IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO. 1 OF 2021

(Original Civil Case No. 17/2019 of the Kigoma District Court, before Hon. G.E. Mariki – PRM)

EAC LOGISTIC SOLUTION LIMITED ..... APPELLANT

VERSUS

FALCONY MARINES TRANSPORTATION LIMITED .....RESPONDENT

J U D G M E N T

11th May & 18th May, 2021

I.C. MUGETA, J.

The trial court adjudged the appellant to pay the respondent USD 17,345 being unpaid principal sum for the work done by the respondent, allegedly, on instruction of the appellant. The assignment involved transportation of two excavators from Kigoma Port to Kalemie Port in the Democratic Republic of Congo (DRC). It was further ordered that the said principal sum would attract interest at 22% from the due date to the date to full satisfaction of the decree. The appellant was aggrieved, hence, this appeal which is premised on nine grounds of appeal. On the hearing date, counsel for the appellant, Mr. Sadiki Aliki, reduced them to four.

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i. *That, the trial court erred to hold that there was a contract between the appellant and the respondent.*
ii. *That, the trial court erred to hold that the respondent fully executed her contractual obligation.*
iii. *That, the trial court erred to hold that the parties had a sub contract for shipping the suit consignment.*
iv. *That, the trial court decided for the respondent against the weight of evidence and the law.*

In the course of his submissions, Mr. Sadiki dropped the fourth ground.

The facts of the case are simple and straight forward. The appellant had two excavators for transportation to her client in DRC from Kigoma Port through Kalemie Port. The two excavators were finally transported to Kalemie by the respondent. The appellant has refused to pay the costs involved because firstly, the respondent transported the consignment before they agreed on the costs. Secondly, there is no evidence that the cargo was delivered to the consignee as no delivery note has been presented by the respondent.

Each party marshalled one witness for its side. These are Mbaraka Harudu Said (PW1) for the respondent and Damas Michael (DW1) for the appellant. The respondent tendered four exhibits to support her case. These are a bill of lading to transport the cargo from Zheng Jiazhong to Kalemie (Exhibit P1), the invoice indicating the shipment costs (exhibit P2), the cargo manifest for

which the respondent transported the goods from Kigoma to Kalemie (exhibit P3) and the e-mail correspondences between Mbaraka Said (PW1) and Daniel Mungo who is one of the appellant's directors (exhibit P4).

After analysing the evidence, the learned Principal Resident Magistrate concluded: -

> *"The conduct of the directors from handling (sic) the consignment to the plaintiff together with transportation documents and the fact that in the email correspondences, the defendant admitted and was promising to make good the payment. All these proves that parties had agreed in common only that their agreement was not reduced into writing".*

This holding is subject of the complaint in the first ground of appeal. Then the trial magistrate further held: -

> *"The documentary exhibits that is the BL dated 7/7/2017, cargo manifest dated 7/7/2019 and sub T1 dated 18/4/2019 (exhibit P3) are to the effect that the plaintiff shipped the cargo to the agreed destination which is Kalemie Port".*

This finding is subject of the complaint in the 2nd ground of appeal.

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The first and third grounds above are similar. I shall deal with them jointly. On these ground of appeal Mr. Sadiki Aliki made a two-edged argument. Firstly, that the two directors of the parties (PW1 and DW1) acted ultra vires because they executed the contract without power of attorney from each company authorising them to do so as required by the companies Acts. When I probed him to cite the section, he said he does not remember the actual section. Secondly, that there was no agreement on the actual shipping costs before the goods were transported. While he admitted that DW1 met PW1 in Kigoma and handed him over the bill of lading, he said handing over of that document was for purposes of costs calculations but the appellant has never received any invoice regarding costs to be paid for the shipment. The learned counsel also complained about the admission in evidence of email correspondences (exhibit P4) for the reason that such admission violated section 18 (2) of the Electronic Transactions Act, 2015 as no affidavit was filed to establish the authenticity and reliability of the devices in which the exhibits were stored before retrieval. To support his argument, he referred the court to the case of **Simbanet Tanzania Ltd v. Sahara Media Group Ltd**, Commercial Case No.2/2016, High Court, Commercial Division

(unreported). On the delivery of the consignment, he submitted that delivery is evidenced by a delivery note which was not tendered in evidence.

