IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO. 07 OF 2018

(Arising from Civil Case No. 5/2016 at the Resident Magistrates' Court of Arusha)

TANZANIA ELECTRIC SUPPLY CO. LTD ..... APPELLANT

VERSUS

PETER SANGIWA/ MEGA TRADING COMPANY ..... RESPONDENT

JUDGMENT

16/11/2020 & 19/3/2021

ROBERT, J:-

The Appellant, Tanzania Electric Supply Company Limited, and 11 others were sued jointly and severally at the Resident Magistrates' Court of Arusha in Civil Case No. 5 of 2016 for recovery of Tanzanian Shillings Sixty Three Million, Four Hundred Eighty Seven Thousand and Sixty (TZS 63,487,060/=) being the sum of unpaid electric materials and equipment supplied by the Respondent to the Appellant through the said 11 others during the period of 21/4/2009 to 28/3/2011. After a full trial, the trial court passed judgment in favour of the Respondent and granted reliefs sought by the Respondent.

Aggrieved, the Appellant filed this appeal against Judgment and Decree of the trial court.

Briefly, facts relevant to this matter stems from Civil Case No. 1 of 2014 instituted by the Respondent on 6th March, 2014 in the High Court of Tanzania at Arusha against the Appellant claiming payment of TZS 267,928,549/=, inclusive of the interest at the rate of 21% per annum, being the payment for electric materials supplied by the Respondent to the Appellant from 19/06/2009 to 17/08/2012.

On 21/9/2015 parties reached amicable settlement and filed a deed of partial settlement. The High Court recorded the settlement and issued a decree to the effect that, the Appellant herein agreed to pay the Respondent the amount of TZS 15,000,340/= being the unpaid amount of tax invoices reflected in the Appellant's system and further that, for the outstanding claim of TZS 63,487,060/=, the Respondent herein should amend the plaint and join the Appellant's employees whose names appear in the delivery notes for equipment and materials purportedly supplied and received by the Appellant through its employees without Local Purchase Order (LPO).

As a claim of the outstanding sum of TZS 63,487,060/= which is below the Jurisdiction of the High Court was still pending, on 22/9/2015 parties prayed under section 21 of the Civil Procedure Code for the case to be transferred to the subordinate court where they would amend the Plaint and include the employees of the Appellant herein for a claim of the outstanding amount. The High Court (Mwaimu, J) gave an order for transfer of the matter to the Resident Magistrates' Court where necessary amendments would be effected for the Resident Magistrates' Court to adjudicate on the suit.

At the Resident Magistrates' Court, the matter was registered as Civil Case No. 5 of 2016 between the Respondent herein as the Plaintiff against the Appellant herein and 11 others as the Defendants. The trial court proceeded with the matter ex-parte against the said 11 other Defendants who were the employees of the Appellant herein and passed judgment against the Appellant herein (1st Defendant then). Aggrieved, the Appellant filed this appeal armed with six grounds of appeal which I take the liberty to reproduce as follows:

1. *That the trial magistrate erred in law and fact for entertaining the matter which is beyond pecuniary jurisdiction making the judgment, decree and proceedings illegal;*

2. *That the trial magistrate erred in law and fact in failing to decide on each and every issue framed hence constitute a serious breach of procedure;*
3. *That the trial magistrate erred in law and fact for holding that the Defendant now appellant admitted to have been supplied with materials from the plaintiff now Respondent vide High Court of Arusha Decree from Civil suit No. 1 of 2014.*
4. *That the trial magistrate erred in law and fact in failing to scrutinize and assess evidence adduced by the Appellant regarding the procedure for supplying equipment's (sic) to the appellant which is the public company and are governed by Public Procurement Act of 2004 and Public Procurement Act of 2011.*
5. *That the trial magistrate erred in law and fact for improper examination and assessment of evidence adduced by the Plaintiff now respondents regarding then supply of the said equipment's (sic).*
6. *That the trial magistrate erred in law and fact in holding that the 2nd to 12th defendants worked under the direction of the first Defendant.*

When the matter came up for hearing on 16th November, 2020, the Appellant was represented by Mr. Karonda Kibamba, State Attorney whereas

the Respondent was represented by Mr. Makundi Robinson, Learned Counsel.

