IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 87 OF 2017

(Original Civil Case No. 8 of 2016 of the District Court of Kilosa at Kilosa)

ERICK CHITALULA.....APPELLANT

VERSUS

NEW MSOWERO FARMS LIMITED.....RESPONDENT

JUDGMENT

Date of last Order: 24/4/2018

Date of Judgment: 3/5/2018

Munisi,J

Before the District Court of Kilosa at Kilosa, the appellant Erick Chitalula instituted a suit against the respondent seeking the following orders:

a) A declaration that the defendant is in breach of contract.
b) Payment of Tshs. 8,500,000/= being special damages as pleaded above and payment of Tshs. 100,000,000/= as general damages.
c) Costs of this suit.
d) Any other reliefs this court may deem fit and just to grant.

The suit by the appellant was premised on a contract for brushing and packing of sisal fibres entered between himself and the respondent on 7/3/2016 which was admitted in court as exhibit P1.

It was the appellant's case that on the basis of the said contract, on 7/5/2016 he presented 3700Kgs of sisal fibres for brushing and packing but the respondent required him to execute a new contract which he did and on 24/5/2016 he paid for the requisite costs. However, on 13/6/2016 he learnt that the 3700kgs stored in the respondent's store was missing and upon inquiry, he was told that the same had been handed over to its owner. Upon the failure to recover the same, he reported the matter to the police and later instituted a suit against the respondent. At the conclusion of the trial, the court found that the case had not been proved and dismissed it. Appellant has thus preferred the present appeal based on the following grounds:

1. That the trial magistrate erred both in point of law and fact in relying on the evidence that, there was no contract between the appellant and the respondent.
2. That the trial magistrate erred both in point of law and fact by declaring that the appellant is not the rightful owner of 3700 kg of sisal fibres.
3. That the trial magistrate erred both in point of law and facts for holding in favour of the respondent (the defendant) that the sisal fibres consignment belonged to one Linda Igore by failure to consider that there were two different consignments, whereas 3700 kilograms of sisal fibres for the appellant and 2700kgs of sisal fibres for the said Mr. Linda Igore.
4. That the trial magistrate erred both in facts and law for failure to distinguish between the 3700kg consignment owned by the appellant and the payment of Tshs. 500,000/= that which was paid as two distinct transactions.
5. That the trial magistrate erred in facts by mentioning in the judgment that appellant claims Tshs. 100,000/= as general damages instead of Tshs. 100,000,000/= as prayed in the plaint.
6. That the trial magistrate erred both in point of facts and law by pronouncing the judgment against the weight of

evidence. A copy of judgment is annexed hereto and marked as annexure **APP1.**

When the appeal was called on for hearing on 24/4/2018, Mr. Raymond Cosmas and Mr. Joseph Chacha Mkohi, learned counsel appeared for the appellant and the respondent respectively.

Mr. Cosmas contended strongly that the appeal had merit in that there was on going contract between the appellant and the respondent. With regard to ground No 1, he argued that the magistrate erred in holding that there was no contract between the parties while exhibit P1 was drawn in line with the provisions of section 10 of the Law of Contract Act hence constituting a valid agreement. With regard to the 2nd ground of appeal, the learned counsel faulted the magistrate for her failure to hold that the appellant was the rightful owner of the 3700kgs of fibre while there was sufficient evidence proving ownership. In the 3rd and 4th grounds, he argued that since DW3 was not a party to the suit, it was wrong for the magistrate to grant him the ownership of the disputed fibres, adding that the payment of 500,000/= was in relation to a different transaction as there were two distinct transactions. In ground 5, the complaint is on a clerical mistake on the typed judgment that instead of reflecting the pleaded amount of Shs. 100.000,000/=, the same mentions only Shs. 100,000/=. In the last ground he faulted the magistrate on the ground that she failed to evaluate the evidence presented before her thus deciding the case wrongly. He thus prayed for the appeal to be allowed with costs.