Mr. Kabuguzi replied that the evidence of PW1 and DW1 confirmed that there existed a contract and the respondent met her part of the bargain. He argued further that from the evidence and the pleadings, parties agreed that the cargo is no longer at Kigoma port. On the legality of the admission of the emails, he submitted that this objection was not raised at the trial.

In rejoinder, Mr. Sadiki submitted that an objection on a point of law can be raised at any time.

In my view, as submitted by Mr. Kabuguzi, the parties are not at dispute on the fact that the cargo has been transported to Kalemie. On cross examination, DW1 testified: -

> *"The two containers are not at customs' yard now as they have been shipped by Falcony Company to Kalemie".*

Considering this evidence, I agree with the learned trial magistrate that even if there was no written agreement between the parties, their conducts proves existence of a contract. The handing over of the bill of lading to the

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respondent is evidence that the appellant intended the respondent to ship the cargo to Kalemie and the respondent executed her part of the bargain.

DW1 testified that he could not have entered into any contract because there was no board resolution by power of attorney authorizing him to enter into contract with the appellant. It is my view that such requirements are internal arrangements for proper management of the company's affairs. Internal arrangement of one company is not a business of its clients in terms of section 37 of the Companies Act, No. 12 of 2002. DW1 traveled to Kigoma to meet PW1 on the shipment of the cargo. It was not upon the respondent to find out if he is fully authorized by the appellant. If DW1 had not been authorized to act for the appellant that is evidence for disciplinary processes and not for the company to deny liability for actions performed by its directors. I according hold that by conducts of the parties, there was a contract between them.

Since there was a contract, it is my view that the dispute lies on the costs to be paid to the respondent for the shipment service rendered which is the second limb of Mr. Sadiki's argument. The respondent claimed USD 17,345 while the appellant maintain that the respondent shipped the cargo before the parties agreed on the fees. The trial magistrate never addressed his mind

to this issue as no specific issue relating to this matter was framed. The duty to prove the agree fee lies on the respondent who want the court to believe her that the agreed shipment costs was USD 17,345.

The only evidence that supports her claim is the invoice (exhibit P2). To win her claim, the respondent must prove that her offer in the invoice was received and accepted by the appellant.

PW1 testified that he sent it to Mr. Mugo via email. He said: -

> *"On 2/7/2019 we got a ship called Rafiki 3 that would transport the consignment. I notified Mr. Mugo of the development and sent him all costs that were supposed to be paid which is USD 17,345".*

However, as submitted by Sadiki Aliki, such email was not tendered in evidence. Therefore, there is no evidence that the offer in the invoice was sent, delivered and accepted. Further, it is my view that the above evidence of PW1 contradicts the invoice (exhibit P2) which shows it was prepared on 4/7/2019, therefore, it could not have been sent to Mr. Mugo on 2/7/2019.

In his judgment, the learned magistrate relied on the promise to pay to and lack of evidence disputing the invoice conclude that there was agreement on

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costs. This promise is in exhibit P4 which is email correspondences between PW1 and Mr. Mugo. The relevant email reads: -

> *"Hi Mr. Mbarak,*
> *I have received bad news from my client, he want more time before paying us since the cnee (sic) want to debug the machine. It is difficult for us as now we have to think how to negotiate with you and get more time to arrange a payment to you. When we spoke, you were open to us paying something to enable you unlock the issue with vessel as we wait for big money. Kindly advise on how much we can start with so we look for it. Once again thank you for your patience as we seek to sort the payment issue".*

I agree this is a promise to pay. However, it does not assist to determine the agreed shipment costs. Further, there is no evidence that invoice was delivered therefore the argument by the trial magistrate that it is undisputed is misconceived. Consequently, I hold that the respondent did not prove that the shipment costs was agreed to be USD 17,345. However, since she, indeed, shipped the consignment she deserves payment of the rightful costs involved. The above email from Mugo to PW1 proves that the consignee received the cargo despite the fact and complaint by Mr. Sadiki that no

delivery note was tendered. The question is, what amount ought to be paid to the respondent?