Submitting on the first ground, Mr. Kibamba argued that, the trial court lacked jurisdiction because the matter at hand was purely commercial in nature which arose from a contract of supply of electric materials and exceeded TZS 30,000,000/= threshold set by the law. He argued that section 2 of the Magistrates' Courts Act as amended by Written Laws (Miscellaneous Amendments) Act No. 4 of 2004 added a list of matters considered to be of commercial significance. He noted that, the present case falls under item (iii) and (iv) of that list. Further to that, he submitted that the same Act also amends section 40 of the Magistrate Courts Act by adding new subsection (3). The new section 40(3)(b) limits the pecuniary jurisdiction of the District Court to TZS 30,000,000/= in relation to commercial cases. He argued that failure by the trial court to determine that the matter before it was of commercial nature and did not fall in the jurisdiction of the trial court rendered the entire proceedings illegal.

To support his argument, he referred the Court to the cases of **Zanzibar Insurance Company Limited vs Rudolph Temba, Commercial Case No. 1 of 2006 at page 8 and 9; Charles Sugwa vs Daniel Lucas,**

Commercial Case No. 10 of 2015 at page 6 and Nyamaswa Investment Limited vs VAP Insurance (T) Ltd.

The second ground of appeal faults the trial court for failure to determine issues raised. The learned counsel submitted that the trial court failed to determine the issue on whether there was a contract between the Plaintiff and Defendant as shown in page 5 para 1 of the impugned judgment. He maintained that failure of the trial court to decide on this issue occasioned failure of justice as the claim originated from failure of the Respondent to submit Local Purchase Order (LPO) which is the contract of supply of the alleged material. The Appellant denied to have issued the LPO to the Respondent.

Coming to the third ground, the learned counsel argued that, the trial court failed to construe the wording of the settlement Decree in Civil Case No. 1 of 2014 at page 7 of the Judgment by claiming that the Appellant had admitted to have been supplied with equipment from the Respondent. He clarified that the Appellant did not admit but wanted the employees who appeared in the delivery notes of the Appellant and in the settlement decree to be joined in a suit so as to explain to the court who instructed them to collect the alleged material.

On the fourth ground, he argued that the Appellant is a public company which is subject to public procurement laws and Regulations therefore, for the Respondent to be paid the claimed amount he was supposed to prove that the Appellant approached him and requested to be supplied with electric materials according to the Government Notice No. 5/2005 under Rule 71(d) but the Respondent failed to prove that.

The Learned counsel argued that, at page 24 of the proceedings the Respondent admitted that no one instructed him to supply the said equipment materials and further that, it was the Appellant's employees who used to collect the said electric materials from his shop. He maintained that, there was no evidence to prove that the Appellant instructed any employees to collect the alleged materials from the Respondent's shop and further that since the Respondent knew the procurement procedures and failed to take necessary measures, he acted on his own peril.

On the fifth ground, the learned counsel faulted the trial court for improper analysis of evidence. He submitted that had the trial court directed its mind at pages 24, 26, 27, 28 and 29 of the proceedings, it would find that: first, the Respondent was not instructed to supply goods to the Appellant. Second, the Respondent did not have a contract of supply because

he failed to furnish the LPO to the court as evidence. Third, the Respondent was fully paid for the previous supply of goods which he was instructed by the LPO. Fourth, the Respondent having filed civil case No. 1 of 2014 which provoked reconciliation process to take place, the Respondent conceded to a claim of TZS 15,000,340/= as the remaining balance for the goods which the Appellant instructed him to supply through the LPO. Therefore, there was no pending previous claims. Fifth, the delivery note used by the trial court as evidence of supply had no originals nor were the books used tendered as evidence. Sixth, the Appellant as a public company has a specialized officer dealing with that, there was no proof if the said personnel contacted the Appellant to supply the goods.

