

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 213 OF 2020

(Arising from the Judgment of the Resident Magistrates Court of Coastal Region at Kibaha in Civil Appeal No. 09 of 2020 before Hon. J. Mushi, **RM** dated 22/09/2020, Original Civil Case No. 43 of 2017, Mlandizi Primary Court.)

RAMADHANI RASHID APPELLANT

VERSUS

TIEL ELISANTE NNKO RESPONDENT

JUDGMENT

27th May & 25th June, 2021.

E. E. KAKOLAKI J

This is the second appeal by the appellant which is contested by the respondent. It is arising from the judgment of the Resident Magistrates Court of Coastal Region at Kibaha in Civil Appeal No. 09 of 2020, handed down on 22/09/2020, that dismissed the appellant's appeal, which was originating from the decision of Mlandizi Primary Court in Civil Case No. 43 of 2020. The appellant has fronted three grounds of appeal which I shall soon state.

Briefly the facts that gave rise to this appeal are very simple to tell. Before the Primary Court of Malandizi the appellant had sued the respondent for breach of contract claiming for payments of Tshs. 1,040,000/= being the amount he would have earned had the respondent not breached the contract. The story goes thus. The respondent who is the owner of a motorcycle Halijoe make with Reg. No. MC 117 CAH on 25/12/2019 entered into agreement (exh. "A") with the appellant by handing him the said motorcycle to run passenger transportation services on the terms that he (appellant) would be paying to the respondent Tshs. 10,000/= per day for six and half (6 ½) months consecutively starting from 25/12/2019. It was also their express term of agreement that upon fully performance of the terms of agreement within specified time the appellant would acquire ownership of the said motorcycle. Other terms were that all running expenses be covered by the appellant and that should the appellant default to remit the daily revenue within 10 days consecutively the respondent would be at liberty to terminate the contract. And further that, should the respondent breach the contract then the appellant would be entitled to all the money that he had handed to the respondent during the existence of the contract.

Having remitted a total of Tshs. 1,040,000/= only to the respondent, the appellant defaulted performance of the said contract, asserting that the said motorcycle had mechanical defects, as a result on the 04/05/2020 the respondent took him to the Ward Executive Officer for Madafu ward, who reconciled them and the two entered into an addendum agreement to the existing one (exh."B"). It was agreed in the addendum agreement to extend

time for payment of the due amount of Tshs. 910,000 within 91 days, Tshs. 10,000/= each day from 20/05/2020 up to 11/08/2020. And that should the appellant fail to settle the amount, the ownership of the said motorcycle will revert back to the respondent. After 10 days had passed without the appellant effecting any payment as per the agreed terms in the addendum agreement, the respondent on 20/08/2020 before the Ward Executive Officer (DW2) decided to repossess his motorcycle the result of which moved the appellant sue him before the Primary Court of Mlandizi, for breach of contract claiming that 91 days for repayment of the due amount had not expired. Having heard both parties and considered the evidence adduced, the trial court determined the case in favour of the respondent by dismissing the appellant's claims on the reason that, it is the appellant who in fact breached the agreement for failure to effect payment of the initial part of the due amount within 10 days consecutively as per the agreed terms in both first and addendum agreement. Aggrieved with that decision, the appellant unsuccessful appealed to the District Court of Kibaha as he had his appeal dismissed without costs and the trial court's decision confirmed, in its judgment delivered on the 22/09/2020. Disgruntled the appellant is now before this court to express his dissatisfaction canvassed with three grounds of appeal which I herewith reduce down in verbatim:

1. That the Appellate Court erred in law and fact by holding the petitioner breached the contract which is contrary to the terms as they are stipulated.
2. That the Appellate court erred in law and fact for failure to interpret the contracts as what terms amounted to breach of contract.

3. That the Appellant Court erred in law and fact for failure to award sum to the petitioner on the basis of quantum merit.

The appellant who for undisclosed reasons has renamed himself petitioner is now through the above grounds of appeal praying this court to allow the appeal by quashing and setting aside the decisions of both the District Court of Kibaha and Mlandizi Primary Court with costs and declare that he did not breach the contract. On the date set for hearing both parties appeared unrepresented and with leave of this Court agreed to dispose of the appeal by way of written submissions. I commend them for adhering to the filling schedule orders save for the appellant who opted not to file his rejoinder submissions.

The appellant in his styled submission argued all grounds as one but strangely formulate his own issue as a guiding point to argue his appeal and responded to it. The issue was whether the appellant or petitioner as he termed himself breached the terms of contract. In responding to the said issue, the appellant submitted, both trial and appellate courts were in error for failure to interpret the contractual terms between the parties. He argued, the first contract was varied by the addendum agreement hence the terms binding the parties at first changed as parties remained bound by the terms in the addendum agreement only. According to him it could not be interpreted that, failure to pay the respondent Tshs. 10,000/= every day amounted to breach of contract as time for payment was extended to 91 days which was the deadline for repayment of the whole due amount. It was his submission that, basing on that fact the two preceding courts ought to have found that by terminating the contract 10 days before its expiry period

the respondent was in breach of contract, thus this appeal be allowed by quashing both decisions of the preceding courts.

