IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., MWANDAMBO, J.A. And MGONYA, J.A.)

CIVIL APPEAL NO. 251 OF 2021

ISAKA COMMERCIAL AGENCY (T) LTD..... APPELLANT

VERSUS

PANGEA MINERALS LIMITED..... RESPONDENT

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

(Nangela, J.)

dated the 7th day of May, 2021

in

Commercial Case No. 125 of 2019

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JUDGMENT OF THE COURT

23rd April & 14th May, 2024

MWANDAMBO, J.A.:

The appellant, Isaka Commercial Agency (T) Limited lost to the respondent, Pangea Minerals Limited before the High Court (Commercial Division) in a suit founded on the alleged breach of contract of supply of white polished rice. In a judgment delivered on 7 May 2021, the trial High Court dismissed the appellant's suit, hence the instant appeal.

The facts from which the appeal has arisen are largely not in dispute. By a Direct Purchase Order (DPO) dated 12 May 2018, the respondent

contracted the appellant to deliver 120 metric tonnes of White Tanzania polished rice at a price of TZS 370,992,000.00 inclusive of 18% Value Added Tax. According to the DPO (exhibit P1), delivery was to be made to Freight Forwarder on 14 May 2018. However, the appellant did not deliver the rice on the date indicated in the DPO. Instead, it did so in instalments and the respondent accepted delivery thereof so much so that, by October 2018, the appellant had delivered 36 metric tonnes and payment of the corresponding price on the deliveries made by the respondent.

It was common ground between the parties that the rice was to be consumed by the respondent's employees working mainly at its Buzwagi Mine Kahama, District through in-house catering. Due to substantial reduction in the number of employees as a result of closure of mining activities at its Buzwagi Mine, the respondent changed the manner of providing meals to the remaining employees from in-house catering to outsourcing the service to a third-party that is NICE Catering Limited. With that development, the respondent found itself in a situation where it no longer required to be supplied with the contracted rice. Subsequently, the respondent informed the appellant of the development and advised her of an arrangement she had with NICE which entailed the appellant delivering

the remaining consignment albeit at a reduced price. The appellant declined the respondent's arrangement with NICE and insisted on supplying the rice to the respondent notwithstanding what the respondent referred to as cancellation of the contract through an email dated 24th April 2019 admitted as exhibit P5 during the trial.

Since the negotiations were barren of fruit, the appellant instituted the suit before the trial High Court. It prayed for judgment for; a declaratory order that the respondent breached the contract; payment of TZS 276,674,000.00 on account of the price for the remaining consignment; special damages in the sum of TZS 125,200,000.00; general damages; interest and costs.

In her written statement of defence, the respondent denied having breached the contract. On the contrary, her case was that it was the appellant who breached the contract by her failure to supply the agreed quantity of rice on the agreed date. She denied having contracted with the appellant to supply the rice in instalments and contended the appellant was advised to supply the remaining consignment of rice to NICE but refused do so.

The trial court framed five issues for determination of the suit from which it made the following findings. **One,** exhibit P1 constituted a binding contract between the respondent and the appellant for the sale of the rice to the respondent; **two,** notwithstanding the appellant's failure to deliver the contracted quantity of rice on 14 May 2018, the respondent's acceptance of the consignment on 18th May 2018 by instalments amounted to variation of the contract in relation to the date and quantity. Further, in the ordinary course of things, the respondent was bound to accept the remaining quantity failing which, be liable for compensation on the strength of section 32 (2) (b) of the Sale of Goods Act (the Act). **Three,** in view of the restructuring in the respondent's operations resulting into outsourcing of catering services to NICE to whom the appellant was required to supply rice, the respondent did not breach the contract for the supply of rice. **Four,** the appellant suffered no loss and damages in view of the fact that she had knowledge of the change of circumstances in the respondent's operations and the arrangement the respondent had with NICE to whom the appellant was required to supply the remaining quantity of rice but refused to do so. It thus rejected the appellant's claim for damages resulting into the dismissal of the suit as alluded to earlier on.

Dissatisfied, the appellant instituted this appeal upon 4 grounds of appeal. Apparently, the respondent was also dissatisfied with part of the decision and lodged notice of cross appeal upon 3 grounds. Closely examined, the appellant's grounds raise two main issues, that is, (1) whether the trial court's finding that the appellant's suit was not proved to the required standard was a result of a proper analysis of the evidence (grounds 1, 2 and 3) and; (2) whether the refusal to award damages and compensation for the loss sustained by the appellant was justified (ground 4).

