IN THE HIGH COURT OF THE UNITE REPUBLIC OF TANZANIA

(IRINGA DISTRICT REGISTRY)

(LAND DIVISION)

AT IRINGA

CIVIL APPEAL NO. 13 OF 2018

(Appeal from the Judgment and Decree of the District Court of Mufindi at Mafinga (Hon. M.R. Hamduni RM) date on 25th day of September, 2018 in Civil Case NO. 07 of 2018)

PANIC SYSTEM GROUP COMPANY LIMITED ..... APPELLANT

VERSUS

CHINA CIVIL ENGINEERING CONSTRUCTION COPRORATION (CCECC) ..... RESPONDENT

Date of Last Order: 28/04/2020
Date of Judgment: 18/06/2020

JUDGMENT

MATOGOLO, J.

Panic System Group Company Limited who is the appellant in this appeal, was the plaintiff in Civil Case No. 07 of 2018 before the District Court of Mufindi who sued the present Respondent China Civil Engineering Construction Corporation (CCECC) praying for the following reliefs.

(i) Payment of Tshs. 42,000,000/= being the actual money for the remaining term of contract.

(ii) Payment of Tshs. 10,500,000/- costs for breach of contract.

(iii) Payment of Tshs. 35,000,000/= being specific damages, interest on court rate per annum from the date of institution to the date of full payment.

(iv) Costs of the suit.

(v) Any other reliefs and orders that the court deems just to grant.

The suit was heard ex-parte and ex-parte judgment was delivered after the respondent was served with the plaint but failed to file written statement of defence within the period prescribed.

However, despite the fact the appellant was given opportunity to prove her claim ex-parte the same was dismissed.

The appellant therefore has come to this court with her appeal in which she filed memorandum of appeal with two grounds as follows:-

(i) That, the trial court erred both in law and fact for not properly consider documentary evidence adduced by the appellant who clearly proves case in the favour of the appellant.

(ii) *That, the trial court erred in law and fact for not properly evaluate the evidences (sic)of the parties.*

The appellant therefore prays to this court to allow the appeal and set aside the judgment and decree of the District Court of Mufindi.

The appellant was represented by Irene Joel Mwakyusa learned advocate but the respondent appeared in person.

The appeal was argued by written submissions where the respondent's submission was prepared by LEOPA Attorneys on gratis.

In her submission in support of ground No. 1 the counsel for the appellant argued that the suit was heard ex-parte. The appellant tendered various documentary evidence proving that there was legal contractual relation between the parties. These are advertisement letter (Exhibit P1), suspension letter (Exhibit P2), Termination letter (Exhibit P3) and demand note (Exhibit P4).

She said those documents were sufficient evidence to prove existence of contractual relationship between the parties. But the trial court was seeking for service contract entered between the parties. The evidence prove that the defendant breached the contract. She said who alleges must prove according to the case of ***Hemd Said vs Mohamed Mbilu (1984) TLR 113***.

She said the case was heard ex-parte and the appellant are the one who tendered evidence and witnesses at the trial court. The evidence was proving existence of the legal contract between the parties. But the trial magistrate ignored all documentary evidence. She contended that the appellant proved the case on the balance of probability. And the appellant's evidence is heavier and deserve to win the case.

As to the second ground it is the appellant's contention that the trial court had the duty to evaluate the evidence adduced by the appellant's witnesses and the documentary evidence tendered. But the trial magistrate

just keep on what she wanted and leave her duty of evaluating all evidence adduced by the appellant on how those evidence proved the case. She said this being the first appeal the court should re appraise the evidence of the trial court and referred the case of ***Hassan Mzee Mfaume vs. Republic (1981) TLR 167***.

