IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL APPEAL NO. 21 OF 2020

(Arising from the judgment and decree of Kinondoni District Court by Hon. H.M. Hudi RM in Civil Case No. 183 of 2018)

M/S CAF INVESTIMENT LTD .....APPELLANT

VERSUS

RAVJI CONSTRUCTION LTD.....RESPONDENT

JUDGEMENT

10/6/2022 & 10/8/2022

L.M. Mlacha,J

The appellant, M/S CAF INVESTMENT LTD was the defendant in the district court of Kinondoni in Civil Case No. 183/2018. The respondent, RAVJI CONSTRUCTION LTD was the plaintiff. The district court found for the respondent and awarded payment of Tshs 41,676,150/= to the respondent plus Tshs 2,000,000/= general damages and the costs of the suit. The appellant did not see justice in the decision and came to this court by way of appeal.

The grounds upon which the appeal is based read as under: -

ORIGINAL

1. The trial court erred in law and facts for entering judgment and decree in favour of the plaintiff without paying due regard to contradictory amount purported to be paid as against amount claimed, in absence of proof of payment and at large evidence discharging the burden of proof required by the law.
2. The trial court erred in law and facts for failure to enter judgment and decree in favour of the defendant in respect of defence and counter claims, following strong evidence which discharged the burden of proof required by the law.
3. The trial court erred in law for holding that the notice of stoppage to work issued by the plaintiff without further notice of resumption to work to date while the plaintiff continued to do the same work did not amount to breach of contract.
4. The trial court erred in law and facts for holding that the defendant did not complete the works on its own cause as per the agreement while in fact there was unlifted stoppage notice prohibiting the defendant from continuing with work issued by the plaintiff. Had the trial court taken into account the effect of such stoppage notice, it would not have reached such findings.

ORIGINAL

5. The trial court erred in law and facts to enter judgment and decree in favour of the plaintiff by relying solely on the hearsay testimony of PW1.

With leave of court hearing was done by written submissions. Before going to examine the submissions, a bit of the background may be useful. As it is now the practice of this court, the summary of the evidence is reproduced as follows. The respondents, civil construction company, were engaged by Consumers Choice Ltd to renovate a godown work which included construction of an office block on plot No. 7. Block A Sinza Kinondoni Dar es salaam. It then engaged the defendants, another construction company, as subcontractors, to do the work for them. They signed a contract on 11/11/2014 which had Tshs 200,000,000/= as the contract sum. There was some added work worth Tshs.52,000,000/=. They paid a total of Tshs 220,167,500/=. The appellant developed problems. They could not finish the work. They decided to terminate the contract. They measured the work done and realized that it was for Tshs 173,491,350/= only. There was Tshs. 41,676,150/= for the unfinished work. They required the appellant to pay this amount but they could not do so hence the case. They prayed for

payment of Tshs 41,676,150/=, damages at the discretion of court and costs.

The appellants filed a defence and denied the claim. They stated that the respondents were the ones who breached the contract by stopping them to proceed with the work. They agreed that there were added works. They prayed for Tshs 35,632,982/= for the added works and Tshs. 100,000,000/= general damages by way of counter claim.

The court framed issues and the parties were called to prove their respective cases. The case went on full trial. The record shows that the respondents had two witnesses namely, PW1 Abdalah Hood Tangalile (28) and PW2 Engineer Peter Mangishi (61). PW1 works with the respondent company. He deals with Human Resources and Administration. He told the court that the parties entered into the contract in 2014 for building a ware house and an office block. The respondent was the main contractor and supervisor. The appellant was to do the work. He also received cash. He said that the appellant received cash but did not finish the work. He went on to say that the contract amount was Tshs 200,000,000/= but they added some work worthy 52,000,000/= making a total of Tshs 252,000,000/=. They paid them but could not finish the work. Calculations

revealed that they were to refund Tshs 41,676,150/= which he asked the court to order to be paid. PW2 spoke of the signing of the contract. He signed it but did not supervise the work. It was for building a godown and office block.

The appellant had two witnesses also who tendered 4 exhibits. DW1 Charles Anthony (54) is a civil Engineer. He agreed that there was a building contract for Tshs 200,000,000/= exhibit D1. He said that they started the work in December 2014 but were served with a stoppage letter which terminated the contract on 7/8/2015. No reasons were given for termination of the contract. He said that the work was not completed due to the termination notice, exhibit D3. He went on to say that the parties were engaged in negotiations which lead to the signing of a Memorandum of Understanding (MOU) on 11/12/2018, exhibit D2. He went on to say that they made an assessment and found that they were yet to be paid Tshs. 35,631,982/= on the work already done which he prayed to be paid plus Tshs. 100,000,000/= general damages.

DW2 Mathayo Makagumba (52) is an architect and project Manager of the project. He told the court that he supervised the respondent company on behalf of Consumers Choice Ltd. He said that the appellant worked on the

project but were stopped. The respondent took over the project. He proceeded to supervise the project. The respondent did the work themselves. They completed the project themselves.

