IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

CIVIL APPEAL NO. 04 OF 2022

(Originating from the Resident Magistrate Court of Songea at Songea in Civil Case No. 5 of 2020)

SHINYANGA FARM VET AGRO TRADERS COMPANY LTD.....APPELLANT

VERSUS

TITO VOLUNGWA MBILINI.....RESPONDENT

JUDGEMENT

14.04.2022 & 20.07.2022

U. E. Madeha, J.

The Respondent was the plaintiff and the successful litigant in Civil case No. 05 of 2020 before the Resident Magistrate Court of Songea whilst the Appellant was the defendant and the losing party. The Resident Magistrate Court of Songea entered its decree as follows:

1. *That in totality this court holds that the case decided in the plaintiff's favour with costs and it is hereby declared that the defendant is in breach of contract.*
2. *Payment of specific damage of tune of 297,000,000/=.*
3. *Payment of general damage to the tune of 120,000,000/=*

4. *Payment of interest at the decretal amount rate of 7% from the date of judgement to the full payment of Decree.*
5. *Costs to be paid by the defendants.*

The material facts of this case as obtained from the case record indicate that: the Respondent claimed that the Appellant's company informed him that they manufacture fertilizer. They convinced him to enter into a purchase agreement of the same whereby they promised to lower the purchasing price. Next, they requested him to deposit an amount of Tanzanian Shilling two hundred million (tsh. 200,000,000/=) into their NMB bank account. Immediately, the Respondent borrowed two hundred million from the Bank and he accordingly deposited the money to them. That he successfully obtained a deed of transfer of the same issued by the bank. The Respondent lamented that he incurred a loss amounting to two hundred and ninety seventy million Tanzanian shillings (tsh. 297,000,000/=) as general damages, where he translated that the bank's interest was Tanzanian shillings forty-seven million (tsh. 47,000,000/=) being for two years and the loss from anticipated profit was Tanzanian shillings fifty million (tsh.50,000,000/=). On the same note, he had received a sum of Tanzanian shilling one hundred and sixty million (tsh. 160,000,000/=) but had not

received a penalty amount of Tanzanian shilling eight million (tsh. 8,000,000/=).

During the cross-examination, the Appellant stated that he did not receive any money to buy fertilizer while the NBC Bank branch Manager, Frank Kilanga (**PW2**), testified that on 30th day of August 2018, the Respondent appeared at the NBC Bank and deposited an amount of two hundred million Tanzanian shillings from his account to NMB. He informed the Court that he had records (both hard and soft copies) of that transaction. He identified the transfer form (TISS) form was then tendered and admitted as Exhibit P1. PW2 stated that the said transfer was truncated to the NMB Bank account Songea Branch, Branch Code 023 from Account No. 021148000021. On the same note, the customer's mobile phone number that is +255 767 341 794 was filed. It was evident that: the beneficiaries were Shinyanga Farm Vet Agro Traders Co. LTD, P.O. BOX 787 Kahama Tanzania, that the said transfer went to the NMB Bank Kahama Tanzania Account No. 30610024170 and the account holder being the Shinyanga Farm Kahama Vet Agro Traders. Furthermore, the purpose of transferring the money was that the Respondent wanted to purchase fertilizer and the said transfer was done by PW2.

On his side the Appellant had one witness named Hashim Hamidu who testified as DW1. He admitted that he was indebted to the Respondent to an amount of only Tanzanian shilling one hundred and sixty million (tsh. 160,000,000/=) since the fertilizer load had already been partially delivered to the Respondent. He insisted that the delivery note is in their office to the company director. He further testified that the fertilizer bags were for sale and each bag could generate interest of not less than five thousand Tanzanian shillings (tsh. 5,000/=).

When the appeal was called before me, Mr. Kitala Mugwe, the learned counsel entered appearance for the Appellant whilst Mr. Dickson Nduguru the learned counsel too appeared on behalf of the Respondent. By consensus from both sides, the appeal was argued via written submissions.

At the commencement of his submission, Mr. Kitala Mungwe opted to abandon their first ground of appeal which states that: 'the trial court erred in law and fact in determining the matter in which it had no jurisdiction'.

In arguing their second ground of appeal, which states that: 'the trial court erred in law and facts in pronouncing judgement in favor of the Respondent without considering the Appellant's evidence', Mr. Kitala

Mungwe contended that the Respondent failed to tender any proof of the alleged contract which he claimed to have been breached by the Appellant before the trial court. Besides, he argued that the Respondent's bank principal officer, who has been mentioned to have told the Respondent to deposit the money in the said account, has not been mentioned by his or her name. that, in relation to that it leaves doubt about the Respondent's testimony.

