IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 100 OF 2020

(Appeal from the Decision of the District Court of Kinondoni in Civil Case No. 23 of 2019)

MAMMUT HOLDING INTERNATIONAL LTD............ APPELLANT

VERSUS

FM CARGO LTD..RESPONDENT

JUDGMENT

28th September & 18th October, 2022

BWEGOGE, J.

The respondent above named, a transport company, commenced civil proceedings against the appellant herein for breach of contract. The respondent claimed payment of shillings one hundred seventeen million only (Tshs. 117,000,000/=) being an outstanding balance of the agreed sum, among others. The trial court had decided in favour of the

respondent. The appellant was not amused and preferred the appeal herein premised on six grounds as hereunder reproduced:

1. *That the trial magistrate misdirected herself in holding that the defendant breached the agreement which in fact didn't exist.*

2. *That the trial magistrate erred both in law and fact in permitting the respondent to rectify an error occasioned on the notice to produce and later on admitted the same, having sustained the objection to its admissibility.*

3. *That the trial magistrate erred both in fact and law by failure to properly evaluate the evidence tendered by the parties.*

4. *That the trial magistrate misdirected herself to have admitted the documents as exhibits, without complying with the procedural law pertaining to the admissibility of the same.*

5. *That the matter at the trial court was transferred from one magistrate to another without adhering to legal procedure.*

6. *That the trial magistrate misdirected herself to have ordered the appellant to pay a decretal sum without proof of the existence of the contract and loss specifically incurred.*

The facts of this case, in the interest of brevity, are as hereunder narrated: Sometime in June 2018, the respondent, a cargo haulage company, had entered into an oral agreement with the appellant herein for transporting cargo to Congo DRC through Tunduma Border. Two hauling trucks belonging to the respondent with registration No. T.609 CXC and T. 505

AWW were hired for transporting the appellant's cargo. One, Magnus Mapinduzi (PW1), the principal officer of the respondent, had deponed in court that it was mutually agreed that the appellant would pay Tshs. 250,000/= per day for the period in which the vehicles would be in transit. The purported agreed sum is the centre of the dispute which this court shall revert to, later on.

The hauling trucks departed on 22nd June, 2018. No payment was made prior to the departure, conceivably, based on mutual trust between the parties herein. Later on, PW1 prepared a statement of account (exhibit PE1) and sent it to the respondent as a reminder of their contractual agreement. Thereafter, followed a chain of communications between the parties herein which the appellant now seeks to disengage from. It seems, the dispute that arose between the parties herein on the payable amount, among others, resulted in the hauling trucks remaining stuck at the border for several months before the goods were localized and offloaded.

Then, on 29th January, 2019, the respondent instituted a claim against the appellant at the tune of Tshs, 117,000,000/=, being unpaid contractual amount; interests thereon and costs of litigation. The appellant had vehemently disputed the total amount claimed by the respondent. The appellant's defense, martialled by one Wakati Kabaka (DW1), was to the

effect that the contractual transportation period was only 15 days. And, the agreed transportation costs to the tune of Tshs. 19,500,000/= was paid to the respondent through the bank.

The trial court, having heard both parties and considered the documentary evidence tabled before it, had found the appellant liable for breach of contract. The trial court ordered the appellant to pay the respondent Tshs. 117,000,000/= being the outstanding amount due and payable to the respondent. The appellant was also condemned to pay the costs of litigation. Hence this appeal.

The appellant was represented by Mr. Ally Jamal whereas the respondent was represented by Mr. Deogratias Ogunde, the learned advocates. The appeal herein was argued orally. The presentations of both counsel above named will feature in the discussion of the grounds of appeal hereafter.

Now, this court proceeds to canvass the preferred grounds of appeal sequentially, commencing with the 1st ground. The complaint herein is to the effect that there was no agreement between the parties herein which the appellant could have broken. The counsel for the appellant had premise his argument on the fact that there were no clear terms in respect of the agreement entered between the parties herein and the trial court

had failed to resolve the issue. The question on whether the terms of the agreement lacked clarity, shall be discussed while canvassing the last issue. Otherwise, the question on whether there was a contract or not between the parties herein, need not detain this court. Based on the evidence on record, this court would not tarry to hold that the parties herein contracted verbal agreement. One, Wakati Kabaka (DW1), the principal officer of the appellant, conceded to this fact. As well submitted by the counsel for the respondent, the dispute herein is not on the existence of the contract between the parties herein, but on the amount payable by the appellant as transport costs. The 1st ground of appeal collapses.

