IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]

AT ARUSHA

CIVIL APPEAL NO. 13 OF 2019

(Originating from the Resident Magistrates' Court of Arusha, Civil Case No. 63 of 2017)

VETERINARY SERVICE PROFFESSIONALS LTD ..... APPELLANT

Versus

GIFT JOSHUA T/a NOVUS ATTORNEY ..... RESPONDENT

JUDGMENT

2nd June & 13th August, 2021

Masara, J.

In the Resident Magistrates' Court of Arusha (the trial court), the Appellant herein sued the Respondent claiming compensation of TZS 55,723,817/= for breach of contract in relation to provision of various legal services entered to by the parties herein. The Appellant also claimed general damages and costs of the suit. When served with the plaint, the Respondent raised a counter claim of TZS 60,000,000/= being unpaid amount due to him after he had rendered the agreed legal services to the Appellant. At the end of the hearing of the dispute, the trial court dismissed both the suit and the counter claim for lack of proof.

Brief facts material to this appeal as can be gleaned from the record are as follows: The Appellant is a company dealing with supply of veterinary products, including selling animal and farm equipment and medications. On the other hand, the Respondent is a registered advocate dealing with provision of various legal services. The Respondent is also a partner at Novus Attorney. Sometimes around 2013 the Appellant and the Respondent entered into an oral agreement whereby the Respondent undertook to provide wide range of legal services that would be needed by the Appellant. Among the services the Respondent committed himself to render to the Appellant included issuance and renewal of arrest warrants to persons indebted by the Appellant, filing of various cases in

court, debt collections (recovery of debts) from company debtors as well as provision of legal advice.

It was agreed that the Appellant pays the Respondent for each service rendered. According to the testimonies of directors of the Appellant (PW1 and PW2), in each case filed the Respondent was paid TZS 1million, whereas in each arrest warrant furnished, the Respondent was paid TZS 400,000/=. Arrest warrants were issued and disseminated in various parts of the country where the company debtors could be traced. According to PW1 and PW2, the Respondent was paid for all the services but he did not perform the duties as agreed. That the Respondent kept on promising that he made follow up of various arrest warrants and filed various cases but he did not avail them with copies of the said arrest warrants and cases filed in court. There were various people who were indebted by the Appellant, due to inaction by the Respondent to recover the debts and failure to execute the arrest warrants as agreed, such money was not collected. They went on to say that the Respondent's inaction exposed the Appellant to a huge loss, which they calculated to the tune of TZS 55,723,817/=, the amount they claimed from the Respondent.

On his part, the Respondent denied the claim. However, he admitted that he was engaged by the Appellant to undertake the above duties. He stated that he filed some cases, made follow up for debt collection and issued new warrant of arrests. Some of the arrest warrants issued and attended by the Respondent were admitted as exhibit D1. He further contended that he was not paid out in carrying out the aforementioned activities; rather, he incurred his own costs, believing that he would be refunded by the Appellant. After the Appellant sued him in the trial court, he raised the counter claim of the amount due to the Appellant which he calculated to TZS 60,000,000/= as blanket fees for the services rendered.

After hearing the parties and exhibit tendered, the trial magistrate made a finding that there was a valid contract between the parties herein. As to the claims of each party, she held that there was no sufficient evidence to prove both the Appellant's claim and the Respondent's counter claim. Consequently, she dismissed both the suit and the counter claim. The Appellant was dissatisfied by that decision, they hence preferred this appeal on three grounds as reproduced hereunder:

a) *That after the trial court had found existence of contract between the parties herein, it erred in law and in fact when it failed to grant the remedies sought by the plaintiff in Civil Case No. 63 of 2017;*
b) *That the trial court erred in law and in fact when it held that there was no breach of contract while the respondent admitted the tasks assigned to him by the appellant in his counter claim in absence of case number of the cases filed in court as performance of the contract; and*
c) *That the trial court erred in law and in fact when it held that there was no serious evidence which was produced by the appellant to prove their case in presence of supporting documents and admission by the respondent.*

At the hearing of the appeal, the Appellant was represented by Mr. John Mseu, learned advocate, while the Respondent appeared in person and fended for himself. The appeal was argued through filing written submissions.

