IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

CIVIL APPEAL NO. 53 OF 2021

(Arising from the decision of Resident Magistrate Court of Mwanza at Mwanza in Civil Case No. 67 of 2020)

CSR COMPANY LIMITED ----------APPELLANT

VERSUS

ANDREW MASAGA @ANDREW KULWA MASAGA----------RESPONDENT

JUDGMENT

Last Order:28.07.2022
Judgment Date: 11.08.2022

M.MNYUKWA, J.

This is the first appeal where parties had their matter tried and determined before the Resident Magistrate's Court of Mwanza at Mwanza. ANDREW MASAGA @ANDREW KULWA MASAGA was the plaintiff and now the respondent in this appeal, successfully sued the CSR COMPANY LIMITED the defendant at the trial court now stands as the appellant in this appeal. The respondent claimed before the trial court for the following reliefs:

i. *Payment of Tanzania Shillings, twelve million six hundred thousand (Tshs, 12,600,000/=) plus 12% interest as per paragraph 3.*

ii. *Interest rate per month from the date of the breach to the date of the judgment.*

iii. *Court interest on the decretal sum at the rate of 7% per month from the date of the judgment to the date when the same is paid in full.*

iv. *General Damages.*

v. *Cost of the suit.*

vi. *Any other relief the court may deem fit to grant.*

At the trial court, the matter ended in favour of the plaintiff and the decree was entered against the defendant. The defendant did not see justice and filed this appeal with six grounds of appeal thus:-

1. *That the trial magistrate erred in law and in fact to consider that the respondent on the material date of handling was in Dar es salaam and he come on 28th June 2020 on the site.*
2. *That the trial magistrate erred in law and in fact for failure to consider the evidence before it.*
3. *That the trial court erred in law for illegally receiving the exhibits.*
4. *That the trial magistrate erred in law and in fact for issuing a decision which is double jeopardy to the appellant.*

5. *That the trial magistrate erred in law and in fact for burdening the appellant to pay Tshs. 12,600,000/=plus interest of 12% to the respondent.*
6. *That the trial magistrate erred in law and in fact for awarding Tshs. 5,000,000/= to the respondent without considering principles governing general damages.*

Before this court, the appellant afforded the legal service of Mr. Samwel Kazinga learned Advocate and the respondent had the service of Mr. Ally Zaid learned advocate. Pursuant to the court order dated 14.06 2022, the appeal proceeded by the way of written submissions whereas, the appellant was ordered to file his submissions on 22.06.2022, and the respondent was to file on 01.07.2022 and a rejoinder (if any) was to be filed on 08.07.2022. as per the records, both parties complied with the orders.

On his submissions, the appellant prays to add one ground of appeal to wit: the trial Magistrate erred in law and in fact for denying the appellant right to amend the written statement of defense which could include her counterclaim hence the denial of the right to be heard. He also opted to abandon ground No 3, and argue grounds 4 and 5 jointly.

Submitting on the added ground of appeal that, the trial Magistrate erred in law and fact for denying the appellant right to amend the written

statement of defence which could include her counterclaim hence the denial of the right to be heard, Mr. Samwel Kazinga submitted that, the trial court rejected the defendant prayer to amend the WSD to include the counterclaim which could determine the respondents claim. Referring to pages 9 to 11 and 17 of the trial court typed proceedings, he avers that, the trial court rejected the prayer for the reason that the issues were already framed while the prayer for amendment was made before commencement of the trial. Referring to Order VI Rule 17 of the Civil Procedure Code Cap 33 RE: 2019, he insisted that the law is clear that a party may request to amend the pleadings at any stage of the proceedings. In that situation, he avers, that being the position of the law, the defendant was denied a right to be heard.

On the first issue the trial magistrate erred in law and in fact to consider that, the respondent on the material date of handling the project was in Dar es Salaam and he came on 28th June 2020 to the site. He submitted that, there is no dispute that the work was scheduled to commence on 20th May, 2020 and to be handled over on 04th June, 2020 but the respondent was not present to the site till 28 June, 2020. He avers that, no evidence before the trial court was to the extent that the appellant delayed. He insisted that, the respondent issued the demand

notice to the appellant (Exhibit 3) without going to the site which shows that the respondent had a bad motive of not paying the outstanding balance to the appellant. Referring to the agreement Exhibit P1, he avers that there were no provisions as to how the site was to be handled to the constructor for drilling and also did not provide as to how the same could be handled to the respondent. He went on that, the appellant was given the telephone number of the watchman with who he communicated and was shown the site and after accomplishing the drilling, he was instructed by the respondent and handled the same to the watchman on the agreed date that is 04th June, 2020.