It was the submission of the appellant that they entered into the contract for Tshs 200,000,000/= which was for construction and supply of materials, labour tools, plant and equipment and transport. They did the work but were on 7/8/2015. They submitted that the respondents terminated the contract unilaterally by stopping them to continue with the work. Submitting on ground one, the appellant said that PW1 and PW2 did not give any tangible evidence upon which the award could be based. They referred the court to section 110 (1) of the Evidence Act which has the principle that *he who allege the existence of facts must prove them*. They said that there was no any technical report or valuation report tendered to show that the appellant defaulted to complete the work. There was therefore no evidence upon which the finding and award was based.

Submitting on ground two and five, they said that DW1 tendered a copy of the contract signed by both parties, the memorandum of understanding and Notice of stoppage (Exhibits D1, D2 and D3 respectively) to prove the counter claim. It was submitted that Exhibit D3 shows that the respondent

stopped the appellant on 7/8/2018 while the contract was signed on 11/11/2014. They thereafter referred the court to clause 2 of Exhibit D2 which reads "*That, the M/S CAF INVESTIMENT LIMITED have already completed the said building works and handing over of the same in the manner that was agreed upon*" and submitted that the appellant had already done what was agreed in the contract. They went on to say that based on this evidence it was erroneous to dismiss the counter claim. They invited the court to re-evaluate the evidence on counter claim and grant it. They asked the court to be guided by the case of **Martha Michael Wejja v. Attorney General and 3 others** [1982] TLR 35.

In grounds three and four it was submitted that the notice of stoppage was nothing but a move to frustrate the contract. They referred the court to the submission made on the forgoing and argued the court to allow the appeal.

In reply to ground one, it was submitted that there was proof that the appellant defaulted and failed to complete the construction work. The court was invited to examine the evidence of PW1 and PW2 on this aspect. It was invited to find as found by the district court that the appellant had been overpaid Tshs 41,676,16/=. It was further invited to find and hold that the importation of section 110 (1) of the Evidence Act was erroneous.

They argued the court to support the finding and decision of the district court.

Submitting in reply to grounds two and five, it was said that the evidence on the counter claim was examined and properly considered. Exhibits D1, D2 and D3 show that the appellant did not complete the work. Further that the appellant was overpaid. The court was asked to disregard the submission that the evidence of PW1 was hearsay. They went on to say that the memorandum of understanding does not create any claim by the appellant against the respondent. They asked the court to find that the case of **Martha Michael Wejja** (supra) is distinguishable.

I will now move to examine the way the parties have managed to convince the court in their submissions. Ground one talks of lack of proof to justify the award of Tshs 41,676,150/= and Tshs. 2,000,000 general damages. In making the award the trial court had in mind the evidence of PW1 and PW2. I agree with the respondent that the evidence of PW1 and PW2 did not contain any evidence justifying the award of the amount. None of witnesses brought an audited or valuation report showing that the amount of work done and what was left. Much of what was said by PW1 depended on information from office documents which he did not tender as exhibit.

They also included information from people who were in office between 2014 and 2015 who did not come to testify. I would expect a report from a quantity surveyor (QS) or valuer but there was none. The claim was in the nature of specific damages which called the report to establish the strict proof. It was the report of the QS or valuer which could establish the proof. There was no such a report. There was no proof so to say. Further, as correctly observed by the respondents in their submissions, much of what was said by PW1 who was the key witness was hearsay for he was not present in 2014 when the contract was signed or subsequent thereafter. He was also not an engineer himself to know the details and shortcomings. PW2 who was an engineer said clearly that he signed the contract but did not take part in its execution. The work was supervised by another person. His evidence was equally useless. Failure to establish the bases for the breach of contract means also that the award for general damages has no leg up on which to stand. It follows that the awards were erroneous made and should not be left to stand. Ground one is therefore answered in the affirmative.

Grounds two and five are in respect of the counter claim. The appellant has the view that there was good evidence to prove breach of contract and the

counter claim. They say that the counter claim was wrongly dismissed. I agree with the appellant that there was good evidence to establish a breach of the contract but I don't think that the claim for unpaid money was proved. I will try to show.