The complaint in respect of the 2nd ground of appeal is premised on the ground that the trial magistrate had sustained the objection on the admissibility of the document. Later on, the trial magistrate allowed the counsel for the respondent to rectify an error occasioned, which was the ground of objection, and then admitted the same document in evidence. The counsel for the respondent has forcefully submitted that it was unprocedural on part of the court to have allowed the counsel for the respondent to correct the error having ruled that the objection on the admissibility of the impugned document was meritorious. In the quest to

find the veracity of the complaint advance by the appellant's counsel, this court reverts to the proceedings of the trial court dated 08th October, 2019.

The record of the trial court on the date mentioned above entails that PW1 had attempted to tender a letter from the appellant's principal Officer, titled "RE: PAYMENT PLAN FOR THE TWO HORSE TRUCKS RENTAL WITH REGISTRATION NO. T. 609 AND T. 505 AWW." The said document was said to have been received from the appellant's principal officer through email. Thus, it was a scanned document. Previously, on 20th August, 2019, the respondent's counsel had served notice to the appellant to produce the original copy of the said letter which was in its possession so that it could be tendered in evidence. And, the notice made it clear that the secondary document in possession of the respondent would be tendered as evidence in the event the appellant failed to produce the same. It seems the appellant had not taken heed of the notice. And the PW1 had tendered the primary document into his possession as proof of communicated concession on part of the appellant.

Further, the record entails that the counsel for the appellant had objected admission of the relevant document on the following grounds: **First**, it

was a copy of the original; **second**, the notice to produce the aforementioned document didn't indicate that the document was sent by the appellant's principal officer through email. The trial magistrate had conceded the fact that the notice to produce was valid in law but it failed to state that the document required to be produced was sent to the respondent via email. Then the trial magistrate had sustained the objection, but in the interest of justice, allowed the respondent's counsel to amend the notice and serve the same to the appellant. The matter was adjourned and scheduled for hearing on 17th October, 2019.

When the matter was brought for hearing, the counsel for the appellant had stated in court that the original letter demanded to be produced could not be found. Therefore, he stated that he had no objection to the admissibility of the secondary document in that respect. The trial magistrate had admitted the document as exhibit PE3. This procedure adopted by the trial court is what the counsel for the appellant alleges was improper and prays this court to expunge the exhibit from the record of this case. This prayer is patently misconceived. This court is of the considered opinion that the trial court had no legal justification to sustain the purported objection having ruled that the notice to produce served to

the appellant was valid in law, save the missing magical words entailing the fact that the document was communicated by email.

The counsel for the appellant herein has prayed this court to evoke the decision in the case of **Vicfish Ltd. vs. The Registered Trustees of the Roman Catholic Diocese of Kigoma and Another,** Civil Appeal No. 14 of 2017 HC (unreported)and expunge this documentary evidence from the record of this case. This court join hands with counsel for the respondent in that the case cited doesn't fit into the context of this case. In the said case, the court found that the trial court had admitted in evidence the xerox of the inspection report without the witness explaining why original copies could not be tendered in evidence. Consequently, the appellate court expunged the relevant document from the record. This is not the issue before this court.

It suffices to point out that, the appellant having received the notice requiring them to produce the original document, and failed to do so, had no valid ground to object to the admissibility of the secondary document. There is no gainsaying that the appellant's counsel in the trial court didn't renounce the fact that it was sent from the appellant. Based on the observation made above, this court finds no ground to fault the procedure adopted by the trial court in admitting the impugned secondary document.

In fact, it would have been unprocedural for the trial court to have refused to admit the document in evidence having ruled that it was preceded by valid notice to produce duly served to the appellant. The second ground of appeal collapses as well.

The 3rd ground of appeal avers that the trial magistrates failed to evaluate the evidence tendered by parties. The submission made by counsel for the appellant in support of this ground of appeal is to the effect that the issue before the trial court was whether there was a contract between the parties herein whereas the trial magistrate had failed to properly resolve the same. That the documentary evidence tendered didn't prove the existence of the contract. Further, the counsel charged that the trial court had accorded weight to the documentary evidence from one Wilfred Rwiza who is not the employee of the appellant. That, had the trial court properly analysed the evidence, it would have not reached the impugned decision.

This ground of appeal need not detain this court as well. Upon scrutiny, this court apprehends that though the 1st and 3rd grounds of appeal purport to be two and different grounds in averments, yet the submission by the counsel is premised on the same argument in that the contract between the parties herein was inexistent. And, this court reiterates the previous stance that the documentary evidence notwithstanding, there is

an admission on record of the trial court from the sole defence witness (DW1) in that the parties herein contracted verbal agreement. Likewise, the 2nd paragraph of the written statement of defence filed by the appellant at the trial court speaks volumes of this fact. This court finds it pertinent to restate the fact that the dispute between the parties herein is not on the existence or nonexistence of the contract, but on terms of the contract, specifically, on payable transportation costs. The assertion that one Wilfred Rwiza was not the employee of the appellant but a stranger without power to make any concession on behalf of the company shall be dealt with in discussing the last ground of appeal. Hence, the 3rd ground of appeal herein lacks ground to stand and collapses.

The averment in the 4th ground of appeal alleges that the trial magistrates erred in admitting the documentary evidence without compliance with the procedural rules. This allegation, as submitted by counsel for the appellant, is based on two premises: **First**, the documents were not read in court after they were admitted in evidence. **Second**, exhibit PE3 (Payment Plan) was tendered by the respondent's advocate instead of the witness. The counsel for the respondent herein countered that the procedure of reading the documentary evidence in court is applicable in criminal proceedings and the case of **Robison Mwanjis and 3 Others**

vs. Republic [2003] TLR 218 cited by the counsel for the appellant is inapplicable in this case.

This court is on all fours with the counsel for the appellant in that the forecited case of **Robison Mwanjis** is distinguishable from this case. In the relevant case, the superior court was faced with the complaint that the caution statement of the accused person was not read in court having admitted in evidence. The court had this to say:

> *".......exhibit PI was not read over in court after admission. This means that the appellant admitted something whose content he did not know."* (Emphasis mine).

Further, the court observed:

> *"..............it is clear that after exhibit PI was tendered and cleared for admission, it did not complete the third stage of being read out in court so that its contents could be heard by the appellant."* (Emphasis mine).

It is apparent in the holding of the superior court that the court had admitted a caution statement whose content the appellant didn't know and had no means to know. Further, the court made it clear that the

purpose of reading out in court the admitted document is to enable the accused person to hear the incriminating content of the document tendered against him. Now, reverting to the matter before this court, can it be said with certainty that the appellant didn't know the contents of the documents admitted in evidence in the trial court? The answer is negative. The matter herein being a civil proceeding, the parties herein had ample time to exchange pleadings with annexures intended to be tendered in evidence to avert either party being taken by surprise. Hence, the appellant cannot be heard complaining that the trial court had admitted the documentary evidence whose contents were not known. Further, exhibit PE1 (statement of account) bears acknowledgment of one Seif Othman by the title of the General Manager. And, the remaining documents (exhibit PE1 and PE2) imply they were authored by the appellant's principal officers. Therefore, this court finds no procedural sin committed by the trial court. The allegation that the exhibits were tendered by the advocate is not supported by the record of the trial court. The 4th ground of appeal is found without substance.

The charge in the 5th ground of appeal is to the effect that the case at the trial court was improperly transferred to several trial magistrates without compliance with the laid down procedure pertaining to the transfer of a

case from one magistrate to another. The counsel for the appellant alleged that the case having remitted to the assigned mediator who had failed to mediate the parties herein was returned to the trial magistrate without being remitted to the resident magistrate in charge for assignment to the trial magistrate. With due respect, this is not the procedure. When mediation fails, the mediator is supposed to remit the case to the trial magistrate who was previously assigned to preside over the case. It doesn't make any difference if the mediator opts to remit the relevant case directly to the trial magistrate or through the resident magistrate in charge who had assigned her/him the case for mediation.