Submitting on the second ground of appeal that, the trial magistrate erred in law and in fact for failing to consider the evidence before it, he submitted that, at the trial court, PW1 disclosed that the contract was for surveying borehole, drilling, pipe installation and pump installation referring to page 12 of the trial court typed proceedings but the respondent was not clear as to whether the work was not properly done or done out of time. He went on averring that, the respondent complained that there was no pipe installation on page 15, and on page 16 he complained that the work was not done, and went on to page 17 that there was no water. Mr Samwel Kazinga insisted that the respondent

failed to prove his case and the trial magistrate failed to consider the evidence of DW1 who submitted that, the work was completed on time the evidence which was confirmed by PW1 that there was a drilled hole and there was a water pipe. He insisted that, no expert report tendered by PW1 to prove the allegation against the appellant and therefore the case was not proved against the appellant.

On the 4th and 5th grounds of appeal, he submitted that, the trial court erred to enter the decree against the appellant awarding the respondent the claimed amount of 12,600,000/= plus interest, without considering that the respondent performed the work and the drilled bare hole exists on the respondent's site to his benefit. He insisted that, it is against the principle that no one should enrich himself at the cost of others and therefore the respondent should not be left to enjoy the well at a zero price.

Submitting on the last ground that the trial court erred in law and in fact for awarding 5,000,000/= as general damages, he claims that the same was done without considering principles of awarding the general damages. He avers that the law presumes to be a direct, natural or probable consequence of the act. He claims that, the respondent did not give evidence to show which crops and their value were affected to the

extent of the award. Insisting, he cited the case of **Tanzania Saruji Co-operation vs Africa Marble company** [2004] TLR 155.

He thereafter prays this court to allow the appeal with costs.

Replying to the appellant's submissions, Mr. Ally Zaid started by disputing the added ground of appeal that it was against the principle stated in **James Funke Gwagilo vs Attorney General** [2004] TLR 161, that, parties are not allowed to form new grounds of appeal which originally did not form part in the appeal.

After his remarks, he went on to respond to the added ground that, the trial magistrate was right to deny the prayer for amendment for the reason that both parties agreed that the pleadings were complete. He insisted that the prayer come later on 26 January, 2021, when the matter come for hearing and the respondent had travelled from Dar es Salaam to Mwanza. He went on insisting that, had the trial court allowed the amendment, could prejudice the respondent. He cited the case of **Eastern Bakery vs Castelino** (1958) E. A 461, insisting that, amendments that can be made while making injustice to the other party should not be allowed. He, therefore, avers that, the appellant had a chance to file a fresh case to claim against the respondent as stated in the case of **Karashe vs Uganda Transport Co. Ltd** (1967) E.A 774.

Responding to the first ground of appeal, he submitted that, the agreement (Exhibit P1) provides for time frame of the completion of the work which was divided into four parts Hydrogeological survey, borehole drilling, water well construction and pump installation. He went on that, the appellant did not complete the project, for she did not install water pump that's why, when the respondent visited the area, he decided to issue a notice thus Exhibit P3 and P4. He went on that, the project was not completed and handed over to the respondent for no evidence in that regard. He, therefore, insisted that the trial court properly considered all the circumstances.

On the 2nd ground of appeal, he insisted that the trial magistrate considered the evidence before it and the submissions by the parties. He avers that the "pump was not installed" to the project and made the same incomplete contrary to the agreement (Exhibit P1) referring to pages 4 and 9 of the trial court typed proceedings. Insisting that, the trial court needs no expert report or witness. He cited the case of **Hemed Said vs Mohamed Mbilu** [1984] TLR 113 that, the party whose evidence is heavier than the other must win.

On the 4th and 5th grounds of appeal, he submitted that the trial court was right to award the appellant a sum of 12,600,000/= plus 12%

interest. He avers that, the agreement Exhibit P1 provided specifically on clause 1.4 that, failure of the appellant to honour the terms of the agreement will be obliged to pay the outstanding sum of 12,600,000/= plus 12% interest. Referring to page 13 in the case of **Mariam E. Maro vs Bank of Tanzania**, Civil Appeal No. 22 of 2017, he insisted that the court must honour the terms of the agreed terms.

On the 6th ground of appeal, he submitted that it was not pertinent to call agricultural officer for the issue of general damages is within the court's power and discretion to access the quantification referring to at page 6 of the case of **Anthony Ngoo &Another vs Kitinda Kimaro**, Civil Appeal No. 25 of 2014. He, therefore, prays this court to dismiss the appeal with costs.