Mr. Mkohi, learned counsel, countered the submission by arguing that the appeal lacked any merit. With regard to ground No 1, he contended that the trial magistrate was right in finding that there was no contract for 3700kgs of sisal fibre as exhibit P1 – the governing contract was couched in a general way and was no specific. He relied of section 29 of the Law of Contract to support his stance that a contract has to be certain and specific. In that regard, he argued that the complaint in ground 2 has no merit as

no proof was led by the appellant that there was a specific contract relating to the disputed 3700kgs of sisal fibre, he relied on section 110 of the evidence Act to support the proposition that it was upon the appellant to prove what he alleged in his pleadings. Relying on the case of **Hemed said V Mohamed Mbilu (1984) TLR 113**, he argued that appellant failed to call even the people he alleged to have bought the sisal from them to support his claim that he had bought the alleged consignment, adding that this failure rendered his evidence incredible. With regard to ground No 3 and 4, the learned counsel argued that from the evidence presented before the trial court, the issue of two transactions did not arise, he insisted that the only transaction that existed was that of 3700 kgs which was settled through the payment of 500,000/= to the appellant by the respondent as shown in exhibit D1. With regard to ground No 5, he argued that since it is a clerical error, the law is clear that appellant could apply for rectification of errors under section 96 of the Civil Procedure Act if he so wishes. With regard to the last ground, the learned counsel argued that the magistrate did evaluate the evidence properly and there is nothing to fault him in her reasoning. He thus prayed for the appeal to be dismissed with costs.

I have closely considered the respective submission by the learned counsel in the light of the evidence adduced before the trial court and the law cited to me. From the counsel submission, it appears to me that the main issues of contention revolve around the alleged existence or otherwise of a contract between the appellant and the respondent in respect of the disputed 3700kgs of sisal fibres coupled with who is the rightful owner of the same. The learned magistrate was satisfied that there was a valid contract between the two but with general clauses. She observed in her judgment that while there was a binding contract (exhibit P1), appellant failed to respect the same and concluded thus:

> *"However exhibit P1 which was tendered by PW1 (Erick Jonathan Chitalula) in court, only shows an agreement*

between PW1 (Erick Jonathan Chitalula) and the defendant's company, on Sisal Fibre Job work for brushing, it never specified if it was for the 3700 Kgs of Sisal Fibre or not.

Therefore, in as much as there was no specific contract in terms of the goods/Cargo in dispute, then there is obviously no breach of Contract between the defendant and the plaintiff."

It can be gathered from the record that the existence of a contract of brushing and packing of sisal fibres -exhibit P1 between the parties was not disputed, even on the hearing of the appeal it was not disputes. In that respect, ground No 1 of appeal appears redundant as the magistrate observed that there was a valid contract. What is at issue is whether there was a contract in respect of the said 3700kgs of Sisal Fibres entrusted to the respondent and who owned them. While appellant claimed it was his property relying on exhibit P1, the defence side comprised of three witnesses maintained strongly that appellant failed to honour the contract and that the disputed consignment belonged to DW3. The magistrate after assessing the evidence was satisfied that the same belonged to DW3 and that the sum of Shs 500,000/- as exhibited by exhibit D1 was paid to the appellant as a consideration for the same as per the testimony of D3. The question is whether there is any material evidence to fault the magistrate's findings that exhibit P1 did not mention the claimed 3700kgs of sisal fibre and that the consignment belonged to DW3.

Starting with exhibit P1, the record reveal three documents which are photocopies endorsed as exhibit P1; there are two contract documents dated 7/3/2016 & 7/5/2016 and a petty cash voucher dated 24/5/2016. Looking at the documents referred to as exhibit P1, apart from the fact that they are photocopies, the endorsement does not meet the requirements of Order XIII Rule 4(1) of the Civil Procedure Code Cap 33 RE 2002 which provide, thus:

4(1) *Subject to the provisions of sub rule (2), there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely-*

(a) the number and the title of the suit;
(b) the name of the person producing the document;
(c) the date on which it was produced; and
(d) a statement of its having been so admitted;
and the endorsement shall be signed or initialed by the judge or magistrate.

