IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 20 OF 2020

(Arising from the Judgment of the District Court of Kinondoni at Kinondoni Civil Case No. 124 of 2018 before Hon. H. M. Hudi, **RM** dated 20/12/2019.)

HAMAD RASHID MOHAMED ..... APPELLANT

VERSUS

TANCOAL ENERGY TANZANIA ..... RESPONDENT

JUDGMENT

29th April & 04th June, 2021.

E. E. KAKOLAKI J

The appeal before this court originates from the decision of the District Court of Kinondoni in Civil Appeal No. 124 of 2018 handed down on 20/12/2019 which dismissed appellant's claims. Discontented the appellant knocked this court's door equipped with three grounds of appeal which I will soon state. The appeal is contested by the respondent. Though both parties are represented when the matter came for hearing on 23/03/2021 only respondent's advocate appeared before the court and prayed for court's leave which was granted to have this appeal disposed by way of written submissions and undertook to notify the appellant's advocate of the filling schedule. Thanks to both parties for complying with the filing schedule order

and I commend both counsels for their immerse efforts to assist this court reach its decision.

In order to appreciate the status of this appeal. I find it incumbent to narrate albeit briefly its background story as discerned from the pleadings and trial court proceedings and judgment. Before the trial court the appellant had sued the respondent for the claims of **United States Dollars Nineteen Thousand and Five Hundred (USD 19500) equivalent to Tanzania Shillings Forty Four Million, Forty Seven Hundred Thousand, Nine Thousand and Five Hundred** (Tshs. 44,479,500/=) being the principal debt for breach of verbal agreement between the two. It was claimed by the appellant/plaintiff that the Respondent/Defendant sometimes in 2005 entered into oral agreement to pay the appellant a total of **United States Dollars One Thousand Five Hundred (USD 1500) equivalent of Tanzania Shullings Three Million, Forty Two Thousand, Five Hundred (Tshs. 3,420,500=)** every month as consultation fee and pay for scholarship of his son. The said claims were denied by the defendant in its Written Statement of Defence contending that the Respondent never contracted the appellant as in 2005 it was not in existence already for being incorporated on 30th May 2008. Though not pleaded in the plaint as to what was the consultation fee for the court framed three issue being, **one**, whether or not there was agreement between the parties, **two**, whether or not the defendant breached the said agreement and **third**, to what relief are the parties entitled. In responding to the first issue the trial court and basing on the prosecution evidence of PW1 and PW2 found that, at the time of contracting the alleged contract the defendant company was not in existence but that fact was cured by the defence evidence of DW1 when admitted that

the appellant was under payment until 2016, which implied there was agreement between the two parties. As to the second issue the trial court judged that, despite of existence of agreement it was difficult for the court to make a finding that, the same was breached for want of evidence to establish the terms and conditions of the said contract, rights and duties of each part to the contract and its period of existence. It concluded that the claims of partly performance of the terms of agreement by the respondent for effecting payments was to the appellant not enough evidence to prove breach of contract. Since there was no breach of contract the third issue was also answered in disfavour of the appellant for want of proof of damages suffered as the contract was not breached. The suit was therefore dismissed with costs for want of merits hence the present appeal by the appellant fronting three grounds of appeal going as follows:

1. That, the Trial Magistrate erred both in law and fact by holding that there was no breach of the contract between the Appellant and the Respondent without considering the evidence adduced during the trila by the Appellant.
2. That, the Trial Magistrate erred both in law and fact by dismissing the case and for failure to consider that Appellant is entitled to legal reliefs as a result of breach of contract by the Respondent.
3. That, the Trial Magistrate erred both in law and fact for failure to analyse the evidence adduced by the Appellant and further the Trial Magistrate this leaded himself by stating untrue facts hence the Judgment is problematic.

Relying on those grounds tt was the appellant's prayers that:

1. The whole judgment of Hon. Hudi, RM be quashed and set aside.
2. This Court call and inspect the proceedings of the District Court.
3. This Court grant costs of the appeal.
4. Any other relief this court may deem fit to grant.

The appellant in this appeal enjoyed the services of Mr. Anwar Katakweba learned advocate from **KKB Attorneys at Law** whereas the respondent was defended by Philemon Mrosso learned advocate from **Alloys & Associates**. Mr. Katakweba opted to argue all grounds of appeal in seriatim.

