IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

CIVIL APPEAL NO. 59 OF 2020

(Appeal from the Judgement of the District Court of Ilemela at Mwanza (Kalegeya, RM dated 23rd September, 2019 in Civil Case No. 10 of 2018)

MOBISOL UK LIMITED ..... APPELLANT

VERSUS

VENGE MASALA NGIKA ..... RESPONDENT

JUDGMENT

25th February, & 1st April, 2021

ISMAIL, J.

This appeal arises from the judgment of the District Court of Ilemela at Mwanza, in respect of a suit for breach of contract, entered on 6th August, 2017, relating to installation of a 200W-solar power system in his guest house and bar, at Kirumba, Mwanza. The consideration for the service was TZS. 2,124,750/- whose manner of payment has evoked the bickering that bred the trial proceedings and the instant appeal. The contention by the respondent was that, subsequent to such payment, the appellant installed the system and he enjoyed the services for a short

period of time before such services were disconnected, ostensibly on the ground that the respondent had been in arrears of utility bills. Contending that he had settled all his obligations, the respondent demanded that the service be restored. Though the appellant sent its technicians to fix the problem, nothing was rectified. On the contrary, the appellant alleged that the respondent had reneged on its obligations under the contract by failing to pay the contract sum, tempering with the installation, failing to pay his bills and misrepresenting facts about his social status.

After hitting an impasse, the respondent instituted proceedings in the District Court of Ilemela at Ilemela, which several prayers were prayed. Key among them was the payment of damages, specific and general, the aggregate of which was TZS. 50,500,000/-. Out of this, Tzs' 30,500,000/= allegedly accrued due to loss of income for the period the respondent was starved of the service.

In its decision, the trial court held that the appellant was culpable of reneging on its undertaking. While the learned magistrate found that specific damages were not proved, it went ahead and awarded general damages, in the sum of TZS. 20,000,000/-. Besides that, the appellant was

ordered to refund the sum of TZS. 2,124,750/- that was paid by the respondent.

Bemused by this decision, the appellant has preferred an appeal to this Court. The memorandum of appeal has four grounds of appeal which are reproduced as hereunder:

1. *That, the Honourable Trial Court erred in law and facts in holding to the effect that the Respondent (the then Plaintiff) paid the purchase price of the Solar System at contract inception in lump sum the fact which was not proved to the standard expected in law by the Respondent herein.*

2. *That, the Honourable Trial Court erred in law and facts in holding to the effect that the Respondent (the then Plaintiff) breached the contract by tempering with the Warranty and Security Seals of the Solar System and cutting and installing non-issued appliances resulting to its collapse of disfunctioning.*

3. *That, the Honourable Trial Court erred in law and facts for failure to hold that the Respondent (the then Plaintiff) was in breach of contract by misrepresenting himself to be a peasant/farmer to the Appellant (the then Defendant) to his advantage to secure 25% Discount Offer at the NaneNane Exhibitions held in Mwanza.*

4. *That, the Honourable Trial Court erred in law and facts for failure to properly evaluate evidence in its records resulting in awarding general damages without justifiable cause and reasons let alone*

the higher amount of Tanzanian Shillings Twenty Million (TZS. 20,000,000/=) awarded and or decreed to the Respondent herein (the then Plaintiff).

Hearing of the appeal took the form of written submissions, preferred consistent with the schedule drawn by the Court. As usual, the appellant threw the first jab. Submitting with respect to the first ground of appeal, the appellant's counsel argued that, the respondent's contention that he settled the purchase price of the solar system, at the Nane Nane Exhibition, had not been proved. The counsel argued that Clause 21 (c) of Exhibit P1 required that payments be made through M-Pesa account, but nothing was produced to prove that such payment was indeed made. The counsel relied on the testimony of DW1, the appellant's Zonal Service Coordinator, who testified that for every single installment, the customer is obliged to effect payment of the installation, within seven days, or else the system would revert to monthly billing schedule and forfeit the 25% discount that a non-defaulting customer would benefit.

The counsel further contended that since the respondent was a promisor who made an undertaking to pay the contract price within seven days, failure to do so flouted section 37 (1) of the Law of Contract Act, Cap. 345 R.E. 2019, and that such breach entitled the appellant to invoke the

provisions of section 39 of Cap. 345, and end the contract. The appellant took the view that the right to end the contract was predicated on Clauses 5 and 42c of Exhibit P1, but in this case, the appellant chose to introduce a monthly billing system. The counsel argued that, since the respondent failed to prove that payment was done through M-Pesa channel, the trial court was erroneous in its finding that the contract price had been paid. To buttress his contention, the appellant's counsel cited the case of ***Unilever Tanzania Ltd v. Benedict Mkasa Trading as Bema Enterprises***, CAT-Civil Appeal No. 41 of 2009 (unreported), in which it was held that the court cannot vary the intention of the parties. It was the appellant's conclusion that the respondent failed to prove that he paid the purchase price of the solar system and that this Court should hold so.

