IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR-ES-SALAAM DISTRICT REGISTRY

AT DAR-ES-SALAAM

PC CIVIL APPEAL NO 168 OF 2021

(Arising from Civil Appeal No 26 of 2019 at Kinondoni District Court before Hon. S.K. Jacob RM)

GODLIVING MWANGA .....1ST APPELLANT

TONGA MWANGA.....2ND APPELLANT

VERSUS

GERALD NJAU..... RESPONDENT

JUDGEMENT

Date of last order: 23/8/2021
Date of Judgement: 23/11/2021

Folkloric expressions of members of the community in Tanzania are awash with praises for people who honor their part of an agreement. The Kiswahili saying "ahadi ni deni" (a promise creates a debt) is one of such expressions. As simple as it sounds, the saying carries with it massive wisdom. It has been used for generations to wire, deep into the minds of members of the community, the indebtedness that arises from making a promise.

Apparently, this enviable practice is not unique to Kiswahili speakers or members of the Tanzanian community. A researcher in African Customary Contract Law gives us a glimpse of indebtedness among communities in Southern Africa thus:

> 'Once a contract has been concluded amongst the Swazi, a relationship of debt is created between the contracting parties. A debt must be paid on demand, or at the time agreed upon, and remains payable, no matter how long ago it was incurred...The Swazi say *'licala aliboli'* "a debt does not decay..."
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> See p. 101 Adelle Van Schalkwyk "The Indigenous Law of Contract with Particular Reference to the Swazi in the Kingdom of Swaziland" Submitted in accordance with the requirements for the degree of Doctor of Philosophy at the University of South Africa November 2016

Building upon the above community values, a branch of law known as the law of contract emerged alongside human civilization. The English law with which our legal system (for historical reasons) partly shares the origin, places great emphasis on enforcement of contracts. The immortal words of Sir George Jessel in the celebrated case ***Printing and Numerical Registering Co. V. Sampson (1875) LR 19 Eq*** as quoted bellow are illustrative:

> "If there is one thing which more than another public policy requires it is that men of full age and competent understanding

> shall have the utmost liberty of contracting, and that, their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice"

This judgement centers on contract. It is about two parties to an agreement whose expectations did not go as planned. These parties are Godliving Mwanga and Tonga Mwanga on one hand (I will hence forth refer them as the Appellants) and Gerald Njau (herein after referred to as the Respondent) on the other.

As a part of the backdrop to the case, it is instructive to note that parties to this case are, to use the bass word in business circles, "Wajasiriamali" (entrepreneurs) in Kimara area within the city of Dar-es-Salaam, Tanzania's commercial hub. The learned trial magistrate Jacob provides the following impressive summary of the facts

> "That on the 1st day of May 2017, the Respondent and the [first] Appellant entered into a business contract. In the said agreement, the Appellant rented the Respondent's bar together with 67 plastic chairs and 18 tables. Among them, there were also 20 Coca Cola chairs and 4 tables, 1 coca cola fridge, 1 Pepsi Fridge and 2 TBL [Tanzania Breweries Ltd] Fridges. The contract was for six months, at a rent of Tsh 4,200,000. Unfortunately, the contract did not run all the way through. For what the Appellant claims was

a demolition of the bar due to a road expansion, the business had to be halted."

The litigation journey of these entrepreneurs kicked off in 2017 when Mr. Gerald Njau (the Respondent in this case) knocked the doors of Kimara Primary Court seeking compensation for breach of contract against Mr. Godliving Mwanga and Ms. Tonga Mwanga.

Mr. Njau successfully sued the duo for payment of a total of Tsh 3,6000/= (three million and six hundred thousand only). Aggrieved by this decision Godliving and Tonga Mwanga appealed to the District Court of Kinondoni at Kinondoni, this time engaging the services of Adv. Fulgence Johnson. Save for a finding that the 2nd appellant was not privy to the contract and therefore free from any liability whatsoever, the learned magistrate at Kinondoni District Hon. S.K. Jacob, RM upheld the decision of Kimara Primary Court. The Mwanga's were aggrieved once again hence this appeal. This time around, cognizant of the Hon. S.K. Jacob's finding that relieved the second appellant from liability, only the first appellant has appealed to this court as reflected in the memorandum of appeal.