Mr. Armando Swenya, learned advocate who acted for the appellant before the trial court continues to act for her before the Court this time around teaming up with Mr. Mluge Karoli Fabian, learned advocate. So did Mr. Faustine Anthony Malongo and Ms. Caroline Lucas Kivuyo, learned advocates representing the respondent. Ahead of the hearing of the appeal, the appellant's advocates had lodged their written submissions in support of the appeal. The respondent's advocates too filed theirs in reply together with the submissions in support of the notice of cross appeal. Nevertheless, on second reflections, Mr. Malongo prayed to withdraw the notice of cross- appeal and the Court marked it as such before proceeding

with hearing of the appeal. Mr. Swenya who addressed the Court, stood by the written submissions on record but made responses to the questions put to him by the Court in collaboration with Mr. Fabian.

The appellant's learned advocate addressed grounds 1 and 3 conjointly in his written submissions. All the same, in view of the approach we have taken in clustering the grounds into two issues, we have found it convenient to combine our discussion in ground 1, 2 and 3 as they raise a common main issue we formulated a short while ago. Essentially, the learned advocates criticise the trial court for its failure to analyse the evidence properly as a result of which it came to an erroneous finding that the respondent was not in breach of the contract for the supply of rice. Elaborating, counsel argue that the trial court wrongly linked the respondent's contractual obligation vide exhibit P1 with her reduction of its workforce due to operational reasons. It is their further argument that, the fact that the respondent was forced to cut down its workforce, that alone was not sufficient to absolve her from contractual obligations; taking delivery of the remaining quantity of rice and paying for it.

On the other hand, it was argued that, the trial court wrongly found that the respondent assigned her contractual obligations to NICE who was neither a party to exhibit P1 nor was there evidence of consent to such an arrangement between the respondent and NICE. If we understood them correctly, the learned advocates meant to say that, in the absence of an agreement between the appellant and the respondent as well as NICE for the transfer of the respondent's obligations to NICE, anything done was, but an exercise in futility. Prompted by the Court, Mr. Swenya was emphatic that, had the negotiations for taking NICE on board been successful, they would have resulted into novation of the contract. Nevertheless, counsel argued that, as the conditions precedent for the application of novation of the contract were not met, the respondent's contractual obligations remained intact.

The other complaint emerging from the appellant's written submissions touches on the trial court's alleged improper evaluation of evidence in relation to the construction of exhibit P1. The learned advocates criticise the trial court's finding that the appellant was required to deliver the whole 120 tonnes of rice on 14th May, 2018 and not by instalments. It was strongly argued that as the appellant was required to

deliver the rice in instalments, it was wrong to hold the appellant in breach the more so when the respondent accepted the 36 tonnes covering six months' period between May and November 2018. Had it been otherwise, counsel argued, the respondent could have rejected the quantity supplied.

To reinforce their submissions, counsel cited several of the Court's decisions, that is; **Lutter Symphorian Nelson v. Attorney General & Another** [2000] T.L.R 419, **Stanslaus Rugaba Kasusura & Another v. Phares Kabuye** [1982] T.L.R 338 and **Tanzania Sewing Machine Co. Ltd v. Njake Enterprises Ltd,** Civil Appeal No. 15 of 2016 (unreported) for the proposition that any finding of the trial court must result from a balanced evaluation of the evidence of all witnesses for each side in the case. However, we wish to assure the appellant's counsel that, not all is lost as a result of trial court's alleged failure to analyse evidence properly. This is so because the Court is sitting in a first appeal, rule 36 (1) (a) of the Rules empowers it to re-appraise the evidence on record and draw its own inferences of fact. This is precisely what we shall be doing in the determination of the first issue arising from grounds 1, 2 and 3 to gauge whether the trial court's findings are a result of proper evaluation of evidence of both parties. From that re- appraisal we shall, as of necessity

be addressing ourselves whether the appellant discharged her burden of proof entitling her to a judgment in her favour.