The Counsel proceeded to strongly argue that the Respondent failed to tender any exhibit in relation to the allegation that he had loaned the said money from the bank as a result he suffered a loss due to the bank's interest. He further averred that the Respondent ought to have tendered evidence of a bank loan from the said bank of alleged money as proof.

Concerning the third ground of the appeal, Mr. Kitala almost reiterated what he submitted in respect to the former ground. He states that the trial court erred in law and fact when deciding the matter in favor of the Respondent without a clear analysis and evaluation of evidence as adduced by the parties. He contended that there was no evidence from the Respondent on breach of contract. That whatever was testified was hearsay and the trial court misdirected itself in relying on it since it is against the law.

The Counsel made reference to page three of the typed proceedings and judgement since their transaction was a contractual relationship, covered by the law of the Contract Act, and that the trial magistrate wrongly interpreted the existence of the contract in the sense that the contract was not tendered before the court as the basis of the claim to prove the allegation.

He faulted the trial court for failure to decide the case on the balance of probability as required under the law and that the trial's magistrate only recorded the cross-examination questions asked to DW1 by the Respondent's advocate but not his. He begged this Court to draw an adverse inference to the trial court's proceedings in this matter at hand. He argued that, as per his assessment of the entire evidence in the records, the Respondent herein did not manage to prove his case therefore he requested that this Honorable Court be pleased to allow the appeal.

In reply, Mr. Dickson Ndunguru initially submitted that he sincerely appreciates the Appellant's counsel for abandoning the first ground of appeal. As for the second ground of appeal he argued that it has no merit because the evidence of the Respondent was evaluated to the required standard as seen at page 6 to 7 of the judgement. It was his further argument that the problem with the evidence of the Appellant side is that it

did not match with the pleadings so the trial Court could not consider such ultra vires arguments. To bolster his argument, he cited and made reference to the case of **Pasinettiadriano v. Giro Gesr Limited and Another** [2001] TRL 89 wherein that case they quoted the decision of Mfalila J in the case of **Joseph Marco v. Pascal Rweyemamu,** 1971 HCD 59, which held that:

> " In *civil cases, it was extremely important for the trial court to limit its findings to the issue as revealed by the state of the pleadings, and no party should be allowed to go outside his pleadings...Order v1 rule 7. The purpose is... to prevent parties from introducing new matters without giving adequate time to the opposite party to answer. Pleadings are meant to clarify and identify the area of the dispute between the parties, the way each side is afforded sufficient opportunity to prepare its case on the points in dispute.*"

The learned counsel further submitted that, the above being the position of the law the Appellant's complain about failure to evaluate evidence by the trial court is nothing but a mere statement that needs to be decided against him for being contrary to the pleadings.

Furthermore, the learned counsel submitted that the Appellant complained about same ground that the Respondent did not tender contract of sale and that the person whom the Respondent mentioned as the principal officer of the Appellant was not mentioned hence creating doubt on the party of the Respondent's case. In his view, Mr Dickson Ndunguru argued that all that evidence was useless in comparison to the plaint and testimony of DW1 who admitted to having received the money but said that there was part performance of the contract as fertilizer of Tanzanian shillings forty-eight million (Tsh. 48,000,000/=) was delivered. But since the same was not raised as a counterclaim or set-off or was pleaded on the plaint then why the Court should take it to be true facts and what fact should be proven using this evidence not pleaded.

With regard to the third ground of appeal the counsel submitted that it is not mandatory for a contract to be written it could be orally terms as well and so long as the Appellant admitted to receiving the money and for the same purposes pleaded on the plaint then there was no remaining fact that needs more evidence to prove this case. Eventually Mr. Dickson Ndunguru beseeched us to dismiss the appeal since it lacks merits. In

response to the submission by Mr. Ndunguru the learned advocate for the Appellant had nothing to rejoin.

On my side, I have re-read the entire evidence on record, the memorandum of appeal plus considered the submissions from both sides and find that the contentious issue for determination in this appeal are: **One**, whether or not there was a contract between the Appellant and the Respondent. **Two**, whether or not the Respondent paid the Appellant Tanzanian shillings two hundred million (tsh. 200,000,000/=) being purchasing price for supply of fertilizer and **third** whether or not the substance was delivered to the Respondent.