Submitting on the first ground of appeal Mr. Katakweba argued that, the learned trial magistrate was in error to hold that there was no breach of contract for want of specific terms and conditions of the contract, rights and duties of the parties and unspecified period of the contract while the alleged missing evidence was clearly stated by PW1 in his testimony at page 4 and 5 of the typed proceedings, when said the agreement was for the appellant to assist two entities, **Atomic Energy Company** and **NDC** to form partnership called **TANCOAL Energy Tanzania Ltd**, the company which was paying him until 2016 when it stopped. He said, the fact that the respondent was paying the appellant was not in dispute as it was also confirmed by the respondent through DW1 and the respondent never cross examined appellant's witnesses on that aspect, thus admission and proof of existence of the agreement and breach of contract. He fortified his submission by relying on the cases of **Jaspini S/O Daniel @Sizakwe Vs. Director of Public Prosecutions**, Criminal Appeal No. 519 of 2019 (CAT-unreported) and **Masharuby @Babu Ayubu Vs. The Republic**, Criminal Appeal No. 590 of 2017 (CAT-unreported) where the Court of Appeal

observed that, failure to cross examine a witness on important matters implies acceptance of the facts at dispute. Mr. Katakweba added, since the respondent had promised and agreed to continue paying the appellant, it ought to have performed her obligation as per the terms of contract under section 37 of the Law of Contract Act,[Cap. 345 R.E 2019], failure of which amounted to breach of contract. To reinforce his argument on this point he referred the court the cases of this court in **Iscon Commodities (T) Ltd Vs. Abdul Ahmad Lila**, Civil Case No. 08 of 2018 (HC-unreported) and **First National Bank (T) Limited Vs. Miles Solutions Co. Ltd**, Commercial Case No. 108 of 2017 (HC-unreported) where the Court insisted on the importance of parties to fulfil the obligations imposed by the terms of contract. It was Mr. Katakweba's submission, since the respondent was legally bound to fulfil his obligations by paying the appellant up to 2018, his act of ceasing payments amounted to breach of contract, which evidence the trial magistrate overlooked, thus a prayer for this ground to be allowed.

On the second ground of Appeal the appellant faulted the trial Magistrate for dismissing his case and failure to consider the fact that the Appellant was entitled to legal reliefs as a result of breach of contract by the Respondent. It was Mr. Katakweba's contention on this ground that, had the trail magistrate considered PW1's evidence that the respondent's abrupt stoppage of payment of USD 1500 per month to the appellant, caused him to suffer damages since he had secured several loans with anticipation to settle them using the monthly paid money from the respondent, he would have appreciated that, the appellant suffered damages and was entitled to legal reliefs sought in the plaint. He argued once breach of contract has occurred the aim of paying damages is to restore the injured party in a

situation he was before, hence payment for the remaining outstanding amount of USD 19,500 equivalent to Tanzania Shillings 44,479,500/= for the breached contract as prayed was necessary for indemnification of the appellant of the suffered damages. To concretise his point the **case of Robinson Vs. Harman (1848) 1 Exch 850**, cited by Hon. Justice Stephen Mubiru, in the Ugandan case of **Ewadra Emmanuel Vs Spencon Services Limited Civil Suit No. 0022 of 2017 UGHCCD 136,** was relied upon, where the Court insisted as follows:

> *"--- The rule of the Common Law is that where a party sustains a loss by reason of breach of contract, he is so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed.*

With that authority the court was urged to grant the reliefs sought by the appellant in the plaint.

On the third and last ground it was his submission that, the trial magistrate failed to analyse the evidence thus arriving into unjust judgment. He reasoned, had he relied on evidence properly adduced by DW1 who confirmed that the respondent stopped payments to the appellant, the payments which were based on the existing oral agreement, he would not have arrived to the conclusion that the terms and condition, rights and duties as well as the span of the contract were uncertain, since terms of the agreement were oral and not written as stated by PW1. Relying on the case of **Ismail Rashid vs. Mariam Msali Civil Appeal No. 75 of 2015** that referred to the case of **Shemsa Khalifa and Two others Vs. Suleman Hamed,** Civil Appeal No. 82 of 2012 (CAT-unreported), Mr. Katakweba

submitted, the judgment of the trial court cannot rely on the evidence not adduced before the court as will lead it to arrive at unjust decision, something which is discouraged by the Court of Appeal in that case. He therefore invited this court to quash the impugned decision and allow the appeal with costs.