In the Written Statement of Defence at paragraph 2 (1) the appellant averred that she offered Tshs. 20,000,000/= and the respondent proposed that she should ship the cargo first before they agree on the costs. In his evidence DW1 testified: -

> *"In our preliminary negotiation I informed the plaintiff that we were ready to pay Tshs. 20,000,000/= but he said he would agree after receipt of costs from the ship".*

According to PW1 he got the ship on 2/7/2019 and prepared the invoice as well. This means he got from the ship the transportation charges by profoma invoice or other means. Due to the nature of the dispute in this case where the parties have not made full disclosure of what they agreed, the profoma invoice from the ship would have been the basis for assessing the reasonable shipment costs. However, the same is not part of the evidence nor PW1 disclosed the quotation from the ship in his evidence. On this account, since there is no evidence that the parties agreed on the shipment costs but it is undisputed that the respondent transported the cargo, I award him the Tshs. 20,000,000/= which the appellant had offered as pleaded and stated in the

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evidence of DW1. The same shall attract 22% commercial interest from the due date to the date of this judgment. Then it shall attract 7% interest from the judgment date to the date of full settlement of the decree sum. Orders of the trial court, save for costs, are substituted as above.

As it can be noted herein above, I have used the evidence in the emails (exhibit P4) to decide this case despite the objection by Mr. Sadiki that they were illegally admitted in evidence. This is because the objection is wanting in merits. According to section 18(2) of the Electronic Transactions Act, 2015, an affidavit establishing the reliability of the manner in which the electronic data message was generated, stored, communicated, maintained and the original identified is not a prerequisite for admission of electronic documents. This section outlines factors upon which admissibility and probative value of such evidence can be determined. For purposes of admissibility, I hold, those criteria can be established by an affidavit or other form of evidence like oral evidence depending on the kind of document to be admitted. In case of oral evidence, it suffices the witness to testify on how the electronic data message was generated, stored, communicated, maintained and the original identified prior to tendering the electronically generated documents. Filing of affidavits or certificates is necessary when the person seeking to tender

the evidence is not the person in-charge of the computer from which the data message was generated or a party to the chain of custody of the electronic document or device. The cited case of **Simbanet Tanzania Ltd** (supra) did not decide that filing an affidavit is mandatory but whether the filed affidavit met the conditions under section 18 (2) of the Electronic Transactions Act. It is, therefore, distinguishable. In this case PW1 tendered emails of his own communication with Mr. Mugo, therefore, no affidavit was required.

Let me wind up by commenting on two important things. Firstly, on the manner the mediator recorded the final orders after mediation process failed as indicated at page 9 of the trial court typed proceedings: -

> *"Mediator, Parties are not interested with this mediation have marked failed (sic). The matter be remitted to the trial magistrate so as to fix the final PTC date"*

This was an irregularity. It is a settled rule of practice that when mediation fails, mediators are not supposed to put on record reasons that broke it down. The rationale is simple, mediation process is confidential if it fails, disclosure of information can prejudice the trial magistrate/judge. In such cases the duty of the mediator is limited to recording the failure in this form:-

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"***Court/Order*** – *Mediation has failed"*

Secondly, on the award of interest. The learned trial magistrate awarded interest at commercial rate from when payment was due to the date of full satisfaction of the decree. Under section 29 of the Civil Procedure Code [Cap. 33 R.E 2019] this rate runs up to the date of the judgment only. Therefrom, to the date of full and final satisfaction of the decree, interest is charged at court rate in term of Order XX rule 21 of the Civil Procedure Code. The trial court, therefore, erred to award interest at commercial rate to the date of the final settlement of the decree.

This said and done, I partly allow the appeal to the stated extent. Since the appeal has partly succeeded and mainly for my own review of the evidence and not the strength of arguments by the parties, I give no order as to costs in this court. Costs as awarded in the trial court are undisturbed.

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I.C. Mugeta

Judge

18/5/2021

Court: Judgment delivered in chambers in the presence of Mr. Sadiki Aliki, advocate for the appellant and in the presence of Mubarak Said – Managing Director of the of respondent also represented by Mr. R.G. Kabuguzi advocate.

Sgd: I.C. Mugeta

Judge

18/5/2021