Given the course I taken in determining the above issues, the first and second issue will be answered simultaneously. Therefore, to begin with whether or not there was a contract between the parties and whether or not the Respondent paid the Appellant tsh. 200,000,000/=. It is the finding of this Court that there was in deed an existing oral contractual relationship between the parties whereby the Respondent did pay tsh. 200,000,000/= as consideration for an anticipated supply of fertilizer. This is because from the record, the evidence of PW1 (Respondent) and DW1(Appellant) indicates the same, that it is clear that PW1 transferred Tanzanian shillings two hundred

million on the 31st day August 2018 to Shinyanga Farm Vet Agro Traders Co. LTD that was from NBC Bank to NMB Bank (the account owned by Appellant).

Needless to observe, the circumstance of this case suggests that there was an oral contractual relationship since the Appellant though disputing but he impliedly admitted in evidence by stating that there was a compromise in respect to selling fertilizers. That he handed over to the Respondent a total amount of forty-nine million Tanzanian Shillings for fertilizer, and the remaining one is hundred and sixty million Tanzanian shillings that the Respondent owes him.

In regard to that, this indicates that there was a contractual relationship between the two. In resorting to the afore explained conclusion this Court has relied on various decisions for instance, reference can be made to the case of **Engen Petroleum (T) Limited v Tanganyika Investment Oil and Transport Limited** Court of Appeal of Tanzania at Dar es salaam, Civil Appeal No. 103 of 2003 (unreported) whereby the issue therein was whether there existed a contract between the parties. The Court held that:

> *"Although the learned judge erroneously held that there was no contract of sale of petroleum product between the*

parties a careful scrutiny of the evidence, conduct of the parties and the circumstances of the case establishes there was an oral contract of sale of petroleum products by the Appellant plaintiff company to the Respondent defendant company. A contract of sale of goods is a contract whereby the seller transfers the property in goods to the buyer for money consideration called price, and there may be contract for sale between the owner and the other. We reinforce in view of the provision of ***section 5 (1) of the Sales of Goods Act,*** *which states; 5 (1)" Subject to any other written laws in that behalf, a contract of sale may be made in writing (either with or without seal) or by word of mouth, or partly in writing and partly by word of mouth or may be impliedly from the conduct of the parties. We are satisfied that transaction involving the parties to this suit was an oral sale contract of petroleum products under which the Appellant supplied petroleum products to the Respondent for the due price and local currency"*

Reverting to the third issue, that is whether or not the property did pass? It is the finding of this Court that substance (fertilizer) was not delivered to the Respondent hence the property did not pass. This is because the evidence is indicative that no fertilizer product was not taken by the Respondent. The Appellant was obliged to measure, weigh, simply stated to

put his product in a deliverable state. Since a property does not pass until and upon such considerations are observed and the buyer is served a notice thereof. Moreso, the Appellant was supposed to know the number of bags of fertilizer used by the Respondent, the ones in debt and their price.

Further, the Appellant claimed that the remaining money is tsh.160,000,000/= because he delivered fertilizer bags amounting to forty-nine million Tanzanian shillings (tsh. 49,000,000/=) but after my perusal of the Court's record and I have found no such evidence. It was expected that the Appellant would maintain a delivery note signed by the Respondent which shows the amount paid, claimed thus enable good record and further application justice in a dispute like this.

The law under Section 20 (b) and (c) of the Sales of Goods Act Cap 214 [Revised Edition 2002] is explicit in that:

> *"(b),where there is a contract for the sale of a specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the seller has notice thereof. (c)where there is a contract for sale of a*

specific goods in a deliverable state, but the seller is bound to weight, measure, test and do other act or things with reference to the goods for the purpose of ascertaining the price of the property does not pass until such thing is done."

Simply stated, the Appellant here in has failed to keep the property in a deliverable state as there is no evidence of a delivery note, the debit and credit were thus not communicated well between the parties to the suit. As such, fertilizer did not pass between the Appellant and the Respondent, he breached the contract by not discharging his obligation as earlier observed in the Resident Magistrate Court.

Basing on the foregoing reasons, I am loath to interfere with the finding of the trial Court, I hereby uphold the decision to the following effect. I order that:

1. **Firstly,** the Appellant to pay a number of Tanzanian shillings two hundred million (tsh. 200,000,000/=) only to the Respondent.
2. **Secondly,** the Appellant should pay an interest of 7% to the Respondent.

3. **Thirdly,** the Appellant to pay the cost of litigation up to this juncture.

Last but not least, the appeal is partly allowed. Order accordingly.

DATED and **DELIVERED** at **SONGEA** this 20th day of July 2022.

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U. E. MADEHA

JUDGE

20/07/2022