It is notable from the three documents referred to as exhibit P1 that they contain a casual endorsement on the top of the page as follows:

"exh P1"

The Court of Appeal in the case of **Ismail Rashid V Mariam Msati, Civil Appeal No. 75 of 2015** (unreported) adopted the position taken by courts in India (**Sadik Hussain Khan V Hashim Ali Khan, AIR (1916) PC 27 (41)**) and insisted that the rule as to endorsement must be observed in letter and spirit with a view to insisting observance of the wholesome provisions of these statute in order to prevent abuse of justice.

There is no doubt the endorsement done by the trial court on the exhibits which on the face of them were mere photocopies offended the provisions of Order XIII Rule 4(1) supra. In that regard, I have no option but to disregard them. The trial magistrate disregarded them on the ground that they were not specific to the claimed 3700 kgs. In my considered view, being photocopies they were wrongly admitted in evidence and since they were not properly endorsed, their evidential value diminished even more. By mere looking at exhibit P1, it lacked any material particular to relate it with the disputed consignment of 3700 kgs of sisal fibre. I am thus in agreement with the trial magistrate that the alleged consignment had no nexus to exhibit P1. In addition, in view of the material irregularity highlighted, they fall short of providing any evidential

value to prove the claims by appellant. The magistrate was thus right in her findings on the issue though on slightly different reasons.

Consequent to my finding herein above, the next issue is whether there is any other evidence to support the appellant's claim of ownership of the said 3700kgs of sisal fibre. From the evidence presented, it is apparent that the three defendants disputed the claim vehemently stating that the said cargo belonged to DW3. From the reasoning of the magistrate, it is apparent that she was impressed by the defence witnesses and found that the said cargo belonged to DW3. It is trite law that in matters of credibility, courts of first instance are best placed to assess the credibility of witnesses. In the case of **Ibrahim Ahmed V Halima Guleti (1968) HCD 71**, Cross J. (as he then was), observed thus:

> *"....Surely, when the issue is entirely one of the credibility of witnesses, the weight of evidence is best judged by the court before whom that evidence is given and not by a tribunal which merely reads a transcript of the evidence."*

From what I can gather from the record and the magistrate's judgment, she believed DW3 to be a truthful witness, thus from the legal principle propounded in the above case, I see no good reason to fault the trial magistrate. Further, having studied closely the testimony of the appellant, I see no clear evidence to support the proposition that the dispute 3700kgs were presented to the respondent in compliance with the terms of exhibit P1 the contract. At any rate, having found that exhibit P1 was irregularly admitted and endorsed any claim based on it crumbles. On the other hand, the defence case was cogent and consistent on how the 3700kgs got stored at the respondent's premises and how it was removed in two instalments of 100 It thus follows that grounds 2, 3, 4 and 6 are devoid of any merit as they all revolve around the ownership of the said 3700kgs of sisal fibre together with exhibit P1.

With regard to ground No 5, it is apparent the complaint with regard to the amount of Shs. 100,000/= reflected on page 1 of the typed

judgment, having perused the hand written copy, the amount of Shs 100,000,000/-pleaded by the appellant is correctly reflected. The omission is therefore a clerical error which could be corrected under section 96 of the Civil Procedure Code if the appellant so desires. The ground thus lacks any merit.

From the foregoing analysis, the appeal is devoid of any merit and it is accordingly dismissed in its entirety.

I make no orders as to costs.

A. Munisi
Judge
3/5/2018

Judgment delivered in Chambers in the presence of the appellant in person and in the presence of MS Sharifa Mohamed, learned counsel holding brief of Advocate Mkohi for the of the Respondent, this, 3/5/2018.

A. Munisi
Judge
3/5/2018