Coming to the sixth ground, he argued that there was no instructions as required under Rule 71 of the Public Procurement Regulations.

Replying on the first ground of appeal, Mr. Makundi submitted that this matter was originally instituted at the High Court as civil case No. 1 of 2014. Parties settled the matter partly and prayed to transfer the matter on the remaining claim of TZS 63,487,060/= from the High Court to a court with competent jurisdiction. The High Court ordered the matter to be transferred to the Resident Magistrates' Court to entertain the remaining claim.

He submitted that section 40(2)(b) of the Magistrates Courts Act provides for pecuniary jurisdiction of the RMs' court to be two hundred million shillings (TZS 200,000,000/=), therefore the RMs' court had jurisdiction to entertain the matter. He submitted further that the Commercial Division of the High Court does not have exclusive jurisdiction on the matter. He cited Order IV Rule 1(3) and (4) of the Civil Procedure Code and referred the court to the case of **Marungu Sisal Estate Ltd vs George Nicholaus and 2 others (2003) TLR No. 21** to buttress his argument. He prayed for the first ground of appeal to be dismissed with cost.

Responding on the second ground of appeal, he submitted that, every issue raised at the trial court was determined as evidenced at page 5 of the impugned judgment where issues were framed and page 6 to 8 where issues were determined.

On the third ground, he replied that parties in this appeal came into a consensus in the Civil Case No. 1 of 2014 before the High court and the Appellant herein paid some of the money claimed by the Respondent. By that payment the Appellant admitted that he was supplied with the said electric equipment. The finding of the High Court in the cited case originated from the deed of settlement between the Appellant and Respondent. The

High Court did not decide on itself that there were materials supplied to the Respondent.

Responding to the fourth ground of appeal, he referred the court to the case of **Royal British Bank vs Turquand (1856) 6E&B 327** which he stated that developed a doctrine of "indoor management". The doctrine provides that each outsider contracting with a company in good faith is entitled to assume that the internal requirements and procedures have been complied with.

He argued that, in the present case, the LPO was internal arrangement, the Respondent was trading in good faith knowing all the internal procedures were followed. In the trial court, the Appellant failed to bring any witness to dispute this as shown at page 4, para 3 of the impugned judgment.

Responding on the fifth ground he submitted that, during trial the Respondent brought 29 delivery notes showing that he supplied the Appellant with electric equipment. He argued that, section 115 of the Evidence Act establishes the burden of proof in civil cases. He submitted that the burden of proving that there was no supply was upon the Appellant but

he failed to bring evidence for such proof. He therefore prayed for this ground of appeal to be dismissed.

On the last ground of appeal he replied that, the impugned Judgment provides at page 4, para2 that the Appellant's witness testified to the effect that she knew the other 11 Defendants in the trial court as Appellant's employees but she was not in the position to prove their signatures in the delivery note which means they were taking instructions from the Appellant under vicarious liability. He referred the court to the case of **Ernest Alex Kamsakila vs Exim Bank (Tanzania) Ltd, Civil Case No. 10 of 2014 (unreported), High Court of Tanzania at Arusha,** at page 8 in support of his argument and prayed for the appeal to be dismissed.

In rejoinder submissions, Mr. Kibamba reiterated that the trial court had no jurisdiction to entertain the matter. He insisted that section 40(3)(b) of the Magistrates Court Act as amended by Written Laws (Miscellaneous Amendments) Act No. 4 of 2004 makes it mandatory for a claim of commercial significance above 30 million to go to a commercial court.

On the second ground, he argued that there were no unsettled matters in the deed of settlement signed by the Parties herein at the Civil Case No.

1 of 2014 before the High Court. He maintained that the Respondent admitted at page 24 of the proceedings that he was not instructed to supply the items disputed by the Appellant and further that after cross-checking the documents the remaining claim was TZS 15,000,340/= which was paid. With regards to delivery notes, he argued that the Respondent admitted that he was the one who wrote the names of the people in the delivery notes. He also admitted that there was proof of settlement of payment.