Having considered the submissions for both parties, it is not disputed that parties entered into agreement (Exhibit P1), whereas the appellant being a duly registered company was to perform a hydrological survey, water drilling, well construction and pump installation in consideration of the payment by the respondent of Tshs. 15,600,000/= whereas the initial payment was done at a tune of 12,600,000/=. The respondent at a trial court claimed the breach of the contract that the appellant failed to fulfil her obligation as stated on Exhibit P1 therefore,

bound by terms to the extent that the appellant was to return the advance payments plus 12% as agreed on the agreement. The appellant disputed the decision of the trial court that the case was not proved to the standard required hence this appeal.

As it is trite law that the one who alleges must prove his allegations, as also stated under section 110 of the Evidence Act, Cap. 6 R.E 2019 that, whoever desires any court to give any judgement as on the facts the person asserts, to any legal rights or liability, must prove that, such facts exist. It is a settled principle of law that, in civil cases the standard of proof is on the balance of probability. It is the appellant in this appeal who is now challenging that the case at trial court was not proved to the standard required.

In determining this appeal, therefore, and taking into consideration that this is the first appellate court, it is trite law that, this court has the power to reconsider and re-evaluate the trial court's evidence and if warranted, draw its own conclusions, if it is established that the trial court failed to appreciate the weight of the evidence tendered before it. (See the case of **Leopold Mutembei Vs Principal Assistant Registrar of Titles, Ministry of Lands, Housing and Urban Development** Civil

Appeal No. 57 Of 2017 and the case of **Yohana Dionick and Shija Simon vs R,** Criminal Appeal No 114 of 2015.)

Starting with the added ground of appeal, and before going to the merit and in line with what was stated by the respondent that, the ground was new and was not required to be added, I do not support the respondent's learned counsel's view for the reason that, this matter proceeded by way of written submissions and had the matter proceeded orally the law is clear that before the matter is heard, a party may pray for the addition of the grounds.

Going to the determination of the merit of the added ground, the appellant claims that, he was denied the right to be heard after his prayer to amend the WSD was denied by the trial court. His claim was opposed by the respondent's learned advocate that the court was right for, if it was to be allowed, it could have prejudiced the respondent for the matter was scheduled for hearing and issues were already framed. The law provides under Order VI Rule 17 of the Civil Procedure Code Cap. 33 RE; 2019 provides: -

17. *The court may at any stage of the proceedings allow either party to alter or amend his pleading in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of*

determining the real questions in controversy between the parties.

Going to the trial court's records, it is evident that the appellant specifically on pages 9, 10 and 11 of the trial court's proceedings, when the appellant learned counsel prayed for amendment, the respondent learned counsel objected. Having heard the parties over the prayer, the trial court ruled out that the amendment was an afterthought for the matter was at the hearing stage. As it is stated in the quoted provision of law above, pleadings can be amended at any time as may be necessary for the purpose of determining the real questions in controversy between the parties. Going to what transpired, it is with no doubt that Mr. Kazinga notified the court that, pleadings were complete and there were no further applications, interrogatories or discoveries. The same gave the trial court a room to set the matter for mediation which was marked failed and consequently set a hearing date. I agree with the trial court that, the appellant learned counsel had enough time to have the pleadings amended to include his counter-claim before the scheduling order was made and therefore, raising it at the hearing date was not proper. In this regard, under Order VIII Rule 23 the law is clear that:-

23. *Where a scheduling conference order is made, no departure from or amendment of such order shall be allowed unless the court is satisfied that such departure or amendment is necessary in the interests of justice and the party in favour of whom such departure or amendment is made shall bear the costs of such departure or amendment, unless the court directs otherwise.*

In this regard, I agree with the respondent's learned counsel and find his cited case of **Karashe vs Uganda Transport Co. Ltd** (1967) EA 774, relevant that the denial by the trial court was proper and did not prejudice the right of the appellant for he had room to sue the respondent in a fresh suit to recover his claim. This is because, the appellant did not pray to the trial court to depart from the scheduling order as required. Therefore, I find no merit in this ground of appeal.