In rebuttal to the first ground of objection, the counsel for the respondent submitted that the trial court's finding and conclusion was unblemished. Relying on Exhibits P1 and P4, the respondent contended that the contract price was paid in lump sum on the date on which the contract was signed. The counsel quoted the appellant's principal officer who testified in Exhibit P4 admitting that such lump sum payment was received from the respondent. He argued that the contention that the respondent made part payment in the sum of TZS. 1,000,000/- through M-Pesa account was not

proved by the appellant. Vindicating the trial court for its reasoning and finding, the respondent's counsel cited section 110 (1) of the Evidence Act, Cap. 6 R.E. 2019 which requires the person who asserts the existence of a certain fact to prove that fact.

The contending submissions in respect of ground one crystalize into one broad question. This is as to whether the contract price of TZS. 2,124,750/- was paid by the respondent. The contention by the appellant is that the said sum was not paid in full. Only the sum of TZS. 1,000,000/- is acknowledged to have been paid. This is unlike the respondent who contends that the said amount was settled in full on the date of the contract. As I tackle this issue, let me remind the parties of the requirements that parties have in proving their allegations. This is, as acknowledged by the counsel, provided for under sections 110, 111 and 115 of Cap. 6. With respect to civil cases, the standard of proof is on the balance of probabilities. It is a requirement that is widely acknowledged and emphasized. Underscoring the importance of such requirement, Sarkar's Laws of Evidence, 18th Edn., ***M.C. Sarkar, S.C. Sarkar and P.C. Sarkar***, published by *Lexis Nexis*, at page 1896, made the following commentary:

> ***"... the burden of proving a fact rests on the party who substantially asserts the affirmative of the***

issue and not upon the party who denies it; for negative is usually incapable of proof. *It is ancient rule founded on consideration of good sense and should not be departed from without strong reason .... Until such burden is discharged the other party is not required to be called upon to prove his case.* ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."*** [Emphasis added].

In ***Paulina Samson Ndawavya v. Theresia Thomas Madaha***, CAT-Civil Appeal No. 45 of 2017 (unreported), the Court of Appeal of Tanzania cemented this requirement by quoting, with approval, the fabulous Lord Denning's remarks in ***Miller v. Minister of Pensions*** [1937] 2 All. ER 372, wherein is held:

> *"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches of the same degree of cogency as is required to discharge a burden in a civil case. That degree is well*

settled. It must carry reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say – We think is it more probable than not, the burden is discharged, but, if the probabilities are equal, it is not ...."

Reverting to the matter at hand, the argument by the appellant is that only part payment was made. As the appellant did that, it blames the respondent for not proving that he made the payment in full. While I acknowledge that the respondent was under obligation to prove that such payment was made, I take the view, as rightly argued by the respondent's counsel, that such proof was done through Exhibits P1, ***"Mkataba wa Ununuzi na Matengenezo"***, and P4, the primary court's decision. In the former, it is shown at page 1 that payment was made on the spot and it was 100%. The words used are ***"Malipo ya papo kwa hapo 100%"*** and the sum quoted for such payment is TZS. 2,124,750/-. Exhibit P4 quotes Mkora s/o Fredinand (p. 4), the appellant's zonal manager, stating as follows:

".... kwanza nathibitisha kuwa mdai ni mteja wa Mobisol, ambaye alinunua mtambo wa mobisol kwa pesa taslimu mwezi Agost mwaka 2015 kwa kulipa pesa taslimu na wakampa mkataba wa matengenezo kielelezo "A" alioutoa mdai ambao una warrant ya miaka mitatu tangu siku aliyochukua huo mtambo."

From this excerpt, it is clear, in my considered view, that the respondent discharged the obligation of proving that he consumed the appellant's services and that, as far as fulfilling his part of the bargain is concerned, the requirements of the provisions of Cap. 6 had been fulfilled. Since the allegation of non-payment or part payment of the purchase price was advanced by the appellant, the duty of proving this fact rested on the appellant and nothing was led by any of its witnesses to discharge this burden. The appellant has quoted Clause 21c of the Contract which requires that every payment should be done through M-Pesa. The argument by the appellant is that, if such payment was done, then the same ought to have been evidenced by an M-Pesa message. This contention is a double edged sword which would also apply to the appellant in proving that only part payment was done. If it believes that this contention is correct then the assumption is that the acknowledged bit of the payment was done through M-Pesa and the appellant would be expected to produce proof of such payment, and serve as the basis for passing the blemishes to the respondent. This it did not do and I take the view that this duty was not performed.