On the fourth ground, he stated that, the question to ask here is how the Respondent got the authority to supply the goods. He submitted that, the approach starts with a request to supply a proforma invoice, after a request the Respondent's duty is to bring the quotation of material with the price, the Appellant would then issue an LPO which is a contract. After issuing an LPO then the Respondent is supposed to deliver goods as shown in the LPO. When the delivery is made, the Respondent ought to have attached the invoice and LPO but this was not done. He submitted that, the Appellant failed to pay because those documents were lacking. The Respondent proved to the court that he was not instructed to supply the said materials that is why the documents are lacking.

He submitted that the **case of Royal British** cited by the Respondent herein is not applicable in this matter because at page 24 of the proceedings the Respondent admitted that he knew the procedure and further that, any act done by the Appellant's employees was not pursuant to the Memorandum and Articles of Association of the Company.

On the question of the onus of proof, he submitted that, the onus of proving the contract, supply and delivery was on the Respondent not the Appellant. The Respondent failed to bring LPO and proof of delivery note.

With regards to vicarious liability, he replied that since the Respondent had already said that no one instructed them to supply the said equipment to the Appellant, the Appellant cannot be vicariously liable.

In view of the submissions made he prayed for the Appeal to be allowed otherwise the Appellant's employees should take Responsibility for their own actions.

I should pose here and make a determination on the merits of this appeal. Starting with the first ground of appeal, Mr. Kibamba is faulting the trial court for entertaining a matter considered to be of commercial significance involving TZS 63,487,060/= which is beyond its pecuniary

jurisdiction contrary to section 40(3)(b) of the Magistrates' Courts Act as amended by Written Laws (Miscellaneous Amendments) Act No. 4 of 2004. On the other hand, Mr. Robinson seemed to have no objection against the argument that this case involves a matter of commercial significance, however, he maintained that this matter was transferred from the High Court to the Resident Magistrates' Court at the request of parties in Civil Case No. 1 of 2014 before the High Court of Tanzania at Arusha and the amount claimed was within the pecuniary jurisdiction of the trial court under section 40(2)(b) of the Magistrates' Courts Act. He argued further that the Commercial Division of the High Court does not have exclusive jurisdiction on the matter. He cited Order IV Rule 1(3) and (4) of the Civil Procedure Code in support of his argument.

I have looked at the order of the High Court (Mwaimu, J) in Civil Case No. 1 of 2014 dated 22/9/2015 and it reads as follows:

> *ORDER*
>
> *The matter is settled in accordance with the Settlement deed which should be transformed into a decree.*
>
> *As the Parties still litigate on the remaining sum on which is below the Jurisdiction of the Court that is Tsh. 63,487,060 the* case *is transferred to the Resident Magistrates' Court where necessary amendments should be effected to give powers to the court to adjudicate the suit.*

Each party should bear own cost.

Signed
M.P.M. Mwaimu
Judge
22/9/2015

I must admit that it would have been a lot more convenient if the point raised in this ground of appeal would have been raised before the High Court in Civil Case No. 1 of 2014 prior to the order of the High Court to transfer the matter to the Resident Magistrates' Court. Under the current circumstances of this matter, I should hasten to point out that it will be difficult to deliberate on this ground without touching on the decision of my brother Mwaimu, J alluded to above which had the effect of transferring the matter to the Resident Magistrates' Court.

In view of the fact that this ground of appeal questions the jurisdiction of the trial court to entertain this matter, the order of the High Court (Mwaimu J.) in Civil Case No. 1 of 2014 which transferred the case to the Resident Magistrates' Court is inevitably challenged. I therefore find it appropriate to refer this matter together with the records of the High Court in Civil Case No. 1 of 2014 to the Court of Appeal of Tanzania for it to examine the correctness, legality or the propriety of the aforesaid record

under section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 R.E.2019. I will therefore not deliberate on the remaining grounds of appeal.

It is so ordered.