Submitting in support of the appeal, Mr. Mseu combined the 1st and 2nd grounds of appeal. Mr. Mseu asserted that there was a valid contract between the Appellant and the Respondent. He referred to the evidence of PW1 who testified that the Respondent was engaged to render different legal services such as renew arrest warrants and filing of cases. According to Mr. Mseu, the Respondent admitted such testimony in his counter claim. He also admitted existence of the said contract. He admitted that he rendered services to the Appellant and he could not contradict the amount of TZS 55,723,817/= which was claimed by the Appellant. The learned advocate insisted that in terms of section 110(1) of the Evidence Act, Cap. 6 [R.E 2019], the Appellant proved the

case on the balance of probabilities. The Respondent could not prove performance of the work, therefore the trial court ought to have granted the reliefs sought by the Appellant in the plaint, argued Mr. Mseu. He maintained that the holding by the trial court that there was no breach of contract in the absence of proof of performance of work was erroneously arrived at.

Expounding the 3rd ground of appeal, Mr. Mseu fortified that since the evidence of PW1 was not contradicted by the Respondent, it established serious evidence against the Respondent herein. He concluded by praying that the appeal be allowed with costs.

On his part the Respondent submitted that the Appellant's advocate was misguided in submitting that the Respondent admitted the claim in his counter claim. He submitted that had the Respondent admitted in the pleadings, the counsel for the Appellant ought to have moved the trial court to enter judgment on admission as per Order XII Rule 4 of the Civil Procedure Code, Cap. 33 [R.E 2019]. He contended that there was no clear, unambiguous and unequivocal admission as required by law. To support his contention, the Respondent referred to two decisions of this Court: ***CRDB Bank PLC Vs. Francis Esau Mwinuka***, Commercial Case No. 92 of 2020 (HC Comm. Court DSM) and ***Amir Sundeerji Vs. J. W. Ladwa (1997) Limited***, Misc. Civil Application No. 820 of 2016 (HC DSM Registry) (both unreported). The Respondent maintained that a statement in the counter claim is not tantamount to an admission of liability as alleged. According to the Respondent, it is one thing for the Court to find existence of a contract and it is quite another thing to find breach of such contract. Existence of a contract does not automatically breed breach of contract, submitted the Respondent.

Mr. Joshua maintained that the Appellant's advocate was erroneous to shift the burden of proof to the Respondent because the Appellant ought to have discharged their burden of proof before shifting it to the Respondent. He further submitted that in the trial court the Appellant's oral evidence was not supported by any documentary evidence to substantiate the claims. According to the Respondent, if the Plaintiff fails to prove his case to the required standard, the case crumbles even without having to call the defence to fight it. To support this contention, the Respondent cited the Court of Appeal decision in ***The Registered Trustees of Joy in Harvest Vs. Hamza K. Sungura***, Civil Appeal No. 149 of 2017 (unreported). Mr Joshua insisted that he tendered documentary evidence in the trial Court to support the claim that he carried out the tasks assigned by the Appellant but was constrained by the Appellant's refusal to pay for the services rendered. He propounded that at the trial court there is no record that he admitted the amount claimed by the Appellant. That it was the Appellant who failed to prove his claim, argued the Respondent.

Regarding the third ground of appeal, Mr. Joshua submitted that oral evidence is not admissible where documentary evidence exists. To support his assertion, he referred to section 61(1) read together with section 65(e) and section 100(1) of the Evidence Act, Cap. 6 [R.E 2019]. He insisted that the Appellant neglected to discharge his duty as agreed. He concluded that the decision of the trial court was proper and urged this Court to dismiss the appeal with costs.

In a brief rejoinder submission, Mr. Mseu fortified that the Respondent in his counter claim and his written statement of defence filed in the trial court on 1/8/2018 he admitted to have filed various cases under the instruction of the Appellant but failed to produce before the court any plaint and/or case numbers of such cases. Mr. Mseu insisted that the admission by the Respondent was

unambiguous. He distinguished the cases cited by the Respondent, stating that they do not support his claim.