On the first ground of appeal as it appears on the memorandum of appeal that, the trial magistrate erred in law and in fact to consider that the respondent on the material date of handling the project was in Dar es Salaam and he came on 28th June, 2020 on the site. It is undisputed by either party that the work was scheduled to commence on 20th May, 2020 and to be handled over on 04th June, 2020 as reflected in Exhibit P1, but the appellant claims that the respondent was not present at the site till

28th June, 2020. He further testifies that, he did not delay as claimed. It was his testimony that he was given a telephone number of the watchman, an agent of the respondent with who he communicated and the agent showed the site where the appellant executed the work and after accomplishing the drilling, he was instructed by the respondent and he handled the same to the watchman the agent of the respondent on the agreed date that is 04th June, 2020. The respondent opposed the appellants submissions.

In the determination of this ground of appeal, I perused Exhibit P1 which provides for the mode of execution of the contract. On page 2 of the agreement item 12, it reads:-

> "After the completion of the project, the company will hand over the project to the client with the technical advice and instructions"

It is on record that, from the start of the execution of the project, the appellant was introduced to the site by the agent of the respondent who was the watchman with the directions from the respondent and he started executing the work. Thereafter, the appellant handled over the work to the same agent of the respondent. This is evidenced on pages 30 and 31 of the trial court typed proceedings which I reproduce as it reads:-

"...at the site, we found about 3/4 young men who welcomed us, the said young men were watchmen. We were directed by Andrew Masaga and he is the one who gave us the phone numbers of the watchmen. We did not meet with Mr. Masaga.

The work was completed in 3/4 days but we finalized and handled the same on the agreed date (14 days). We handled the completed work to the watchmen who were at the site as Masaga was not there..."

From this piece of the extract from the records, the respondent though denies that, the appellant did not execute the contract on time as agreed, it is not shown on the evidence that he was present or else his agent was not handled the project. When the appellant testified that the respondent was not at the site, the same was not contradicted by cross examination by the respondent which entails that, the respondent agrees as to the truth of the appellant's testimony. In the case of **Damian Ruhele vs R,** Criminal Appeal No. 501 of 2007 the Court of Appeal observed:

"It is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence."

See also Court of Appeal decision in **Athanas Kibogoyo v R** Criminal Appeal No. 88 of 1992 (unreported) and **Georgemaili Kemboge vs The Republic** Criminal Appeal No. 327 Of 2013.

Further, the respondent's testimony at the trial court in that regard is reflected on page 15 of the trial proceedings where he testified that:-

> *"...On 28 June 2020, I decided to come to Mwanza to visit the site and I found that the work was not finalized as agreed, I decided to take photos therein, drilling was done but there was no pump installed"*

It is therefore undisputed that the respondent was not present at the date of handing over the project, and as stated by the appellant that the same was handled over to the agent of the respondent, the same was not called to prove the respondents' allegations.

As I highlighted earlier, the principle governing proof of case in civil suits is that, he who alleges must prove. The rule finds backing from sections 110 and 111 of the Law of Evidence Act, Cap 6 R.E. 2002 which among other things states:

> *"110. Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist.*

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

See also the cases of **Barelia Karangirangi Vs Asteria Nyalwambwa,** Civil Appeal No. 237 OF 2017 and **Ikizu Secondary School versus Sarawe Village Council**, Civil Appeal No. 163 of 2016

In respect of my discussions above, the respondent's claims were not proved for the reasons that, it was the respondent who did not honour the terms of the agreement for failure to discharge his obligations of being present at the scene during the handover and again for failure to parade his client to contradict the appellant who managed to prove that, the contract was performed as agreed between the appellant and the agent of the respondent.

The court of appeal in the case of **Univeler Tanzania Limited vs Benedict Mkasa t.a Bema Enterprises,** Civil Appeal No. 41 of 2009 quoted a decision of the supreme court of Nigeria in **Osun State Government vs Dalami Nigeria Limited,** Sc, 277/2002 that:-

"Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which parties have agreed themselves. It was up to the parties concerned to renegotiate and freely rectify clauses which parties find to

be onerous. It is not the role of the court to re draft clauses in agreement but to enforce those clauses where parties are in dispute."

In that end, I find this ground with merit.

As for the third, fourth, fifth and sixth grounds of appeal, should not detain me as such for the discussion above has also covered this grounds that the matter was not proved to the standard required and therefore any subsequent orders thereof were not justified.

In fine, this appeal succeeds. I allow the appeal to the extent explained above with no order as to costs.

It is so ordered.

M.MNYUKWA
JUDGE
11/08/2022

Right of appeal explained to the parties.

M.MNYUKWA
JUDGE
11/08/2022

Court: Judgement delivered this 11th August 2022 in the presence of respondent's counsel and in absence of the appellant.

M.MNYUKWA

JUDGE

11/08/2022