IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

CIVIL APPEAL No. 60 OF 2017

(Arising from the District Court of Chato Civil Case No.13 of 2017)

BETWEEN

AIRTEL TANZANIA LIMITED.....APPELLANT

VERSUS

MAJURA MATAGE T/A MAJURA GENERAL SUPPLIES.....RESPONDENT

JUDGEMENT

16.4.2020 & 17.4.2020

U.E.Madeha, J

At hand is an appeal from the District Court of Chato Civil case No.13 of 2015 dated 1st November 2016. Before embarking to the grounds of appeal, I find it positive to narrate the historical background of this appeal.

The respondent Majura Matage signed a one-year agency contract having a renewable option with the appellant to provide Airtel money services to customers within Chato and Biharamulo

District on 16/05/2012. Surprisingly, on 04/10/2013 respondent received a letter terminating his contract of service, dissatisfied by the termination, he then successfully challenged such termination in the Chato District Court where he was awarded all that he prayed for the of sum of Tshs 84,995,000/=. The respondent was not amused by that findings, hence appealed to this court on the following grounds as listed hereunder; -

1. *The trial court had no jurisdiction to determine the matter.*
2. *The trial court erred in law in relying on documents which were never tendered as exhibits in court.*
3. *The trial court erred in fact and law in holding that the appellant was in breach of the contract between the parties herein in the absence of evidence to that effect.*
4. *That the trial court erred in law and fact in holding that the termination of the contract caused*

inconvenience in the respondent's business in the absence of the evidence to that effect.

5. *The trial court erred in law and in fact, in holding that the respondent was entitled to payment of Tshs. 995,000 as unpaid commission for the month of November 2013 in the absence of evidence leading to the grant.*
6. *The trial court erred in law and fact in holding that the respondent was entitled to payment of toss 45,000,000/= as costs incurred by the respondent for enlisting 240 agents on behalf of the appellant in the absence of the evidence to that effect.*
7. *The trial court erred in law and fact in holding that the respondent is entitled to 7,000,000/= as 20% commission accrued from agents enlisting by the respondent for each year during the subsistence of the contract in the absence of the evidence to that effect.*

8. *The trial court erred in law and in fact, in holding the appellant is liable to pay the respondents the general damages in the absence of the evidence leading to the said grant.*
9. *The trial court erred in law and in fact, in awarding the general damages of tossing. 30,000,000/= which is extremely high.*
10. *The trial court erred in law and fact in holding that the respondent is entitled to tshs. 1,000,000/= as refund of salaries paid by the respondent to the appellant's employees in the absence of evidence to that effect.*
11. *The trial court erred in law in condemning the appellant to pay the respondent interest at a bank rate.*
12. *The trial court erred in iaw in condemning the appellant to pay the costs of the suit.*

When the matter came for hearing of an appeal, the appellant was represented by the Mr. Libent Rwazo whereas, the respondent was represented by Mr. Kevin Mutatina learned advocate.

When submitting on the ground number 2, 3 and 4, the learned counsel for appellant argued that, the court relied on the evidence which were never tendered in court to substantiate. Section 100 of the Tanzania Evidence Act, Cap 6 (R. E. 2002) requires tendering of the document which a party relying on. The respondent had to tender a copy of the contract but failed to do so by the trial court. The law requires that the one who alleges must prove, as it is provided under section 110 (1) (2) of the Evidence Act, Cap 6 R.E 2002. The respondent to rely on the terms of the contract, he ought to have produced the said copy of the contract so that the breach could be ascertained and the effect of such breach to his business. The learned advocate cited the case of **Barelia Karangirangi versus Asteria**

Nyalwambwa, civil appeal No.237 of 2017 (unreported) where the court emphasized that; -

> *'It is similarly that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities'*

Mr. Rwazo submitted that the trial magistrate erred in relying on the document which was never tendered as an exhibit in the court.

Mr. Mutatina resisted these grounds by submitting that the issue of a contract signed between the two parties was dealt with and it was an issue of the determination by the trial court. The Airtel Branch Manager, Mr Mohamed Kubela admitted in WSD that they had a contract of one year with the plaintiff which was subject to renewal, but they terminated by issuing 30 days' notice, hence the existence of the contract was not an issue in disputes since both parties affirms its existence.

From the submissions of the leaned advocates, it is true that the parties entered into an agreement and as rightly submitted by Mr Mutatina the existence of the contract between the two parties which was never disputed as it was agreed by the appellant officer in the WSD. However, In this case, what Mr Rwazo is questioning is the existence of the terms claimed by the respondent in that contract. I am aware that it is a trite law requirement that he who alleges must prove to the required standards as backed by sections 110 and 111 of the Law of Evidence Act, Cap 6 (R. E. 2002). However, it is also true that facts which are admitted by the defendant need no proof by the plaintiff.

Now, the existence of the contract is and was never in dispute as it was admitted by the defendant, but the terms which have been claimed by the plaintiff were never admitted by the defendant. And for the court to ascertain their existence, the trial magistrate ought to have ordered the production of the said copy

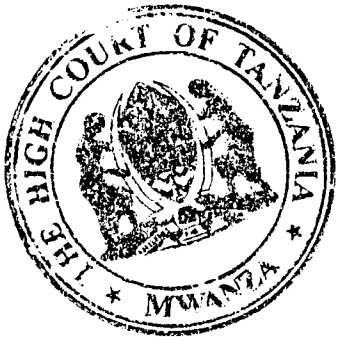
of contract as evidence to satisfy himself as to the existence of the claimed terms in the contract.

The trial Court managed to reach its findings without having a copy contract entered between the parties for him to ascertain whether there was a breach of contract by the appellant. The centre of this dispute was the contract signed, which the respondent claimed to have been breached by the appellant, without going through the terms of the said contract still one cannot be able to find out whether there was breach or not. I have discovered that, the first pre-trial Conference was not handled. By so saying since the grounds number 2,3 and 4 as argued together by both parties are sufficient to dispose the appeal, I find it unnecessary to determine other grounds of appeal.

In view of the stated omission the trial proceedings of the Chato District Court in Civil Appeal No. 60 of 2017 were indeed vitiated and a nullity. I thus, satisfied that before me there are no proceedings upon which appeal could be determined. I agree

with the appellant learned counsel. I quash the proceedings and judgement of the trial Court, the trial proceedings commenced from 29.9.2015. The proceedings in respect of the pleadings and services of summons are salvaged because they have not affected by the said omission. Thus, In the interest of justice, I order a re - trial before another magistrate. I give no order to the costs.

DATED and **DELIVERED** at **MWANZA** this 17th day of **April** 2020.



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U. E. MADEHA

Judge

17/4/2020