

With the above principles in mind, we wish to state that we have not found any justification to interfere with the trial court's assessment on the awarded general damages.

We are alive that Ms. Lamwai has argued that the respondent did not cross-examine the appellant's witnesses during the trial, which according to her, amounted to an admission. However, it is on record that the respondent disputed categorically in paragraph 7 of her amended written statement of defence that the claim for

TZS. 763,560, 000.00 was contrary to clause 17 of the contract. That means, the appellant was required to prove it regardless of whether or not the respondent cross examined the appellant's witnesses. The appellant's obligation to prove was not relieved by the failure to cross examine by the respondent, as rightly observed by the trial court.

In the cited case of **Jacob Mayani vs. Republic**, (supra) it was the appellant's admission which was not controverted through cross examination and thus the trial court considered the omission to be an

admission. However, in the case at hand, it was the witness evidence which was not cross-examined. In our view, the omission did not amount to an admission as the trial court still had to analyse the said evidence and relate it with other pieces of evidence before concluding. Accordingly, the cited case is distinguishable from the facts in the instant appeal.

That apart, though the parties did not dispute the existence of exhibit P1, it did not mean that the appellant was automatically entitled to the claimed relief. After all, what was in controversy centered on whether the respondent breached the contract and not whether the parties executed the said contract. Based on the foregoing discussion, the 1st and 4th grounds of appeal have no merits. We dismiss them both.

Arguing on the 2nd ground of appeal, the appellant is faulting the trial court for not considering exhibits P2 and P3 in her judgment. The learned counsel contended that the trial court failed to incorporate all the exhibits tendered in her decision. She cited the case of **Hamisi Rajabu Dibogo vs. The Republic**, Criminal Appeal No. 53 of 2021 (unreported) to back-up her arguments. Elaborating, Ms. Lamwai submitted that, the appellant had suffered loss because of the breach as she had already made payment for the project material. She referred us

to exhibit P3; a copy of the payment done through SWIFT (the Society for Worldwide Interbank Financial Telecommunication) which is a worldwide payment settlement service provider. According to her, that was a proof for the payment made to suppliers. She faulted the trial court's analysis in its judgment at page 431 of the record of appeal whereby the trial court observed that there was an objection against the tendering of delivery notes and some receipts. Ms. Lamwai argued that the appellant was entitled to be reimbursed the amount she paid for the project materials as the appellant proved it and the respondent did not dispute. To bolster her arguments, she referred us to the case of **Makubi Dogani vs. Ngodongo Maganga**, Civil appeal No. 78 of 2019 (unreported) for the proposition that contents of an exhibit admitted without any objection from the other party are taken to be adequately proved.

Ms. Lamwai concluded by urging the Court to find that the appellant succeeded to prove the costs incurred for the material as per exhibit P3.

In response, Mr. Mwantembe generally rebutted the appellant's submissions arguing that the referred exhibits P2 and P3 do not relate to the contract at issue.

He elaborated that exhibit P2 was a purchase order from the respondent to supply and install the solar street lights dated 19th June 2018. On the other hand, exhibit P3 was the payment of USD 44995.00 effected on 16th October, 2018 through SWIFT transfer to Hong Kong and Shangai Banking Corporation Limited in Guangzhou, China for the purpose of what was alleged to be importation of solar street lights.

He went on to argue that according to PW2's witness statement at page 251 of the record of appeal, the appellant had already bought all the material and sent them to the project site by 27th July, 2018. In further elaboration, Mr. Mwantembe argued that when cross-examined as regards his statement, PW2 insisted at page 456 of the record of appeal that the appellant had already bought the working material for the entire contract including the street lights except cement, as of the said date. The learned counsel submitted thus exhibits P2 and P3 had no connection to the contract at issue. He pointed out that according to PW2, all of the contract materials were bought at Dar es Salaam. It was his further argument that the total amount claimed does not tally with the amount stated in any of the document tendered. He concluded that, the two documents were irrelevant to the contract at issue even if the same would have been considered by the trial court.