The contract was terminated on 7/8/2015 vide a letter reference RCL/CAF/01. It is headed in capital as follows: RE: STOPPAGE OF WORKS FOR THE PROPOSED RENOVATION AND COMPLETION WORKS OF COMMERCIAL COMPLEX FOR CONSUMERS CHOICE LTD PROJECT (TENDER NO CCL/001 COMPLETION WORKS/2014). It stopped the works effective 10/8/2015. The words used were "*as your employer we have decided to implement this stoppage for further follow – up and reconnaissance of the projects. Construction costs, sub contractual IPC claims from the general contract and its discharges i.e additional works and change of quantities*". There is no evidence of any prior discussions between the parties, so the step was taken unilaterally as alleged. Neither was there any evidence of discussions thereafter. The evidence of PW1 show that the respondent took over the work himself thereafter and did it to the end. That is also reflected in the evidence of DW2. No explanation was given as to why the appellant was kicked out from the site other than

what is in the letter. The contract, Exhibit D1 has no any provision to support what was done by the respondents. What was done was therefore, much as the appellant might have been doing something wrong at the site, but illegal and a breach of the contract and principles of natural justice. I think this is not what we should do our business. For future guidance, I would say that where there is reason to believe that the contractor is not doing well or is doing the work contrary to the agreement, a letter must be sent to him showing the short comings and grievances and requiring him to make the corrections within a specific period of time. He should also be required to acknowledge receipt of the letter and respond within a specific period of time. Once he had responded and after a site meeting, if need be, the employer may take action according to the contract, which step may include a termination or a stoppage letter as was done in this case. The termination or stoppage letter does not come unilaterally neither can it give the employer an automatic right to enter the site and engage another contractor or do the work himself. He must engage an independent QS to establish the amount of work done, the cost and shortcomings before any step is taken. He will then inform the contractor that he has taken over the site and say if he has any claims against him. The contractor should also

ORIGINAL

be informed of his right of reference to relevant authorities for redress and be paid his money, if any. Failure to observe the steps, in my view, lead to breach of contract and principles of natural justice which may attract damages.

Like the respondent, the appellant did not bring any evidence to prove the claim of Tshs 35,632,982/= which is in the counter claim. That claim is in the nature of specific damage which needed strict proof. There was no such evidence. It was therefore dismissed properly. But the respondent must get an award for general damages for breach of contract because of the unilateral termination of contract. They must have suffered a lot. Their reputation as a construction company must have been lowered and damaged as well. In the exercise of the discretion of this court in the award for general damages, I assess and award Tshs 10,000,000/= to the appellant.

Grounds three talks of the notice of stoppage of contract. That it amounted to breach of contract. It has been answered in the course of discussing grounds two and five. I may only say that the district court erred in finding that there was no evidence of breach of contract while there was good evidence to prove that aspect. That also applies to ground four which is

also on the stoppage notice. While I cannot say that if the appellant was left at the site they could finish the work as agreed for lack of evidence up on which the finding could be made but I can say for sure that they were stopped and removed illegally.

Ground five say that the district court erred in making the award based on the hearsay evidence of PW1. I have already made the discussion on this aspect. I can only say that much of what was said by PW1 as pointed out above was hearsay.

Finally, I wish to say something about exhibit D2, the MEMORANDUM OF UNDERSTANDING (MOU) FOR THE MATERIAL AND ALL EXPENSES dated 11th October 2018. PW1 and PW2 did not talk about this document despite the fact that it was annexed in the written statement of defence as annexture DEI. It was tendered in evidence by DW1 who said that the parties sat on 11/10/2018 and signed the document. For what it worthy Paras 1, 2, 3, 4 and 5 are reproduced as under:

> *"1. That the RAVJI CONSTRUCTION COMPANY LIMITED entered into an agreement with M/S CAF INVESTMENT LIMITED for godown renovation at CONSUMER CHOICE LIMITED at Sinza area Kinondoni Dar es Salaam.*

2. That M/S CAF INVESTMENT LIMITED have already completed the said building works and handling over of the same in the manner that was agreed upon.

3. That in the course of executing the works M/S CAF INVESTMENT LTD has incurred expenses totaling to Tanzanian Shillings TWO hundred and Twenty Million One Hundred and Sixty Seven Thousand Five Hundred (220,167,500/=)

4. That in the meeting held on the 9th October 2018 between RAVJI CONSTRUCTION LIMITED and M/S CAF INVESTMENT LIMITED the afore mentioned figure was deliberated and the figure justified for payment.

5. That this memorandum is witness of the parties agreement to honor and settle the agreement reached by the parties in respect of the meeting that deliberated the said figure of Tanzanian shillings Two Hundred and Twenty Million One Hundred and Sixty Seven Thousand Five Hundred (220,167,500/=)"

This document was signed by the parties and received without objection from counsel for the respondent. Apart from the fact an MOU is a none binding document, a document which merely states *the intentions of the parties to take action or conduct a business transaction,* but it brings a picture that the appellant did the work and was entitled for some

payments. But as I have said above, there was no report of the QS to prove the claim in the standard required to bridge the gap.

That said, the decision of the district court is vacated and substituted with an order for payment of Tshs 10,000,000/= as general damages for breach of contract to the appellant. The appeal is allowed. Costs to follow the event. It is ordered so.

L.M. Mlacha

Judge

10/8/2022

Court: Judgment is delivered through our virtual Court services. Right of Appeal Explained.

L.M. Mlacha

Judge

10/8/2022

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