IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF KIGOMA

AT KIGOMA

APPELLATE JURISDICTION

(DC) CIVIL APPEAL NO. 4 OF 2021

(Arising from the decision in Civil Case No. 22 of 2017 in the District Court of Kigoma at Kigoma Before Hon. G.E Mariki, PRM).

CHINA RAILWAY 15TH

BUREAU GROUP COOPERATION..... APPLICANT

VERSUS

BUTAHE SECURITY GUARDS AND

SERVICE.....RESPONDENT

JUDGMENT

19/8 & 28/9/2021

A. MATUMA, J

In the District Court of Kigoma at Kigoma, the appellant was sued by the Respondent for payment of Tshs 65,279,430/= as compensation for expected profits from the contract between them which was executed for security services. The Respondent further claimed Tshs 10,000,000/= as compensation for breach of contract and Tshs 10,000,000/= as general damages.

The brief facts leading to the herein above claims was that, the respondent rendered to the Appellant security services on a yearly written contract exhibit P1. The payment was however effected monthly depending to the number of security guards who rendered such services on such particular month. When the first contract exhibit P1 expired, the parties executed the second contract exhibit P2. The second contract started on the 1st July, 2015 and ended on 30th June, 2016. Thereafter no any other written contract was executed but the respondent continued to render services to the appellant and the Appellant continued to pay for the services for almost seventeen months without any written contract.

The services were thereafter terminated by the Appellant and it is when the dispute arose, the respondent claiming that the services she rendered to the appellant after the expiry of exhibit P2 was a continuation of the contract as the same was orally extended by the appellant and that is why she rendered services on the same terms and conditions to the previous written contracts.

On the other hand, the appellant contended that after expiry of exhibit P2 they did not extend the contract between them nor executed a fresh one but they continued an oral cooperation for the services which she later terminated.

The trial District Court ruled out that the services rendered by the respondent to the appellant was on a contractual base from an implied extension of exhibit P2.

Thereafter it found that such contract was breached by the appellant for such termination nine months prior to the time it was expected to expire. In that regard, it awarded the respondent Tshs 31,000,000/= on the ground that Tshs 21,000,000/= thereof was compensation for expected income for three months, Tshs 5,000,000/= as compensation for breach of contract and Tshs 5,000,000/= as general damages. The respondent was further awarded interest of 7% from the date of judgment to the date of full payments and costs of the suit.

The appellant became aggrieved hence this appeal on eight (8) grounds of appeal which were however argued into four major complaints during the hearing of this appeal. The grounds argued were thus, reflecting the following complaints;

i. *That the trial court erred in its decision when it ruled out that the contract between the parties, exhibit PW2 was extended by necessary implication.*

ii. *That the trial Magistrate erred to have issued awards which were neither specifically pleaded nor proved.*

iii. *That the trial court erred to award the respondent Tshs 5,000,000/= as general damages which she was not entitled.*

iv. *That the trial court erred to award the respondent Tshs 5,000,000/= as compensation for allegedly breach of contract.*

At the hearing of this appeal both parties were represented whereas Mr. Sadiki Aliki learned advocate represented the Appellant and Mr. Ignatius Kagashe represented the respondent.

In the first ground of complaint Mr. Sadiki Aliki learned advocate submitted exhibit P2 had an explicit clause to the effect that there shall not be any extension of the contract upon its expiry unless a written notice is issued to the respondent by the appellant in thirty (30) days prior to the date of its expiry. He referred me to clause 2 (b) of exhibit P2. He then navigated through the evidence on record to the effect that both parties stated during trial that there was no any written notice for the extension of exhibit P2, thereby the principle of sanctity of contract ought to apply.

The learned advocate then submitted that after the expiry of exhibit P2 the parties did not wish to extend it but rather contracted orally to cooperate on daily basis, the cooperation of which was finally terminated by the appellant as per exhibit P3 which the trial Magistrate wrongly referred to as a termination notice of contract between the parties.

Mr. Kagashe learned advocate in opposing the first ground herein submitted that the trial court's finding that there was a renewal of contract by necessary implication was right and supported by pleadings and evidence on record.

The learned advocate submitted that exhibit P2 traced its base on exhibit P1, the contract of a similar nature which had the same clause that in the event the appellant wish to continue with the respondent's services after its expiry, a 30 days' notice would be issued. That such contract, expired and no notice was issued but the parties executed exhibit P2. He was of the argument that it is on the same manner after expiry of exhibit P2, the parties extended it for one year although not in writing, after such one year, they further orally extended it by necessary implication for one year whereas nine months prior to the expected expiration date, it was arbitrarily terminated by the appellant. he also relied on the principle of sanctity to contract citing to me the court of appeal decision in the case of ***Abualy Alibhai Aziz versus Bhatia Brothers Limited*** *(2000) TLR 288.*

My determination on this first ground is that both advocates are right in their arguments that the parties were bound by the terms and conditions of their contractual agreements as clearly set up in the principle of **sanctity to contract.**

In that regard exhibit P2 was binding not only to the appellant but also to the respondent as they freely executed it.