Not surprisingly, the submissions in reply focused on supporting the trial court's findings in all respects. Firstly, the respondent's counsel submitted that, since the appellant was in breach of the contract, the respondent was no longer bound to accept delivery of the remaining quantity regardless of her acceptance of 36 tonnes and payment of the corresponding price. With regard to the abortive efforts to have the appellant deliver the remaining quantity of rice to NICE, it was submitted for the respondent that it was only intended to assist the appellant from collapse of her business. Counsel impressed upon the Court that, as the appellant refused to cooperate, she is to blame for any consequences. As to the complaint on the failure to analyse evidence properly, counsel maintained that the trial court did its job perfectly before coming to the conclusion that the appellant's evidence fell short of discharging her burden of proof hence, dismissal of the suit. This is so, they argued, from the evidence, the trial court was satisfied that it is the appellant who breached the contract by her failure to deliver the contracted rice on the agreed quantity and date. The learned advocates placed reliance on the Court's

decision in **Tanzania Cigarette Company Limited v. Mafia General Establishment,** Civil Appeal No. 118 of 2017 (unreported) to argue that the appellant did not prove her case on the required standard entitling her to judgment.

In his oral address, Mr. Malongo pointed out that, since the appellant breached the contract by her failure to supply the rice on the agreed date and quantity, the respondent was not bound to accept delivery in instalments and that the trial court's finding that her acceptance constituted variation of the contract was erroneous. This is so, he argued, in terms of section 101 of the Evidence Act, variation of a written contract could only be made by a written agreement, notwithstanding the respondent's subsequent conduct accepting rice in instalments. A little later, the learned advocate conceded that, notwithstanding appellant's failure to deliver the rice on the agreed date and in the required quantity, there is no evidence of any notice of termination of the contract. Regarding the respondent's arrangements with NICE for the supply of the remaining quantity, Mr. Malongo was in agreement with the appellant's counsel that the conditions precedent for its application were not met. If we understood him correctly which we think we did, counsel meant to say

that the trial court's finding that the respondent was not in breach of the contract by reason of the arrangements with NICE was unjustified.

With the foregoing, we shall now turn our attention to a discussion on the first issue. As alluded to earlier on, the trial court found it established through evidence that, despite the appellant's failure to deliver the contracted rice in one instalment of 120 tonnes on the 14 May 2018 per exhibit P1, the respondent accepted delivery by instalments from 18th May 2018. It will be recalled that the appellant maintained that the contract was for the supply of rice in 20 monthly instalments and indeed, it supplied 36 tonnes covering six months from May 2018. Be it as it may, the learned trial judge rightly held that since the respondent did not exercise her right under section 31 (2) of the Act by rejecting delivery by instalments, and considering her conduct, there was a variation of the contract from delivery of the 120 tonnes at once to delivery by instalments.

Despite the respondent's counsel adamantly arguing as they did that the respondent was no longer bound to accept delivery of the remaining consignment, we are satisfied that on this, the learned trial judge rightly held as he did on the existence of the contract for sale of rice varied by

conduct of the respondent who was bound to accept delivery and pay for it. Afterall, it defeats logic and common sense to argue as respondent does that there was no longer any binding contract after the appellant's failure to deliver the contracted rice in full and yet inform the appellant vide exhibit P5 cancelling a non-existing contract. Exhibit P5 reproduced at page 28 of the trial court's judgment (page 336 of the record) speaks volumes against the respondent. The trial court rightly found, guided by section 33 (1) and (2) (b) of the Act that the appellant had a right to claim for compensation for the remaining quantity of rice following cancellation of the contract vide exhibit P5.

Having made the above finding, the trial court took into account the respondent's efforts to save the contract to the extent of the remaining consignment. Vide exhibit P5, the respondent cancelled the contract and offered explanation on how the remaining quantity of rice will be dealt with. That entailed committing NICE who had been contracted to provide catering services to her remaining employees to take delivery of the remaining quantity at a reduced price. There was evidence that the appellant supplied 19 tonnes of rice to NICE but PW1's evidence was that it was through a separate arrangement from the respondent's agreement.

This is so, because, the appellant refused to agree to the respondent's arrangement with NICE.

Counsel are agreeable that had the negotiations to save contract succeeded assigning the respondent's contractual obligation with the appellant to NICE, they would have resulted into novation of the contract. However, as both counsel submitted and rightly so in our view, the conditions precedent for the application of novation were not met. Section 62 of Law of Contract Act from which novation is rooted stipulates:

> *"If the parties to a contract agree to substitute a new contract for it or to rescind or alter it, the original contract need not be performed".*

There is a discussion on this in a book titled: *The Law of Contract in East Africa*, R.W. Hodgin, Kenya Literature Bureau at page 176, regarding novation as one of the types of discharge of a contract by agreement which recognises the possibility for one party to a contract to release the other and substitute a third person to undertake to perform the released party's obligation. Thus, by agreement of the three parties a new contract releases the original contract. The learned author refers to subject illustrations by the Eastern Court of Appeal in **Settlement Fund Trustees**

v. Nurani [1970] E.A. 562 which underscored the existence of two elements for novation to apply, that is to say; consent of all the parties involved and consideration for the extinguishment of the old obligation. It is remarkable that neither of the two elements existed in the instant appeal nor did the parties to exhibit P1 substitute a new contract to the old one.