Having gone through the judgment of the trial court, we note that the trial Judge neither evaluated nor considered exhibits P2 and P3 as rightly submitted by Ms. Lamwai. Being the first appellate Court, we shall re-appraise them and draw our own inference of fact which we are empowered to do under rule 36 (1) of the Rules. The issue for determination therefore is whether exhibits P2 and P3 proved the costs incurred by the appellant in the process of executing the contract.

The appellant contended at page 9 of the plaint to have transferred USD 65,000.00 to Guangzhou China on 16th October, 2018 as payment for the entire contract materials. According to her, since the contract was breached by the respondent, the appellant should be reimbursed the said sum.

It is noteworthy that, by the nature of the claim, it falls under special damages which requires strict proof. Going through exhibit P3, the sum transferred is shown to be USD 44995.00, which is at variance with the amount pleaded in the plaint. It is a settled principle of law that parties are bound by their pleadings and that where evidence adduced does not support the pleading, the same ought to be ignored. It means therefore that the pleaded amount is not supported by any evidence. Thus, the amount remains unsubstantiated. Apart from that, even if the

amount would have been the same (in pleadings and exhibit P3), still there are other flaws which render the claimed amount untenable. We shall demonstrate: PW2 was categorical in paragraph 14 at page 210 read together with page 451 of the record of appeal that by 27th July, 2018, all the materials required for the implementation of the contract except the cement were already bought and taken to the site. Surprisingly, exhibit P3 shows 16th October, 2018 to be the date when the amount for the purchase the materials was transferred to Guangzhou China through SWIFT. It means therefore, by the time when the amount was transferred to the alleged suppliers, the materials were already bought and sent to site. Yet the appellant did not give any explanation on such a glaring discrepancy. We therefore agree with Mr. Mwantembe that the money transferred as per exhibit P3 did not relate to the materials for the contract at issue.

That apart, PW2 was also categorical that all of the materials for the contract implementation were bought from Dar es Salaam and not China. It is our view that, the stated contradiction was material which dented the credibility of the appellant's claim for the alleged reimbursement.

Another thing that taxed our mind is the plaintiff's 2nd witness statement at pages 251 and 456 of the record of appeal stating that the appellant was stopped from mobilizing the contract materials in July 2018. As to why the appellant went on to transfer the funds to buy the contract materials in October, 2018 (exhibit P3) while by that time she had already been stopped from mobilizing the same remained unanswered. To say the least, the totality of the above analysis led us to rule that exhibits P2 and P3 were meant to prove the claim of USD 65,000.00 as they are incompatible with other evidence adduced during trial. The two exhibits are irrelevant in proving the costs allegedly incurred by the appellant in the course of executing the contract to entitle her to reimbursement claimed. It is therefore our view that the cited cases of **Makubi Dogani** and **Hamisi Rajabu Dibogo** (supra) are irrelevant to the matter at hand. Flowing from what we have discussed, we hold that, even if the exhibits were considered by the trial court, the same would not have established the said claim nor changed the outcome of the case. Consequently, the 2nd ground of appeal fails.

Turning to the 3rd ground, the appellant is complaining that it was an error on the part of the trial Judge to question the authenticity of exhibit P5; a video clip after being admitted unopposed. It is on record

that the appellant tendered the said video clip to support the claim for breach of contract by the respondent. Nevertheless, the breach was proved through other documents (exhibits P1 and P6). In the circumstances, we find the 3rd ground superfluous and we accordingly, dismiss it.

In the light of what we have endeavoured to discuss, we find all of the grounds of appeal unmerited. Consequently, we dismiss this appeal in its entirety, with costs.

DATED at **DAR ES SALAAM** this 27 day of April, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 6th day of May, 2022 in the presence of Ms. Marry Lamwai, learned counsel for the appellant and Ms. Sia Ngowi, holding brief for Mr. Silwani Galati Mwantembe, learned counsel for the respondent, is hereby certified as true copy of the original.

THE COURT OF APPEAL OF TANZANIA

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL