IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO. 2 OF 2022

(C/F Civil Case No. 63 of 2022)

SABRINA ARVIND JANDU..... APPELLANT

VERSUS

NICHOLAUS MTEI.....RESPONDENT

JUDGMENT

16/08/2022 & 22/09/2022

MWASEBA, J.

The appellant, **SABRINA ARVIND JANDU**, after being aggrieved by the judgment and decree of the Resident Magistrate's court of Arusha at Arusha in Civil Case No. 63 of 2019, preferred the present appeal armed with four grounds as follows:

1. *That, the Honourable Trial Magistrate erred in law and in fact in finding that the Defendant now the Respondent paid the plaintiff now the appellant Tzs 28,000,000 by payment vouchers and ordered the Appellant to pay back Tzs 28,000,000 to the*

Respondent without proof by relying on exhibit D1 a document of legal person not a part to the proceedings of Civil Case No. 63 of 2019.

2. *That, Honourable Trial Magistrate erred both in law and in fact in not finding that there was a breach of the agreement by the respondent and thus the Appellant did suffer damages as a result of the Respondent breach of the agreement.*
3. *That, the Honourable Trial Magistrate erred both in law and in fact in not finding that the Appellant was entitled to Tzs 34,500,000 as a rent from January 2018 to November 2019.*
4. *That, the Honourable Trial Magistrate erred in law and indeed acted illegally in composing and delivering a judgment injudiciously.*

Briefly stated, the appellant herein sued the respondent for payment of Tshs. 50,557,000/= plus other damages being the amount he owes the plaintiff as a result of breach of contract. In his reply, the respondent filed a counter claim against the appellant herein claiming for a total amount of Tshs 33,000,000/= being the amount given to the appellant to build a ware house and a legal cost he incurred in resolving their dispute. At the end of the trial, it was decided by the Court that the appellant (plaintiff by then) failed to discharge her duty of proving the claim on the balance

of probabilities. The court went on ordering her to pay the respondent (defendant by then) Tshs. 28,000,000/= which she received for the construction of the warehouse. Being aggrieved the appellant lodged the present appeal armed with four grounds as depicted herein above.

The appeal was argued by way of written submission. Mr Issa Mavula, learned counsel represented the appellant whereas Mr Fridolin Bwemelo, represented the respondent.

Submitting in respect of the first ground of appeal, Mr Mavura complained that Exhibit D1 was in the name of "**Mony Tiles & sanitary Co Ltd**" a legal entity and it was paid to one "**Jagjit S. Jandu**" both of them not a party to Civil Case No. 63 of 2019. It was his further submission that the respondent failed to prove that he actually paid 28,000,000/= to the appellant herein. He referred this court to **Section 110 (1) and (2) of Evidence Act**, Cap 6 R.E 2022 that the burden of proof of certain facts lies on a person who alleges the existence of those facts. He cemented his argument with the case of **Bamprass Star Services Station Limited Vs Mrs Fatma Mwale**, [2000] TLR page 416.

On this ground Mr Bwemelo replied that, it is evidenced in the court proceedings that Tshs. 28,000,000/= was received in two modes of cash amounts whereas Tshs. 14,858,000 was paid through payment voucher

as proved through exhibit D1 and the rest of the amount was paid in cash to the appellant and his brother. During the trial the respondent gave evidence on how the payment to the appellant was done and that the name of "Mony Tiles and Sanitary Co. Ltd" was his company that's why other payments were made via the name of the Company. He averred that Mr Jargit S. Jandu was sent by the appellant to collect the money from the respondent as evidenced by Exhibit D1. It follows therefore that as the respondent proved his case on the balance of probabilities, it was correct for the court to order the appellant to return 28,000,000 to the respondent.

On the second ground of appeal, Mr Mavura submitted that when the appellant and the respondent entered into an agreement in October, 2015, the respondent agreed to finance the appellant with Tshs. 54,000,000 to build a Warehouse within three months which will be offset from the rent at Tzs 1,500,000/= per month but the respondent gave the appellant Tzs 10,000,000 only. So, it delayed the construction of the Warehouse hence occasioned loss to the appellant from January, 2015 to 2018. Thus, the Trial Magistrate erred to find that the appellant did not suffer any damages.

Responding to the 2nd ground of appeal, Mr Bwemelo argued that, the records speak louder that it was the respondent who suffered damages and not the appellant as she was the one who breached the contract that's why no costs were awarded to the appellant.

Coming to the third ground of appeal, Mr Mavura submitted that following the breach of contract done by the respondent the appellant is entitled to be paid Tzs. 34,000,000 as a compensation for rent from January, 2018 to January, 2019 since the respondent failed to honour the contract as required under **Section 37 (1) of the Law of Contract Act**, Cap 345 R.E 2019.

In his response Mr Bwemelo argued that, the appellant was not awarded compensation after the court's finding that it was the appellant who breached the contract and not the respondent as alleged. Further to that, the appellant failed to prove how she deserves to be awarded Tshs 34, 500,000/= as no damages was proved to be suffered by her.

As for the last ground of appeal, Mr Mavura submitted that a judgment delivered by the trial Court were contrary to **Order XX Rule 4 of the Civil Procedure Code**, Cap 33 R.E 2019 by disregarding the evidence of the appellant and by relying to exhibit D1 while the names appear on

those documents were not parties to Civil Case No. 63 of 2019. He prayed for the appeal to be allowed with costs.

Responding to this ground, Mr Bwemelo submitted that in judgment writing each Magistrate has his/her own style though they are supposed to comply with **Order XX Rule 4 of the CPC** as it was decided in the case of **Amir Mohamed Vs Republic** [1994] TLR 138. He submitted further that the judgment of the trial court contains statement of the case, points for determination, the decision as well as the reasons for determination, thus, there is no merit on this ground.

In his brief rejoinder Mr Mavura reiterated what was submitted in his submission in chief.

From the submissions and arguments made for and against this appeal, the issue for determination is whether the appeal has merit. In determining this issue, I will start with the 4th ground of appeal separate and thereafter the 1st, 2nd and 3rd grounds of appeal jointly.

Starting with the fourth ground of appeal, the appellant faulted the trial magistrate that she composed her judgment without adhering to **Order XX Rule 4 of the Civil procedure Code**, Cap 33 R.E 2019 as he disregarded the plaintiff's evidence and thus the said judgment is null and void. She referred this court to the case of **Willy John Vs R.** (1956) E.A

509 as well as **P.T. Georges, C.J in R Vs Herizon Magori** (1970) HCD No. 148.

Looking at **Order XX Rule 4 of the Civil procedure Code,** it is all about the content of a judgment. It provides that:

> *"A judgment shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision."*

I have gone through the said judgment to see whether the trial magistrate complied with the above provision. I join hands with the counsel for the respondent that the trial magistrate complied with the provision as the same contains a concise statement of the case, points for determination, the decision and the reason for the decision. Further to that, the counsel for the appellant averred that the trial magistrate did not consider the evidence of the appellant (plaintiff's case). I have revisited the record and found that the trial magistrate discussed and considered the evidence of both sides. It should be noted that every magistrate has her own style of composing a judgment. At page 6 of the judgment the trial magistrate stated that the plaintiff failed to tender any evidence to explain on how her claim of Tshs. 54,000,000 was arrived at. So, this ground has no merit.

In determining the 1st, 2nd and 3rd grounds of appeal, I have perused the records and noted that the parties herein entered into an oral contract for the respondent to construct a Warehouse worth 55,000,000/= in the appellant's premises on agreement that the same will be off set as a rent from the expenses incurred in the building of the said warehouse for the period of three years.

It is the allegation of the appellant that the respondent breached the contract as he failed to honour their agreement whereas he was supposed to facilitate the appellant with the money to construct the warehouse. On the other side, the respondent alleged that the appellant breached the contract as he paid the appellant Tshs 28,000,000/= on various occasions but no construction took over as per their agreement.

Basing on the evidence adduced at the trial court there was no clear terms of contract entered between the parties regarding the mode of payment and dispute resolution in case one of the parties breaches the terms of contact. However, the claim of each party lies on who breached the contract. The appellant claims for payment of Tshs 50,557,000/= as specific damages and other payments upon breach of contract by the respondent. On the other hand, the respondent claims for Tshs. 33,000,000/= that he gave the plaintiff for construction of a warehouse

and legal costs for resolving the dispute. All those claims for both parties have no proof. **Section 110 (1) of the Evidence Act**, Cap.6 [R.E 2022] stipulates that: -

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

The same has been decided in the case of **Serengeti District Council and Another Vs. Maruko Sendi** [2011] TLR 334 that: -

> "*It is an elementary principle that he who alleges is the one responsible to prove his allegation.*"

In the record It is not clear as to who breached the contract. Thus, the claims for breach of contract have no basis.

In the case of **Rashid Protas Ndumbo Vs Titus Zeno Ndulu**, PC Civil Appeal 65 of 2021) [2021] TZHC 9068 (19 November 2021); (Tanzilii) that:

> "*Admittedly, proving an oral contract may be a daunting task, for that matter parties may consider involving witnesses for proof and future testimonial purposes; it is also advisable to create or preserve any physical evidence associated with the oral contract, such as letters, receipts, etc.; and oral contracts may be easily proved if there is a noticeable output when its terms are implemented. All the*

above three aspects may be established by the court by looking at the proven and accepted history that has transpired between two parties, which allegedly made a verbal contract."

Being guided by the authority above, I will focus on the rights of the parties as to the amount of money which was given to the appellant. Going through the record, it is evident through exhibit D1 collectively that the respondent gave the appellant a total amount of Tshs 14,880,000/= for construction of a warehouse. The appellant does not dispute to be given money by the respondent on two occasions and she admitted to have received Tshs.10,000,000/=. She clarified that the same amount was being given directly to her and sometimes to her brother (PW2). The PW2 averred that he had been going to the office of respondent to collect money and he used to sign the document. Thus, I am inclined to believe that the respondent gave the appellant the amount as appears in exhibit D1 collectively and not more than that.

That being said and done, the appeal is partly allowed. I hereby quash and set aside the decision of the trial court and proceed to order the appellant to pay the defendant Tzs 14,880,000/= only which was proved to be given to her. No order as to costs.

It is so ordered.

DATED at **ARUSHA** this 22nd day of September 2022.

N.R. MWASEBA

JUDGE

22/09/2022