On the respondent's side Mr. Mrosso vehemently resisted the appeal. In response to the first ground he submitted, the trial magistrate properly considered the evidence tendered in court before he rightly concluded that there was no breach of contract by the respondent, as that conclusion was drawn from the alleged existing agreement between the parties. He argued, the issue of agreement was contentious right from the inception of the case as it was evident from PW1 and PW2 evidence as well as DW1 that, the alleged oral agreement was entered in 2005 before existence of the respondent (company) which was incorporated in the year 2008. That as per PW1 and PW2 the said oral agreement was entered between the appellant/plaintiff and two people one Peter and Emmanuel Constantine, who under section 40(1) of the Companies Act, No. 12 of 2002, were supposed to be personally responsible for claims arising out of that purported agreement, thus there was supporting evidence for the court to hold the respondent breached no agreement as the claimed agreement was entered before its formation. He fortified his stance with the decision in case of **Kelner Vs. Baxeter**, 1867, L.R 2 C.P 174, where the Court of Common Pleas in England confirmed that:

> *"...where a contract was signed by one who professed to be signing "as agent" but who had no principal existing at the time,*

the contract would be wholly inoperative unless binding upon person who signed it and a stranger could not by a subsequent ratification relieve him from that liability."

Basing on the above cited authority he argued, since there is nowhere the appellant stated the terms and conditions of the contract apart from insisting for payment without stating his responsibilities to the company worth of that payment as required under section 110 and 111 of the Evidence Act, [Cap. 6 R.E 2019], the trial court was justified to hold the agreement was not breached, as the agreement between the appellant and Peter and Emmanuel was not binding to the company. With that submission he invited the court to dismiss the ground.

As to the second ground he submitted, the specific damages of USD 19500 as claimed by the appellant ought to be specifically proved something which the appellant failed to do through PW1 and PW2 during the hearing. He said the appellant ought to have accounted for as to why such amount should be paid to him, since it is the law that, damages must be specifically pleaded and proved as it was held in the cases of **NBC Holding Corporation vs Hamson Mrecha,** Civil Appeal No. 35 of 1995 (2002) TLR 71 at page 77 and **Masolele General Agencies Vs. African Inland Church Tanzania** (1994) TLR 192. As the appellant did not bring any document to prove the purported consultancy he failed to discharge his duty of proving the specific damaged thus was not entitled to any damage or legal relief as claimed, Mr. Mrosso stressed. He therefore called the court to dismiss the ground too.

In regard to the last ground of appeal on contention of failure of the trial magistrate to analyse evidence the result of which was to mislead himself by

stating untrue facts hence a problematic judgment, Mr. Mrosso countered, the trial magistrate correctly considered and properly analysed the evidence the evidence as the evidence of DW1 proved that the respondent was not legally bound to pay the appellant for want of proven work done or contribution rendered to the respondent, thus the appellant was not entitled to any payment. With that submission he argued, all the grounds of appeal are devoid of merits hence this appeal has no legs to stand on, thus deserves to be dismissed with costs and so prayed.

In his rejoinder submission Mr. Katakweba almost reiterated his submission in-chief and added that, the submission by the respondent that there was no agreement was misleading as that point was positively found by the trial court when answering the first issue that, there existed agreement between the appellant and the respondent. Thus the respondent is estopped from reopening that issue as she never appealed against it. He argued, since there was agreement and the fact that it is uncontroverted evidence the respondent stopped payments to the appellant in 2016 and not in the year 2018 as it was supposed to be, then there was a breach of contract, which ought to be remedied through the claimed damages. In the light of that submission this court was invited to allow the appeal with costs.