On her part the respondent first raised basic legal principles that parties to a suit cannot tie in the weight of evidence. And that it is not the number of witnesses which counts rather the quality of evidence. In the case at hand she said it was easy because it is the one side case but which need a strong argument and submission in order to convince the court. The respondent cited the case of ***Hemad Said vs. Mohamed Mbilu (1984) TLR 113***, to assert that who alleges must prove. The appellant was given the chance to prove her case at the trial court but failed to do so. she said the appellant intentionally split up their case which made difficulties to determine the matter unnecessarily. The appellant's pleadings were clearly submitted for the determination and it was the one side chance though it is not necessary to with for the matter.

Regarding the appellant's submission, it is the respondent's contention that the appellant has totally missed the point and tries to mislead the court. As to ground No. 1, the respondent argued that the trial court decided the case according to law, the appellant submitted evidence accordingly and produced documentary evidence which was not signed nor attested. The trial court decided the case in accordance to the procedure and the evidence adduced was considered properly.

The documentary evidence to show the contractual relationship between the parties were not signed neither agree in any matter does not qualify that there is a contract. The respondent submitted further a litigant should exercise diligence, care and vigilance in his/her matter which is before the court. Upon persistent failure by the respondent and his legal counsel to appear in court, the court granted an order to proceed with ex-parte hearing of the case and made it ex-parte judgment decree and orders. But all these plus what was submitted by the appellant do not amount to sufficient cause to warrant this court to set aside the judgment of the trial court. That the facts explained by the appellant show sheer negligence and lack of care in handling this matter at the trial court. Further the fact that the court erred in law and facts is vague and baseless as there is no supporting case or evidence as alleged. It is mere speculation. The respondent also cited the case of ***Mic Tanzania Limited vs. Hamis Mwinyjuma and 2 Others***, Civil Appeal No. 64 of 2016 HC Dar es Salaam Registry to show that it is not necessary that when the matter was heard ex-parte the plaintiff must win. It depends on the weight and strength of evidence adduced and not otherwise. The respondent prayed for the appeal to be dismissed with costs.

In rejoinder, the appellant stated, although the respondent insisted that all documentary evidence tendered in court at the trial court were not signed by the parties, she argued that the essence of tendering those documentary evidence were proving that there was contractual legal

relationship between the parties though the trial magistrate failed to determine that and demanded for service agreement between the parties.

The documents tendered in court by the appellant include termination letter wrote by the respondent to the appellant termination security service which show that there has been contractual relationship between the parties. But after the termination of the said contract, that is where misunderstanding began. The appellant's counsel insisted this court to allow the appeal.

Having carefully read the submission by the parties, and having gone through the trial court record, it is a common ground that the respondent did not file written statement of defence after being served with the plaintiff's plaint.

The appellant applied for an order of ex-parte proof, the order which was dully granted. The appellant sent two witnesses and tendered some documentary evidence as mentioned by the appellant, which were admitted as exhibits P1, P2, P3 and P4 for advertisement letter, suspension letter, termination letter and demand note respectively.

I have also discovered that the same documents were annexed to the appellant's plaint. However the alleged entered contract of service entered into by the parties was neither annexed to the plaint nor tendered in court as evidence. The crucial issue for determination is whether failure to tender in court the alleged contract of service alleged to have been violated by the respondent nor annex it to the appellant's plaint is fatal. In

other words whether annexing the documents which appellant has annexed to her plaint and tendered them in court without the contract of service itself suffices to prove breach of contract. The trial magistrate found that failure by the plaintiff now appellant to annex to his plaint and to tender it in court is clear that there has been no valid contract as she failed to establish cause of action.

There is logic in the trial magistrate finding. In any civil suit the first and very important issue for a court to decide is whether the plaintiff has a cause of action against the defendant. The cause of action can be determined by only looking at the plaint and anything attached thereto as it was held in ***Musanga Ng'andwa vs. Chief Japhel Wanzagi and 8 Others (2006) TLR 351***.