It is my considered view that this ground is specious and I dismiss it.

Ground two of the appeal decries the trial magistrate's failure to hold that the respondent indulged in the acts of breaching the contract. Acts of

the alleged breach have been listed to include tempering with the Warranty and Security Seals and installing non-issued appliances resulting to collapsing and malfunctioning of the system. The alleged acts were in violation of the provisions of Clauses 12, 14, 41a and 41d. The contention is premised the testimony of DW2 and Exhibit D2, an installation quality report, dated 25th May, 2018. With respect to tempering of the solar system, the appellant contends that DW2's testimony gave an account of what he found when he inspected the respondent's house. He stated that he found that seals had been loosened, an act which is contrary to Clause 28, 41a and 42b. there is also an issue of installing 16 more lights instead of 4 which were supplied by the appellant. This was, in the appellant's view, a breach of Clause 35, and that such installation was, most likely, done by an unqualified technician.

The respondent's counsel has disputed all of that. Defending the trial court's decision, the counsel took the view that no tempering or any act of breach was perpetrated by the respondent. On the contrary, he contended, it is the appellant who is at fault and in breach of contract when it was informed of the defects and took no action for 11 months.

While the question of breach of contract is a matter of evidence, I take the view that remedies for the breach ought to have been exercised and in

the full knowledge of the party that is alleged to have breached the contract. In this case, the breaches that are alleged to have been committed by the respondent fall under the provisions of Clause 42 of Exhibit P1, and the remedies fall under Clause 43. The latter Clause provides as follows:

> *"Kama matukio haya yatajitokeza, Mobisol wanaweza kudai malipo mara au kusitisha mkataba na kuchukua mtambo kutoka kwa mteja na ndani ya siku kumi za kazi tangu ulipotokea."*

From the substance of the quoted provision, I gather that, where a breach is imputed, as is the case here, the option that is available to the appellant is to press for payment, to rescind the contract, or to take possession of the system. In either of these options, the established practice would require that such breach be communicate to the party accused of it and the course of action contemplated by the offended party. This would not only avoid keeping the offending party in the dark about what is perceived to be a breach, but also find ways through which the alleged breach would be remedied. In this case, none was given and the appellant did not trigger any action that would justify its contention. Instead, this argument came after the respondent had triggered an action to enforce his right under the contract.

Furthermore, the fact that none of the remedies under Clause 43 was pursued, means that such breach is imaginary and a mere afterthought that came as a bait against the respondent's claims. In any case, refusal to address the defects does not constitute one of the remedies under Clause 43 of Exhibit P1. In view of the foregoing, I hold the view that the trial court's decision to spurn the allegation of breach of contract was sound and unblemished, and I find nothing faulty in it. This ground of appeal fails.

Ground three queries the trial magistrate's failure to hold that the respondent was in breach of contract for misrepresenting himself as a peasant/farmer, thereby taking advantage of the discount offered by the appellant. The argument by the appellant is that, as a result of the said misrepresentation, a significant sum was whittled down from TZS. 2,655,937/- payable to other customers, to TZS. 2,124,750/- at which the said system was sold to the respondent. The other form of misrepresentation lies in the respondent's concealment of the fact that the house was residential while in fact it was for a commercial use. This, the appellant's counsel contended, was an act which falls within the purview of section 18 (a) and (c) of Cap. 345, and the consequence is to invoke section 19 (1) of Cap. 345 and Clause 42a of Exhibit P1, and render the contract voidable.

This contention has been stoutly denied by the respondent. In his terse submission, his counsel has taken the view that it is a fact that the respondent is a farmer who also owns a guest house and a bar. He argues that the proceeds of agriculture are what financed the business he is carrying on. On the contention that the house was commercial, the respondent's counsel argued that the appellant conducted a site verification and that the installation came upon satisfaction that everything was in order.

I could not agree more with the respondent's contention on this issue. Nothing was misrepresented by the respondent. The fact that he owns some other income earning streams does not make him cease to be a farmer. This is akin to an employee who may have a side occupation that earns him some income. The side occupation does not make him lose what he is. I take the view that the 'charge' of misrepresentation would stick if the respondent was not involved in agriculture.