I have taken time to keenly go through the impugned judgment, proceedings and exhibits tendered in court as well as paying considerable attention the fighting submissions by both parties. In this judgment I am intending to address each and every ground separately as done by the parties if need be. To start with the first ground, it is Mr. Katakweba's assertion that, the trial magistrate was in error to hold that, there was no breach of contract

between the parties without considering the evidence adduced by the appellant that, the respondent continued to effect payment to the appellant basing on the existing oral agreement until 2016 when it ceased the payments, the fact which was confirmed by DW1, thus proof of breach of contract. The contention is contested by Mr. Mrossso for the respondent in that, the court was right to so hold as there was no terms and conditions, duties and rights and life span disclosed by the appellant to prove that the same were breached. That aside he argued, the alleged agreement was not binding the respondent as by the time when the said agreement was entered in 2005 the company was not in existence. In order to determine this issue properly the issue as to whether there was a valid agreement between the parties with known terms and conditions alleged to be breached must be reviewed and answered first as it seem to me no to be properly addressed by the trial court.

The trial magistrate in his typed judgment at page 3 when addressing the issue as to whether or not there was agreement between the parties found out that, as per the appellant's witnesses PW1 and PW2 at the time of contracting the alleged oral agreement between the parties, the respondent's company was not in existence. However, basing on the evidence of DW1, the trial court went on to hold agreement was in existence as since its formation the company continued to effect payment to the appellant until August 2016. Now the glaring question is what agreement was the trial magistrate referring to, its terms and conditions, duties and liabilities as well as its timeline? This question in my opinion was to be answered first by the trial magistrate before concluding there was an agreement between the appellant and respondent but to the contrary

remained unanswered. It is trite law that judgment of any court must be grounded on the evidence properly adduced during trial otherwise it is not a decision at all. See the case of **Ismail Rashid vs. Mariam Msali Civil Appeal No. 75 of 2015** when referring to the case of **Shemsa Khalifa and Two others Vs Suleman Hamed,** Civil Appeal No. 82 of 2012 (CAT-unreported). I am alive to the fact that appellate court cannot interfere with the findings of the lower court except where there is misapprehension of evidence by the lower court or tribunal or where it has acted wrongly or where it has failed to take into consideration matters which it should have taken into consideration. See the case of **Credo Siwale Vs. The Republic**, Criminal Appeal No. 417 of 2013 when cited with approval the case of **Mbogo and Another Vs. Shah** (1968) EA 93, the Court said:

> *"(i) If the inferior Court misdirected itself; or*
>
> *(ii) It has acted on matters it should not have not have acted; or*
>
> *(iii) It has failed to take into consideration matters which it should have taken into consideration,*
>
> *And in so doing, arrived at wrong conclusion. Other jurisdictions have put it as "abuse of discretion" and that an abuse of discretion occurs when the decision in question was not based on fact, logic, and reason, but was arbitrary, unreasonable or unconscionable - See PINKSTAFF VS BLACK & DECKTZ (US) Inc, 211 S.W 361."*

When interfering with the lower court's findings the appellate court therefore has jurisdiction and a duty to review the evidence in order to determine

whether the conclusion originally reached by the said lower court upon such evidence should stand. This stance was amplified in the case of **Japan International Cooperation Agency (JICA) Vs. Khaki Complex Ltd**, Civil Appeal No. 107 of 2004 (CAT-unreported) at page 8 when the Court of Appeal cited with approval the case of **Peters Vs. Sunday Post Ltd [1958] EA 424 when referring to the case of Watt Vs. Thomas** [1947] AC 484, where it was stated:

> *"It is strong thing for an appellate court to differ from the finding on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses.* ***An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this jurisdiction should be exercised with caution.****"* *(Emphasis supplied)*

As alluded to herein above the trial magistrate in this appeal arrived to the conclusion that there was agreement between the appellant and respondent basing on the fact that the appellant was receiving continued payments from the respondent until 2016, despite of the fact that the agreement was entered even before existence of the said respondent's company as per the evidence of PW1 and PW2, something which entitles this court to review the evidence to satisfy itself and establish whether the conclusion reached by the trial court should stand or not. When cross-examined at page 30, 31 and 35 of the typed proceedings both PW1 and PW2 were on record that, the appellant in 2005 entered into oral consultancy agreement with one Peter

and Emmanuel Costantine (company promoters) to assist two entities, **Atomic Energy Company** and **NDC** to form partnership called TANCOAL Energy Tanzania Ltd but no proof of service rendered by the appellant to the respondent was shown to the court, except mere assertion that advise was given to the said promoters of the company. It is trite law that pre-incorporation agreement executed by promoter or agent is binding on the promoter or agent himself as the principal was not existing at the time when it was entered. This stand of the law is well stated under section 40(1) of the Company Act, No. 12 of 2002 which provides thus:

> *"40(1) A Contract which purports to be made by or on behalf of a company at time when the company has not been formed has effect, subject to* ***any agreement to the contrary as one made with person purporting to act for the company or agent for it, and he is personally liable on the contract accordingly.****" (Emphasis added)*

The above position of our law is also well adumbrated by the famous author in Company Law, W. Green in his book **Palmer's Company Law**, Sweet and Maxwell (1997) Vol. I at page 3006, when commenting on company's pre-incorporation contracts, where he stated:

> ***"If a pre-incorporation contract is purported to be made by a company which does not exist, the contract is a nullity, and neither the company, when formed, nor the promoters whose signature is added can normally sue or be sued on contract. Where however, a promoter has contracted ostensibly as agent for the non-existent***

company, he may be made personally liable on the contract in one situation. *If the party with whom he had contracted can show that, tough having contracted as agent, the promoter is in fact the principal, for it is only by holding him personally liable that any effect can be given to the contract, the promoter will be liable." (Emphasis supplied)*

Applying the above law and principles of company law on pre-incorporation contract in the facts of this case, I would hold as I hereby do that the pre-incorporation agreement executed between the appellant and one Peter and Emmanuel Costantine (Company Promoters) purported to be made by the respondent in 2005, a company which by then was not in existence, rendered the alleged contract a nullity, as neither the company, when formed, nor the promoters who purportedly contracted the appellant can normally sue or be sued on the said contract. Similar position was taken by Parker J, which stance I subscribe to, in **Newborne Vs. Sensolid (Great Britain) Ltd** (1954) 1 Q.B 45 citing the case of **Kelner V. Baxter**, (1867) L.R.2 C.P 174 where he said:

"...it is plain that this principle, that the agent is liable, is not based on breach of warranty of authority, because, as I have said, the principal is not in existence, it is not based on any question of estoppel, but it is based on this principle, that it is only by holding him personally liable that any effect can be given to the contract, in other words, ***it is permissible for the plaintiff seeking to hold the agent liable to show that***

that agent, though he had contracted as agent, is himself in fact the principal. *" (Emphasis supplied).*

In light of the above principle the plaintiff can only sue the agent under pre-incorporation agreement upon proof that the same is the principal. In the present matter the appellant ought to have sued the agent or promoters being Mr. Peter and Mr. Emmanuel Constantine, and could only have successfully done so upon proof that the same were in fact principals to the company. Back to the case at issue the mere fact that the respondent paid the appellant some money for the consideration which was not even made clear by the appellant in evidence, I am in agreement with Mr. Mrosso that, the trial court erred in holding that there was agreement between the appellant and respondent. With such finding I hold the trial magistrate was right to conclude that there was no breach of contract though now on different reasons that there was not contract between the appellant and the respondent and therefore there was no known term in the agreement to be breached. The first ground of appeal therefore has no merit and I dismiss it.

The first ground findings has the effect of resolving the second and third grounds of appeal as since there is no breach of contract then the appellant was not entitled to any legal reliefs. Thus the trial magistrate was right in so holding. The second ground of appeal is dismissed as well for want of merits. As to the third ground of appeal the same follows suit as I see no reason to fault the trial magistrate's final finding as having properly analysed the available evidence he rightly concluded that the appellant/plaintiff failed to prove his case to the required standard hence dismissal of the suit.

In view of the above findings and for the foregoing reasons, I conclude that this appeal is devoid of merits and hereby proceed to dismiss it with costs.

DATED at DAR ES SALAAM this 04th day of June, 2021.

E. E. KAKOLAKI

JUDGE

04/06/2021

Delivered at Dar es Salaam in chambers this 04th day of June, 2021 in the presence of Mr. Philemon Mrosso advocate for the respondent also holding brief for Mr. Anwar Katakweba advocate for the appellant and Ms. Asha Livanga, court clerk.

Right of appeal explained.

E. E. Kakolaki

JUDGE

04/06/2021