The appellant, fronted 3 (three) grounds of appeal as reproduced bellow

1. That the district court magistrate erred in law and facts by concurring with the decision of the trial primary court by relying on the tempered or forgery (sic!) contracts of lease submitted at the trial court by the respondent and ruling that the said contracts looks (sic!) looks to be the same while it is not.
2. That the trial court magistrate erred in law and facts by failing to know as to whom was (sic!) the real owner of the said properties in dispute and how it was shifted from the respondent
3. That the District court magistrate erred in law and facts by not considering the 1st and 2nd appellant testimonies on the non-existence of the said properties alleged to be rented to the 1st and 2nd appellant.

When this appeal was called for hearing, the defendant fended for himself as it was the case in both primary and district court where, as already hinted, successfully sued the appellants. This time, the appellant has also chosen not to engage a counsel. As for the appellant, instead of appearing in person like the defendant, issued a power of attorney to one Tonga Mwanga (hereafter Ms. Mwanga).

As can be recalled, Ms. Mwanga was the second appellant in this case at the district court. Needless to say, that at some point during hearing, this court summoned Mr. Mwanga to appear in person having learnt that, although Ms. Mwanga was a part of the case in the trial court, fitting into

the shoes of the leaned counsel who had hitherto represented them in the district court seemed cumbersome.

Upon entering appearance in person as summoned, the appellant indicated willingness to settle the matter amicably with the respondent. This court, in the spirit of overriding principles, provided some guidance on how such amicable solution could be reached in the light of the rules of natural justice. Unfortunately, such efforts proved futile hence this judgement.

Now that the matter has to proceed as through amicable settlement as initially envisaged, the issue before me is to determine whether or not the three grounds of appeal have merit. The next parts of this judgement will, therefore, focus on the three grounds of appeal in the light of evidence received from both sides.

On the first ground, the appellant contends that the trial court relied on a forged contract of lease submitted by the appellant. Addressing this, Ms. Mwanga produced three different copies of the lease agreement indicating that the one which was produced by the respondent to support his claims in both Primary and District Courts was forged. She stressed that

the Respondent had forged the version of the contract relied upon. Ms. Mwanga invited this court to decline enforcing any rights arising from a forged contract.

The respondent, on his part, denies such allegations. He appreciated that the appellants have not denied owing him the amount of money claimed but instead chose to fault a contract that both parties had signed. He invited the court to focus on the contentious matter namely enforcement of the lease agreement.

The learned trial magistrate S.K. Jacob had given considerable attention to this matter. At page 4 of his judgement the learned magistrate provides:

> "I have gone through all the three copies of the contract tendered by both parties and I could not see the difference in either of them. It appears to me therefore that, since the three exhibits are copies of the same contracts, the learned counsel's assertion is unsubstantiated without merit and has to fail."

I agree with this reasoning. I just need to add, if I may, that the Appellant has not made any attempts to prove this allegation as required by our law of evidence. Section 110 and 111 of the Tanzania Evidence Act Cap 6 of 1967 provides:

110(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side.

It does not take much thought, therefore, to realize that this ground, unsubstantiated as it is, has no feet to stand on and, consequently, must fail.

Coming to the second ground, the appellant avers that the trial court magistrate erred in law and fact in failing to ascertain the owner of the properties in dispute. On this ground, the Appellant vehemently argued that the Respondent is claiming property that does not belong to him.

Speaking on behalf of Mr. Mwanga, Ms. Mwanga expounded that when the surrounding houses were being demolished, branded items of the Coca Cola, Pepsi and TBL companies were repossessed by the respective owners. To this end, she averts, the Respondent should have been specific and claim for only what belonged to him. Ms. Mwanga alleged further that the

Respondent was aware of such demolition and subsequent repossession of the items mentioned.