It will thus be clear that the learned trial judge's finding that there was an agreement entailing the third-party NICE to assume the obligations of the respondent for the supply of the remaining consignment was with respect, contrary to the evidence on record. That being the case, the trial court's finding that the respondent was not in breach of the contract with the appellant cannot stand. It is accordingly reversed. The upshot of the foregoing is that, from our own reappraisal of the evidence, the appellant discharged her burden of proof on the breach of contract by the respondent. That disposes the first issue in the appellant's favour with the effect that grounds 1, 2 and 3 stands allowed.

Next we shall turn our attention to ground 4 dedicated to refusal to award the appellant damages and compensation for the breach. In view of our affirmative answer to the first issue, the determination of this ground

should not detain us more than necessary. We are mindful of section 73 of the Law of Contract Act founded on the principle*: ubijus, ibi remedium:* where there is a breach there is a remedy.

The appellant claimed several reliefs mainly; a declaration that the respondent was in breach of contract which should have been granted in view of our determination of grounds 1, 2 and 3. As the trial court did not award that relief, we set aside its verdict and substitute it with an affirmative declaration that the appellant breached the contract for the supply of rice. The second relief relates to payment of TZS 125,000,000.00 in specific damages. In the course of the oral address, Mr. Swenya conceded that the relief was untenable and we accordingly refuse it. Thirdly, the appellant claimed payment of TZS 276,674,000.00 purchase price for the wrongfully neglected remaining goods. The respondent's counsel urged the Court to decline granting this relief considering that there was a huge cloud on its tenability and we respectfully agree. Firstly, there was a serious uncertainty as to whether the appellant bought the whole quantity and kept in stock for delivery to the respondent. Secondly, there was no proof of delivery and refusal to take delivery of the said rice by the respondent neither did the appellant lead evidence to prove the

whereabouts of the said rice. We are satisfied that in view of the yawning gaps in the appellant's evidence, her claim cannot stand and so we reject it.

Next we shall consider the appellant's claim for general damages for the breach. Para 13 of the plaint gave particulars constituting loss and general damages which included; adverse effect on the circulation of the appellant's capital, failure to meet her normal business commitments and mental distress suffered through followings with the respondent for the performance of the contract. These averments feature in para 27 and 28 of PW1's witness statement. Upon our assessment of the appellant's complaints and the evidence, there can hardly be any dispute that the appellant must have suffered some damages as a result of the respondent's breach. However, we are hesitant to consider such aspects as loss on return on investment, expected profits, servicing bank loans, accumulated rent for the go-downs, diminished capital circulation as well as shareholder's psychological suffering from distress in the absence of any cogent evidence to that effect. On the whole, we are of the firm view that an award of TZS 20,000,000.00 will be a fair assessment of general damages for the breach and so we award it. That amount shall attract

interest at the Court's rate of 7% per annum from the date of delivery of the judgment by the High Court till final satisfaction.

That said, we allow the appeal to the extent indicated. The appellant is awarded costs in this Court and the High Court.

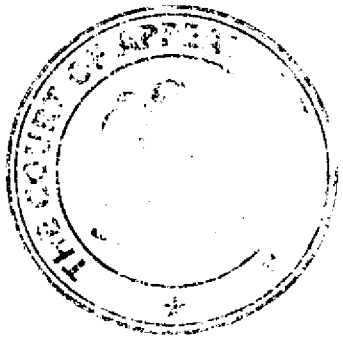
DATED at **DAR ES SALAAM** this 13th day of May, 2024.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered this 14th day of May, 2024 in the presence of the Mr. Alex Balomi, learned counsel holding brief for Mr. Armando Swenya, learned counsel for the appellant and Ms. Caroline Kivuyo, learned counsel for the respondent, is hereby certified as a true copy of the original.



O. H. KINGWELE
DEPUTY REGISTRAR
COURT OF APPEAL