In that exhibit it is clearly stated under paragraph 2 (b) as rightly submitted by Mr. Sadiki Aliki learned advocate that there would not be any renewal of it unless a written notice for that purpose is issued. This fact is not denied by the respondent.

It is as well undisputed fact that exhibit P2 expired without any written notice to its renewal. It cannot therefore, be successfully argued that it was extended after its expiration.

Mr. Kagashe learned advocate was of the view that since the first contract exhibit P1 expired without any written notice to its renewal but the parties executed exhibit P2, it should be inferred to that exhibit P2 was a renewal of exhibit P1 though there was no any written notice. In the circumstances, even after expiration of exhibit P2, the parties continued the contract orally which should be considered as a renewal of exhibit P2.

I am far away to agree with Mr. Kagashe because execution of exhibit P2 is not by whatever imagination an extension of exhibit P1 nor its renewal.

Exhibit P2 was an independent contract between the parties as it bears some new terms and conditions which did not exist in exhibit P1.

In fact, it is on record through the evidence of both parties that the first contract was hardly executed and hardly enjoyed by the parties. The appellant hand several complaints that the respondent's security guards used to steal fuel from the site which necessitated the respondent to several times compensate the loss.

In that regard when exhibit P1 expired, it was not renewed. Instead exhibit P2 was executed with stiff conditions implying that exhibit P1 was not enjoyed by the appellant. Some of the stiff conditions in exhibits P2 which were not in exhibit P1 are;

"i. In case that one guard at night shift is caught sleeping when client's staff patrols around, the client will record accordingly in his work record and fine Tshs 750 each time.

ii. In the case that the guard he himself or cooperates with the thief to attempt to steal something owned by the client but is caught by client's staff, the fine will be as below;

(a) If the thing (s) is under stealing value above Tshs 160,000/= the fine will be 80% of this guard's salary from the 1st of the month to this day.

(b). If the thing (s) is below or equal to Tshs 160,000/= the fine will be at least Tshs 30,000/=

iii. The monthly total fine will be the deduction for the related monthly payment for the contractor".

These conditions which appears at paragraph 1 (vi), (vii) and (viii) in exhibit P2 does not feature in exhibit P1. The same indicates that, the appellant was not happy in the manner the respondent executed exhibit P1. Exhibit P2 is like the appellant was contracting with a thief thereby threatening her not to dare steal no sleep in the night shift.

Exhibit P2 further indicates that the appellant was necessitated to employ some staffs to make regular patrol in the site to see whether the respondent was executing well her contractual duties and some staffs to be watch guards over the respondent's Watch Guards, to restrain them from either stealing or cooperating with thieves.

This was a bitter agreement/contract which could have not be renewed unless there was a written notice to that effect as itself provides;

> *"The contract is renewable* ***but subject to the client giving the contractor written notice 30 days*** *earlier before the expiration of the existing security contract".*

As I have said earlier, the contract was binding to both sides. As such, the respondent if thought that there was extension of this contract ought to have demanded the written notice from the appellant as rightly argued by Mr. Sadiki Aliki learned advocate.

In the absence of such written notice, anything done by the parties after expiration of exhibit P2 was independent oral agreement just as it was exhibit P2 independent of exhibit P1. I therefore, allow this ground of appeal and rule out that the learned trial Magistrate erred in law to have determined that exhibit P2 was by necessary implication renewed.

Having ruled as such, the 3rd and 4th grounds relating to the awards of Tshs 5,000,000/= for breach of contract and Tshs 5,000,000/= as general damages are as well allowed. This is because they trace its origin from the findings that exhibit P2 was impliedly extended and subsequently breached. There was no breach of contract (exhibit P2) as the same expired fully and none of the parties complained of its breach. The respondent's complaint for breach of contract related to an oral contract allegedly extended from exhibit P2. It is not all about exhibit P2 itself. I thus quash the award of Tshs 5,000,000/= and Tshs 5,000,000/= which were awarded to the respondent allegedly for breach of contract and general damages respectively.

In respect of the second ground of appeal relating to the award of Tshs 21,000,000/= to the respondent against the appellant, Mr. Sadiki Aliki learned advocate submitted that the same was unfounded. He argued that the trial Magistrate well-reasoned that the claimed expected income of Tshs 65,279,430/= was not proved but wrongly created his own facts

to award Tshs 21,000,000/= against the appellant. The alleged facts created by the trial Magistrate are; ***The relocation of security guards, costs for purchased of working tools, and the contracts with staffs.***

Mr. Kagashe on his party argued that the respondent had reasonable expectation to continue with the contract to June, 2018 and that the termination thereof nine months prior to the expected expiry date caused loss to the respondent in terms of section 73 of the law of contract Act.