During his submission, the Respondent Mr. Godliving Njau was very brief. He was also idiomatic. He wanted to know if the Appellant had any letter proving such repossession. He went on to wonder how the Appellant could assist such repossession without informing the Respondent in whose custody the branded items were. He indicated further that the agreement was for rent generally. The appellant was supposed to involve him in all stages that led to repossession of the items.

Again, the learned District Magistrate had treated this matter with some enviable detail. His reasoning reflects not only the correct principles of contract and evidence law but also daily practices in the business world. Needless to say, that at the last trial court, the learned counsel who had represented the appellants went as far as demanding receipts to show that the branded items actually belonged to the Respondent. Responding to this argument, Hon Jacob provides at page 3 of his judgement:

> "Though I am not planning to ply on whether or not the Respondent is the actual owner of the alleged equipments (sic!), with respect, I still don't buy into Mr. Johnson's argument…In fact, even if that is the case, that those equipments do belong to the alleged companies….The Appellants, having admitted that, they entered into a written agreement [with] the Respondent through which they

rented the bar and chairs, tables and fridges to the first Appellant at this stage and argue that the same did not belong to the Respondent."

I agree with this reasoning. Again, this brings about the provision of the law of evidence cited earlier on. Assuming that the companies mentioned had indeed repossessed their properties as alleged by the Appellant, they are not privy to the contract that this court is called upon to enforce. As rightly concluded by the trial magistrate, the Appellant was duty bound to return everything entrusted to him by the Defendant as per the contract. Business is not always about owning property. Many of the businessmen and women we see around are merely entrusted with the property we see them trading on. Unless an agreement specifically prohibits, leasing and subleasing are the language of business. This ground has no any merit and hereby fails.

On the third and last ground, the Appellant contends that the learned trial magistrate erred in law and facts by "not considering the 1st and 2nd appellants testimonies on the nonexistence of the said properties alleged to be rented to the 1st respondent." I have decided to quote the ground of appeal as it appears in the Memorandum of Appeal due to the difficulties, I encountered in gasping the real intention of this ground. Had the anonymous counsel who drew up the memorandum on behalf of the appellant appeared

before this court, he would have been put to task to expound on what is meant by "nonexistent" of properties.

I tried to ask this question to Ms. Mwanga and she ended up denying everything she had hitherto admitted and vice versa. Unfortunately, total denial isn't the way to resolve our conflicts in courts of law. For these very obvious reasons, I will not confine myself to discussing this ground any further. Before I pen off this ground, I have a bone to chew with members of the legal profession especially those that assist litigants with drawing up court documents, anonymously. I consider it prudent to remind them the importance of promoting alternative dispute resolution ADR. The importance of ADR as a means of reaching to amicable solutions among litigants cannot be overemphasized.

In this particular case, although the amount of money in dispute (Tanzanian Shillings three million and six hundred thousand only) is not a significant amount compared to the troubles associated with litigation, the appellants were made to believe that they could somehow move this court to enable them to escape all liabilities that naturally bind them for having entered into a business contract with the respondent. It is high time we promoted ADR at all levels to spare members of the business community

with the much-needed time for other equally constructive entrepreneurial activities.

I have given some thought to the Appellant's repeated claim that branded items belonging to Coca Cola, Pepsi and TBL were repossessed by the respective companies during demolition to pave way for road expansion in the Kimara area where the bar was situated. Although there is no any proof made by the Appellant's on this, this court cannot, in the spirit of enforcing the contract, order that the branded items are returned. This would not be practical. The Respondent had prayed for 3,600,000 for breach of contract. The judgement of the Primary court which judgement remained intact at the District Court save for privity of contract as it applies to the second Appellant remains intact.

For avoidance of any confusion this court does not direct that branded items be returned. I direct that the Appellant pays a total of Tsh 3,600,000 to the Respondent as prayed for in 2017 being compensation for breach of contracts and loss of items. I hereby uphold the decision of the District Court. The appeal is dismissed. I make no orders as to costs.

E.I. LATAIKA

JUDGE

23/11/2021