In his reply submission the respondent contended that, the appellant in his submission failed to understand the meaning of addendum agreement, thus a submission that, it changed the terms of the first agreement. He submitted, addendum is something added to the previously existing written document, usually a contract, which is either with more detailed explanation of what is already noted in contract or proposes change to the contract. Since the case was proved by the terms contained in the written contracts and in compliance of section 100(1) of the Evidence Act, [Cap. 6 R.E 2019], both preceding courts were justified to interpret the respondent did not breach the contract, the appellant insisted. It was his prayer that this court be pleased to dismiss the appeal for want of merit with costs and order for payment of the loss suffered by the respondent for appellant's breach of contract. As alluded to the appellant entered no rejoinder.

Having gone through the proceedings and judgments of both lower court as well as considering the fighting arguments from both parties, it is evident to me that, both parties are not at dispute that, there existed a contract between them followed by the addendum agreement. It is this addendum which the appellant submits varied the first agreement terms and therefore parties remained bound by the terms in the addendum only, the submission which is resisted by the respondent. The term addendum is defined by the **Black's Law Dictionary** to mean:

"Something to be added, especially to a document, a supplement."

In the light of the above definition, I am in agreement with respondent's submission when defined the term addendum to mean something added to a previously existing written document, usually a contract. It is therefore a document signed by the parties in addition to the existing one adding or clarifying the existing terms in a more detailed way or varying the terms of the first agreement. Now back to the issue raised and answered by both parties on whether the appellant breached the contract, in my considered opinion, I think it is simple to answer as the same was adequately addressed by both trial and the appellate courts when referred to paragraph 6 of the first contract. For the purposes of clarity I quote that paragraph 6:

6. Aliyekabidhiwa pikipiki akishindwa kulipa malipo kwa muda wa siku 10 mfululizo aliyekabidhi anaweza kuvunja mkataba bila ya malipo/ada yeyote.

In furtherance to that I also quote part of the terms in the addendum:

*"Mimi Ramadhan Rashid **naahidi kupeleka rejesho la pikipiki** kwa ndugu **Tiel Elisante kila siku**, kiasi Laki Tisa na Efu Kumi ndani ya siku 91 na endapo nitakamilisha marejesho haya pikipiki itabaki kuwa yangu na **endapo nitashindwa basi pikipiki itabaki mali ya ndugu Tiel Elisante kama mkataba wa mwanzo unavyojieleza** pasipo na usumbufu wowote. Mkataba huu unaanza tarehe 10/05/2020 hadi 11/08/2020..."*

From the above excerpts in both contract and its addendum, it is clear to me that, the said addendum neither brought to an end existence nor changed the terms of the first contract apart from extending time for payment of the due amount with a condition that the same be paid every day. In my conviction the rest of the terms of the contract remained intact including termination of the contract by the respondent following default in payment by the appellant for 10 consecutive days. Since in this matter the appellant does not deny to have defaulted payment of the due amount for 10 consecutive days, thus entitle the respondent to terminate the contract, I find, the two preceding courts correctly arrived to their findings in that, it is the appellant who breached the contract. I say so because under section 39 of the Law of Contract Act, [Cap. 345 R.E 2019], the respondent being a promisee was entitled to breach a contract upon default by the appellant/promisor. Section 39 of the Act reads:

39. When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

My further interpretation of the above provision is that, the position would be different to the appellant had he contacted the respondent once again with view of securing further extension of time for repayment of the due amount or had the respondent not taken any action against his act of breach of contract. But since he acted in accordance with terms of the contract, the respondent cannot be condemned for his act as it is the appellant who defaulted the terms of agreement. In view of the above reasons, I see no

reason to disturb the findings of the two lower courts and I find the grounds of appeal raised by the appellant devoid of merits and dismiss them.

Lastly I wish to consider the prayer by the respondent for compensation due to the loss suffered out of breach of contract by the appellant. I think this prayer does not deserve consideration of this court for the only reason that it neither featured in the appellate court nor before the trial, therefore entertaining it will amount to granting the respondent an opportunity to bring it through back door. I therefore dismiss it.

In the upshot and for the fore stated reason I find the appeal is devoid of merits and hereby proceed to dismiss it in its entirety.

For the purposes of creating harmony between the parties I order no costs to any party.

It is so ordered.

DATED at DAR ES SALAAM this 25th day of June, 2021.



E. E. KAKOLAKI

JUDGE

25/06/2021

Delivered at Dar es Salaam in chambers this 25th day of June, 2021 in the presence of the respondent in personal and Ms. Asha Livanga, court clerk and in the absence of the appellant.

Right of appeal explained.



E. E. Kkolaki

JUDGE

25/06/2021