He was of the argument that, the awarded Tshs 21,000,000/= was justified in the circumstances.

I agree with Mr. Sadiki on the second ground herein.

The appellant pleaded expected income from the contract had it been continued to the expected expiry period. He was not claiming for loss or damages in this claim. It was **a specific claim for expected income** which was pleaded and ought to have been proved.

As rightly argued by Mr. Sadiki Aliki learned advocate, so long as the trial Magistrate had found that such claims were not proved, it was wrong for him to award Tshs 21,000,000/= ***for relocation, working tools, uniforms and employment contracts with the respondent's staffs/security guards.*** That was creation of facts by the trial court

which were not the basis for the claim of Tshs 65,279,430/= which was an expected income.

The trial court ought to have considered whether such expected income was proved to the extent of the said Tshs 21,000,000/= and not to create independent facts constituting such awarded amount. Looking from the reasoning of the learned triai magistrate, it is as if the awarded Tshs. 21,000,000/= was general damages to the respondent against the appellant for the sufferance she encountered and losses suffered as a result of the breach of contract. If that is true, then the learned trial magistrate was wrong because the respondent's claim which resulted into this award was not for general damages but specific claims for expected income. General damages had its own place in which Tshs. 5,000,000/= was awarded as herein above revealed.

Since expected income was not proved as reasoned and found by the trial court, the learned trial Magistrate ought to have ended dismissing the claim all together. It seems he awarded Tshs 21,000,000/= on sympathy basis resulting to the termination of the oral agreement between the parties. The court was not availed with the terms and conditions in the oral agreement which existed between the parties herein. As I have explained above, exhibit P2 cannot be relied to assume the terms and conditions in the Oral agreement. This is because, since the terms and

conditions in exhibit P1 were varied in exhibit P2, we are not better positioned to know exactly what were the additions and minus in the oral contract. The trial court could not therefore, assume the damages suffered from its breach if any.

Even assuming the conditions and terms in exhibit P2 applied in the oral agreement between the parties, there is undisputed evidence by both parties that the payment on the contract by the appellant to the respondent on each month depended on the number of security guards employed/worked on that respective month.

Therefore, the payment in each month was not constant. It frustrated from one month to another depending on the number of security guards worked on that particular month. The appellant contended in evidence through DW1 that she was paying the respondent the average of Tshs 4,000,000/= per each month.

The respondent on his party through PW1 testified that they employed 48 security guards whose service to the appellant attracted Tshs 7,253,000/= per month.

The witness was however clear that the number of security guards who rendered services to the appellant ranged from 40 to 50 per month. In the circumstances, it was wrong to award Tshs 21,000,000/= on the basis of months (3 months payment) without any evidence on record on the

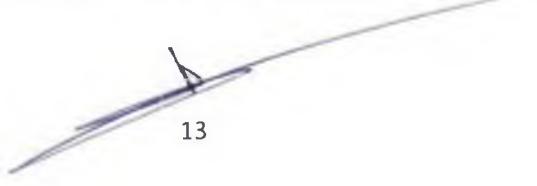
number of security guards who would have been used in the services on the alleged expected income in the three months awarded.

I therefore, allow the second ground as well and quash the award of Tshs 21,000,000/= against the appellant which was awarded by the trial court to the respondent.

If at all there was an oral agreement between the parties which was subsequently terminated by the appellant as pleaded and exhibited by the notice of termination, the respondent is at liberty to re-institute a fresh suit basing on such oral agreement independent of exhibit P2 or exhibit P1 to establish her claims. This is because the alleged oral agreement was not conclusively litigated and determined between the parties.

It was merely discussed in the course of litigating on exhibit P2 the written contract which I have found to have not been breached. The respondent cannot be denied right to sue thereof merely because it was somehow discussed in the due course of litigating on exhibit P2 and particularly when the appellant conceded that he had an oral agreement for service which she termed as cooperation. Whether such cooperation in its termination caused any damage or not it is not for this court to determine as there was no specific suit on it nor determination on it by the trial court.

With the herein observations, I allow this appeal for having been brought with sufficient cause.



The trial court's judgment is hereby quashed and the decree thereof set aside. The appeal is allowed with costs. Right of further Appeal is explained.

It is so ordered.

A. MATUMA

JUDGE

28/9/2021

Court: Judgment delivered this 28th day of September, 2021 in the presence of Cyplian Kaijage (Director of the Respondent Company) and in the absence of the Appellant. Right of appeal is explained.

Sgd: A. MATUMA

JUDGE

28/9/2021