With respect to whether the house was residential, I am again in sync with the respondent. Installation of the solar system was carried out by the appellant through his technicians. If, at the time of installation, the appellant felt that it has been misled by the respondent, the right course of action would be to call off the undertaking and hold the respondent to account. Imputing a misrepresentation at the stage where the respondent has

initiated recovery measures is nothing short of a thinly veiled act of dishonesty. I choose to disassociate myself with this, and I hold that this ground is barren and I dismiss it.

Ground four questions the trial court's evaluation of evidence on the damages which were awarded. The view taken by its counsel is that the quantum of damages awarded was not justified as no reasons were given for such award. He took the view, as well, that the sum of TZS. 20,000,000/- awarded was excessively high. He justified this contention by citing the decision in ***Cooper Motor Corporation Ltd v. Moshi/Arusha Occupational Health Services*** [1990] TLR 96. The respondent's counsel has taken a swipe at the appellant's contention. He holds the view that award of general damages is purely in the discretion of the trial court. He takes the view that the trial court was prudent in its decision to award the sum of TZS. 20,000,000/-. To back up his contention, he cited the decisions in ***Tanzania-China Friendship Textile Co. Ltd v. Our Lady of the Usambara Sisters*** [2006] TLR 70; and ***Kibwana & Another v. Jumbe*** [1990-1994] 1 EA 223.

Let me begin by joining hands with the respondent's counsel by stating that award of damages is a discretionary remedy solely exercised by the trial court. Its grant is preceded by the court's satisfaction that the defendant's alleged wrong doing has been proved and confirmed by the court. This is

consistent with an old decision of ***Stroms v. Hutchison*** [1905] A.C. 515 in which Lord Macnaghten stated as hereunder:

> *"General damages "are such as the law will presume to be the direct natural or probable consequence of the act complained of."*

The cited excerpt was re-affirmed in the subsequent holding by Lord Dunedin in ***Admiralty Commissioners 5.5. Susguehann*** [1926] A.C. 655 at p. 661. He held:

> *"If damages be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a question of the jury.*

It is clear, from these holdings, that the pronouncement of wrong doing by a court becomes a condition precedent for awarding damages. The plaintiff must succeed in his action for any tortious liability or breach of terms of an undertaking. In the trial proceedings from which this appeal emanates, the trial court found that the appellant was on the wrong side of the things. It was held to be a culpable party that breached the contract. The consequence of all this was to, *inter alia*, order payment of general damages.

But as the trial Court did so, it failed to consider the trite position which is to the effect that award of general damages is subject to some considerations. Such considerations include those that were accentuated in

Anthony Ngoo & Another v. Kitinda Kimaro, CAT-Civil Appeal No. 25 of 2014 (unreported), in which it was guided as follows:

> *"The law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence on record able to justify the award. The judge has discretion in the award of general damages. However the judge must assign a reason ...."*

In this case the trial magistrate did not justify his decision to settle at TZS. 20,000,000/- that she awarded. Such failure is what justifies the appellant's consternation about the quantum that is considered to be humongous and unjustified, and I find the appellant's agitation legitimate and supportable. I take the view that, because of a wrong or no application of the principle of law, the award of damages in this case was inordinately high, and I have no hesitation to invoke the principle enunciated in ***Cooper Motor Corporation Ltd*** (supra) and revise the quantum of damages awarded to the respondent. I do that by whittling down the sum of TZS. 20,000,000/- to a sum of TZS. 8,000,000/-, which I consider to be reasonable and an adequate recompense for the damage suffered by the respondent.

In the upshot of all this, save for the alteration made with respect to award of damages, I find the appeal misconceived and lacking in merit. Accordingly, I dismiss it with costs.

It is so ordered.

DATED **at MWANZA** this 1st day of April, 2021.

M.K. ISMAIL

JUDGE

Date: 01/04/2021

Coram: Hon. M. K. Ismail, J

Appellant: Present online

Respondent: Present online

B/C: J. Mhina

Mr. Mapembe, Advocate:

I am for the appellant, we are ready of Judgmen.

Sgd: M. K. Ismail
JUDGE
01.04.2021

Mr. Innocent Michael, Advocate:

We are also ready.

Sgd: M. K. Ismail
JUDGE
01.04.2021

Court:

Judgment delivered in chamber, in virtually presence of Messrs Mapembe and Michael, learned Counsel for the parties, this 01st day of April, 2021.

M. K. Ismail

JUDGE

<u>At Mwanza</u>

01st April, 2021