The appellant, as said above did not annex in her plaint the alleged service contract entered into between the parties. Equally the said contract of service was not tendered in court as evidence. The appellant did not say anything about absence of that contract of service in his plaint and in the trial court proceedings as evidence. Failure to annex the said contract of service in the plaint nor tender it in court as evidence raises reasonable doubt as to whether there was existence of such a contract. The contract of service in the present case was a basic document upon which the appellant's claim would succeed or fail. It is the said contract which we would expect it would spell out the terms and conditions for the contract of service. But failure by the appellant to annex it to his plaint nor tender it in court as evidence draw suspicious and entitled the trial court as well as this

court on appeal to draw adverse inference against the appellant. The court has something to ask itself, may be had the appellant annexed it to his plaint or tendered it in court as evidence would inquire his case. The appellant is challenging the decision of the trial court basing on its failure to act of the documents she tendered in court at the trial. I must point out that the said documents, exhibits P1,P2, P3 and P4 have no evidential value without being there the basic document, that is the contract of service which would be binding upon the contracting parties. I am saying so because it might be possible that what was done in the above mentioned exhibit were permitted without any adverse effect to the respondent. And that the respondent has done what was agreed upon by the parties. The said documents cannot therefore be relied upon and the trial magistrate was correct in my view to disregard them.

The other complaint by the appellant is that the trial court erred in law and fact for not properly evaluate the evidence of the parties as appear in ground No. 2.

The appellant is talking about evidence of the parties. But as already said the case was heard ex-parte. So only one party led evidence and who was heard. She sent two witnesses, Brastus Antony Mtasiwa (PW1) and Julius Mgonya (PW2). PW1 was a watchman and manager of the appellant's company at Mafinga branch.

His testimony is that they entered into contract with the respondent to supply security services.

On 15th May, 2017 they entered into one year contract which was to end on 15th May, 2015. The guarding posts were at Mbalamaziwa and at the area they used to keep their machineries. One of the conditions respondent put is that she did not need watchman who are residents of Mafinga, so he employed from Iringa, Njombe, Mbeya. Tukuyu and Sumbawanga, and they agreed Tshs. 300,000/= as salary per each watchman per month. They had four guns which they were paying Tshs 100,000/= per gun per months. On his part PW2 said was a Director of the appellant's company since 2014. But he was also working as a human resources officer since 2005. He said the respondent was their client since 15th May, 2017 up to 3rd February, 2018. At one time the respondent gave them suspension of one week. Then on 21st February, 2018, the respondent prematurely terminated their contract which was to end on 15th May, 2018. Both witnesses tendered in court exhibits. PW2 tendered demand note (exhibit P4), PW1 tendered in court suspension letter, exhibit P2, advertisement exhibit P1 and termination letter exhibit P3.

As can be seen, the testimonies of the witnesses of the appellant and the exhibits tendered have reference to the contract of service. For instance the terms of type of security guards to be employed and the rate of remuneration to each of the employed watchman and provision of guns. When the contract was signed and when it would come to an end all, these depend on the contract of service which was not tendered in court to enable the trial court as well as this court to be in a better position to decide whether or not there was a breach of contract. Failure by the

appellant to tender in court at the trial the said contract of service the appellant had denied himself right, that is why the trial court decided that she had failed to prove her claim on the balance of probabilities. I don't see any plausible argument for this court to fault the sound decision of the lower court. This appeal is devoid of merit, the same is hereby dismissed with costs.

F. N. MATOGOLO

JUDGE

18/06/2020.

Date: 18/6/2020.

Coram: Hon. F.N. Matogolo, Judge.

L/A: B. Mwenda

Appellant: Present Telesphory Oyendela

Respondent: Absent

Mr. Asifiwe Mwanjala- Advocate:

My Lord I'm appearing for the appellant, the matter is for judgment we are ready.

Mr. Fue Agape:

My Lord I'm appearing for the respondent.

COURT:

Judgment delivered.

F.N. MATOGOLO

JUDGE

18/6/2020.