IN THE HIGH COURT OF TANZANIA

AT IRINGA

(DC) CIVIL APPEAL NO. 2 OF 2009

(Originating from Iringa District Court

Civil Case No. 42 of 2003

Before: F. N. Matogolo – R.M.)

M/S VACULUG GROUP OF COMPANIES LTD. ..... APPELLANT

VERSUS

1. M/S CALTEX TANZANIA LTD.
2. CHARLES SANGWENI } ..... RESPONDENTS

JUDGMENT

UZIA, J.

The appellant, M/S Vaculug Group of Companies Ltd, lost the case in the District Court against M/S Caltex Tanzania Ltd. and Charles Sangweni.

The appellant has preferred the appeal to this Court, and in this appeal he is represented by Mr. Mwakingwe, defence counsel while the Respondent is represented by Trustmark Attorney of Dar-es-Salaam. On 18th February, 2010 leave was granted by this Court to both counsel to argue the appeal by way of written submissions. All parties complied with the orders.

Briefly stated, the facts relevant to this appeal are that, on nknown date the appellant entered into contract with the respondent. The respondent supplied oil and lubricants to the appellant for selling to customers in Iringa Municipal. The appellant owned several petrol stations in Iringa Municipal. He was also supplied with dispensing pumps in order to make his business of selling oil easier. On unknown date the business relationship ceased, for the reason that the appellant bought oil and lubricant from other sources. I have been at loss to note that the transaction between the two companies was governed by express contract, in the sense that there is no document which showed that the two companies entered into a written contract.

The appellant insisted that, the parties entered into contract and one of the contractual agreement was to take the dispensing pumps after cessation of the contract. The respondent denied to have entered in the alleged agreement, therefore, the appellant was required to return back all dispensing pumps after cessation of their business relations. According to the facts in the lower Court as presented by the respondent, the business started on 11th August, 2001 and the business relations ceased on 7th August, 2003, for that matter the appellant remained with the pumps illegally since 2001. The respondent filed a counter claim. claiming damages to be paid at a tune of TShs.5,000 per day for every pump from 11th August, 2001 for the reason that the Company was incurring loss.

The District Court decided in favour of the respondent and ruled out that, the appellant should release the dispensing pumps and return them to the respondents. The appellant was also adjudged to pay TShs.18,000,000/= as damages for the non use of the pumps since 2001 todate (27th May, 2008).

Dissatisfied, the appellant's counsel raised three grounds of appeal as follows:-

(1) The learned Resident Magistrate erred in disbelieving the evidence of PW.1 Rajan Marwaha when he testified that the disputed dispensing pumps were to belong to the appellant after a spell of three (3) in the absence of rebutting evidence from Mohammed Baraka and Ian Wilson who were named as the then Directors of the first respondent and who were in direct working contact with the appellant through PW.1.

(2) The learned resident Magistrate erred in law in deciding that the court could not decide on a matter which was not pleaded when the Court itself recorded evidence on the question of the appellants being entitled to possession and ownership of the dispensing pumps.

(3) The award of Shs.18,000,000/= as general damages was arbitrary and against legal principles

that guide the assessment of general damages in civil cases.

On other hand, the respondents replied and argued that, the grounds of appeal together with the submissions are all untenable in law, devoid of any merits and should therefore be dismissed with costs. That failure for the appellant to call Mohamed Baraka and Ian Wilson who were said to be material witnesses, then the court should draw an adverse inference on such failure.

That it is undisputed fact that Caltex (T) Ltd. and the 2nd respondent are owners of the dispensing pumps which they had supplied to the Appellant.

Further to that, it was not established anywhere that Mohamed Baraka and Ian Wilson were material witnesses required to testify for the respondent. In fact, with the respondents view that they were necessary witnesses to prove existence of the oral contract alleged to have been contracted in favour of the Appellant, they were therefore material witnesses for the Appellant. Two witnesses who testified for the Respondent were material witnesses in this particular case.

On ground No. 2, the respondent submitted that, the trial court considered the evidence of ownership of the dispensing pumps, and that they should be returned, it was up to the Appellant (PW.1) to prove that there was oral agreement

between the parties and that he would remain with the pumps following the cessation of the business relations.

On the last ground, the respondent argued that the award of TShs.18,000,000/= as damages on reasons of non-use of the pumps since 2001 to the date of the Judgment which was 27th May 2008 was right in the sense that long period of time had passed without using the dispensing pumps.

In this appeal, it is necessary to examine the nature of the contract, the parties entered into before dealing with the submissions from the parties. Going by the trial record, I found that no any document which supported the written agreement between the parties which the Court could refer to it. I don't hesitate to term this contract as an express contract. According to Judicial Dictionary by K.J. Aiyar Butterwrths, 13th Edition, on Page 389, Express contract means;

> *"The reciprocal promises contained in the words of the contract or resulting from a true construction of them and excludes stipulations which may arise out of any usage or custom or which may be inferred from the conduct or course of dealings between the parties".*

In instant case, the parties agreed between them orally that, the respondent was to supply oil and dispensing pumps to the appellant. The purpose of supplying dispensing pumps was to make the business of selling oil easier. It was not said

anywhere in the oral contract that the dispensing pumps were the properties of the appellant, or it would be the appellant's properties after three years. The pumps were given to the appellant for the purpose of oil business which would be returned after the cessation of the business relations. The way it looks like the appellant did not comply with the directives of Caltex (T) Limited as a result the business relations between the two ceased. The 1st respondent demanded back the dispensing pumps, some were returned back, but some were not returned. Those which were not returned by the appellant became the subject matter before the District Court. The District Court decided in favour of the respondents that they were entitled to be given their dispensing pumps.

It is my view, that, the appellant's arguments have no merit because the appellant did not satisfy the lower court on the subsequent oral contract entered between him and those people he named them in court during trial.

If the appellant thought that, Mohamed Baraka and Ian Wilson would help him, he was at liberty to apply in court for an adjournment until Mohamed Baraka and Ian Wilson were summoned to appear as witnesses on his side. It was not the duty of the Respondent to call them, in that vein the appellant would be proving his case on balance of probability. The fact that he failed to call them rendered his argument without merit. I also find that the ground of appeal lacking merit.

As to whether the Respondents were entitled to damages to a tune of TShs.18,000,000/=, I find the decision of the District Court proper in circumstances of the case, because the course of action taken by the Respondent of filing a counterclaim against the appellant was vindicating his right. If the appellant would have released the dispensing pumps like those in the first batch, then there would have been no problem, the Respondents would have taken them and put them in another business and there would have been no loss in the Respondents business. I think the District Court rightly presumed to be the natural or probable consequences of the appellant's acts.

For the reasons stated, I find the trial Court's decision on the damages not to the higher side, I therefore dismiss the last ground of appeal as well.

In sum, I find the appeal devoid of merit and it is hereby dismissed with costs.

L. M. K. UZIA

JUDGE

19/8/2010

Right of Appeal explained.

L. M. K. UZIA

JUDGE

19/8/2010

Date: 19th August, 2010

Coram: L.M.K. Uzia, Judge

For Appellant: Present

For Respondent: Absent

C/C. N. Rashid

Mr. Mwakingwe for the appellant.

Judgment delivered in chambers today 19th August, 2010 in the presence of the appellant's advocate.

L. M. K. UZIA

JUDGE

19/8/2010