I have meticulously examined the grounds of appeal and the submissions from both parties, the pertinent issue for determination is whether, on the basis of the record of the trial Court, the Appellant proved the claim against the Respondent on the required standard.

This being a first appeal, this Court has a duty to subject the entire evidence on record to a fresh re-evaluation and come to its own conclusions. The conclusions may affirm the trial court's finding of facts or arrive at a totally different conclusion on the same facts. But any such decision has to be arrived at cautiously. That seems to be the holding of the Court of Appeal in ***Tanzania Sewing Machine Co. Ltd Vs. Njake Enterprises Ltd***, Civil Appeal No. 15 of 2016 (unreported) where it was held:

> *"As first Appellate Court, we are alive to our duty to respect and exercise caution before interfering with the evaluation of evidence and the conclusions and findings of the trial court which had the full advantage of seeing and hearing the witnesses."*

Having carefully examined the record, it is uncontested that there existed some sort of retainership contract between the disputants herein. In both the trial court and even in this Court, both parties are at one that the Appellant had engaged the Respondent in order that the latter provides them with various legal services, including renewing arrest warrants, instituting cases against defaulters, collecting debts to those indebted by the Appellant and to provide legal advice. The evidence of both parties in the trial court is lucid on that aspect. Even in the submissions filed in this Court, there is no dispute on existence of a contract between the parties.

The issue disputed by both parties herein is whether by holding that there existed contractual relationship between the parties herein, the trial court erred in not awarding the reliefs claimed by the Appellant. In the first place, as rightly contended by the Respondent, the mere fact that there existed a contract between parties would not necessarily suggest that there was be breach of such contract.

While I agree with Mr. Mseu that the Respondent admitted that he was engaged by the Appellant to provide various legal services, I do not agree with him that the Respondent admitted that he breached the contract or that he was paid by the Appellant for the said services. In this aspect I am guided by the decision of the Court of Appeal in ***Zaidi Baraka and 2 Others Vs. Exim Bank (Tanzania) Limited***, Civil Appeal No. 194 of 2016 (unreported) in a similar view was expressed in the following words:

> *"Despite that fact however, we are with respect, unable to agree with the learned advocate that the appellants admitted that the amount of USD 600,000.00 was outstanding. What was admitted by the appellants was the existence of the credit facility and that such debt was secured by personal and corporate guarantees of the Directors of Petromark African Limited, the principal borrower."*

The scrutiny of the trial court record reveals that PW1 stated that he engaged the Respondent for the purpose of issuing and renewing warrant of arrests. He stated that for each arrest warrant that was issued he paid TZS 400,000/=. He testified that one of the people they intended to arrest was a person known as Ahmed Kiama who was the Appellant's representative in the Lake Zone, whom the Company owed TZS 16 million. He added that he had to travel to the Lake Zone to ensure the arrest of the said Kiama. After the arrest, the said Kiama was brought to Arusha prison where he was detained as a civil prisoner. The Appellant claimed that he was paying TZS 14,000/= daily for the upkeeping of Mr. Kiama and he gave the Respondent the upkeeping money for six months

but the Respondent only paid for the first three months which led to the release of Mr. Kiama who later escaped without paying the TZS 16 million. According to the Appellant, the burden was shifted to the Respondent and his company to pay the unpaid balance.

From the above, there is no any supporting proof that the Appellant gave the Respondent the money he alleged. Further, in the entire testimonies of PW1 and PW2, the Appellant alleged that he gave the Respondent money to perform certain tasks but the Respondent neglected. However, there is no any evidence tendered to support such statements by the Appellant. The Appellant also stated that there was money paid to the court to the tune of TZS 1.2 million for issuance of arrest warrants but that such warrants were not issued. He testified to have asked the Respondent to meet the Judge i/c in order to have the money paid back, but the Respondent did not bother. One would have expected to have a Court receipt to support the assertions but none was tendered. Whenever he was cross examined by the Respondent whether he had any documentary evidence to back up the assertion, PW1 responded that they had no any such evidence. There was another piece of evidence regarding a dishonoured cheque of TZS 10 million, that was issued by a person known as Mr. Pamba. However, there is no any evidence proving existence of such cheque.

At some point in his evidence, the Appellant stated that he could not even remember the terms of the agreement. That was strange considering that PW1 was the managing director of the Appellant. On a further cross examination, PW1 testified that the main transaction paid to the Respondent and Pallangyo, was through their bank accounts; however, he still maintained that there was no proof of such transactions. The evidence of PW2 is just like that of PW1 since she admitted that there was no proof that they gave money to the

Respondent. For lack of a better phrase one can say that the evidence of PW1 and PW2 were mere assertions without any supporting proof.

In the circumstances, the claim against the Respondent was not substantiated for a number of reasons. First, it would not be possible for the Appellant to work with the Respondent from 2013 to 2015 without any single document proving that there was money paid to the Respondent by the Appellant. Considering the goodwill that existed between the two parties, if at all the Appellant owed such amount of money from the Respondent, there should have been at least a single documentary proof. Second, the claim of TZS 55,732,817/= that is claimed by the Appellant was not substantiated. In other words, there is no ample evidence showing how the Appellant arrived to such claim. The evidence from the Appellant's side was simply that they were giving money to the Respondent. None of the witnesses was able to adduce evidence that would help the Court to appreciate the amount claimed by the Appellant.

Third, there is no doubt that the defence evidence disproved the Appellant's claim by tendering exhibit D1, which shows some of the arrest warrants that were executed by the Respondent. Further, it was stated under paragraphs 14 and 15 of the amended written statement of defence, the number of the cases that were filed in court in the course of executing the contract. That was not disproved by the Appellant. Therefore, the fact that there was a valid contract between the parties herein, and in so far as the Respondent exhibited performance of the contract, the Appellant's claim was rendered untenable due to lack of proof, as was held by the trial magistrate.

The law is settled that in civil cases a person who wishes a particular fact to be decided in his favour has a burden of proving the existence of that fact. That is the gist of section 110 of the Evidence Act, Cap 6 [R.E 2019]. The Court of

Appeal in ***Paulina Samson Ndawaya Vs. Theresia Thomasi Madaha***, Civil Appeal No. 45 of 2017 (unreported), held:

> *"It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R.E 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved"*

In the appeal under consideration, Mr. Mseu was not right in contending that the Appellant discharged his duty simply because the Respondent admitted that he had a contractual relationship with the Appellant. Further, Mr. Mseu's submission that the Appellant had proved his case on the standard required relying only on the premise that the Respondent admitted the services and payments but he could not prove performance of the work, is tantamount to shifting the burden of proof to the Respondent. The Appellant's duty was not discharged. There was no enough evidence from the Appellant that would have led to the conclusion that the claim was proved on the balance of probabilities. The burden was still on the Appellant to prove the claim before the trial court. They should not shift the burden to the Respondent. In ***Paulina Samson Ndawaya Vs. Theresia Thomasi Madaha*** (supra), the Court further stated:

> *"It is again trite that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his and that the burden of proof is not diluted on account of the weakness of the opposite party's case ... In our view, since the burden of proof was on the appellant rather than the respondent, unless and until the former had discharged hers, the credibility of the respondent was irrelevant."*

From the above exposition, it is evident that the Appellant did not adduce sufficient evidence to prove the claim against the Respondent. In that regard, the trial magistrate correctly and properly evaluated the evidence and came into the right and just decision.

The trial Court was also right to hold that the counter claim of TZS 60,000,000/= by the Respondent was unsubstantiated. First, there was no evidence that the Respondent was undertaking the tasks by using his own money from the time he was engaged by the Appellant. Further, there was no proof of any invoice or demand note issued to the Appellant by the Respondent suggesting that there was any amount that was due. In the absence, and considering the fact that the counter claim was preferred more than a year after the suit was filed by the Appellant, it was nothing but an afterthought.

Guided by the above analysis, the appeal is wanting in merits. It is hereby dismissed in its entirety. The decision of the trial court was justified, it remains unaltered. The Respondent shall have his costs for this Appeal.

Order accordingly.

Y. B. Masara
JUDGE

13th August, 2021