It was also alleged by the counsel that the matter herein happened to be before resident magistrates namely, Hon. Mushumbuzi and Hon. Houd, without assigning the reasons for the transfer of the case. This court subscribes to the counsel for the appellant in that it is a rule of the law that a successor judge or magistrate has an obligation to put on record why he/she has to take up a case that is partly heard by another [**M/S. Georges Centre Limited vs. The Honourable Attorney General**, Civil Appeal No. 29 of 2016 CA (unreported)]. This rule is intended to facilitate transparency in the justice delivery and enhance the integrity of the judicial proceedings [**Kajoka Masanja vs. The Attorney and**

Principal Secretary Establishment, Civil Case No. 153 of 2016 CA (unreported). Likewise, the rule is intended to facilitate case management by the trial judge or magistrate and promote accountability [**Fahari Bottlers Ltd., and Another vs. Registrar of Companies and Another** [2000] TLR 102].

Notwithstanding the above acknowledgment, as well submitted by the counsel for the respondent, the case herein was never heard by more than one trial magistrate. And, the record is clear in that the case was once mentioned before Hon. Mushumbuzi. The other mentioned magistrate presided over the case when the decree-holder had filed an application for execution before the record of the trial court was called for the purpose of this appeal. Therefore, it is obvious that the 5th ground of appeal lacks ground to stand. Hence, it likewise collapses.

Now, at this juncture, this court proceeds to canvass the last and pertinent ground of appeal herein which is comprised of two limbs. In the first limb, it is alleged that the trial magistrate misdirected herself in declaring the respondent entitled to payment of a decretal sum for breach of contract without proof as to the existence of the terms of the purported contract. In the second limb, it is alleged that specific damages prayed for and

granted were not proved. The allegation made in the first limb above, surfaced in the submission made by the counsel for the appellant while substantiating the 1st ground of appeal. This court had opted to tackle the same simultaneously with the 6th and last ground of appeal herein.

In substantiating the first limb herein above mentioned, the counsel for the appellant had forcefully submitted that the terms of the contract entered by the parties herein are not clearly known. That the pleadings filed by the respondent herein averred that it was agreed the appellant would pay Tshs. 250,000/= to the respondent for each day of the use of the hauling vehicle whereas the appellant had vehemently refuted the averment. That the same contentions are found in the testimonies of PW1 and DW1. It is on this ground that the counsel invited this court to hold that there was no valid agreement between the parties herein.

Further, in substantiating the 2nd limb of the last ground of appeal, the counsel submitted that the prayer for drivers' allowances which are in substance special damages was not proved. Hence, opined by counsel, the decretal sum of Tsh.117, 000,000/= cannot be justified.

This court apprehends that, in alleging that the contractual terms were not certain, impliedly the counsel evoked a rule that the agreement is void

for uncertainty [***Alfi East Africa Ltd vs.Themi Industries & Distributors Agency Ltd*** *(1984) TLR 256 CA*]. However, to arrive at the conclusion that the agreement is void for uncertainty, the provision of s. 29 of the Law of Contract Act [Cap. 345 R.E 2022] obliges the court to satisfy itself that not only the meaning of the agreement is not certain, but also incapable of being made certain. See also **Nitin Coffee Estates Ltd v United Engineering Works Ltd** [1988] TLR 203 CA.

Previously, this court made it clear that there is no dispute in respect of the existence of the contract between the parties herein. Both parties herein were at one in respect of this fact. The dispute is centred on the terms of the agreement entered by the parties herein. Based on the record of the trial court, this court apprehends that both parties herein have attempted to exploit the opportunity provided by their unwritten agreement to suit their interests. It is obvious that the respondent has inflated the claim whereas the appellant had attempted to lower the claim at a possibly lower amount.

PW1 had deponed in court that the respondent had agreed with the appellant to transport cargo (excavator) to Congo DRC. Two horse trucks were hired to haulage the cargo. The agreed charges were Tshs.

250,000/= per day for all days which each hauling truck would use to travel to Congo DRC and back in Dar es Salaam. The charges claimed by the respondent indicated on the pleading filed in court is Tshs. 117, 000,000/= which included the allowances paid to the drivers during the said trip. The haulage vehicles left Dar es salaam on 22nd June, 2018. It is obvious that the trucks remained stranded at Tunduma Border for unknown reasons until January 2019. PW1 blamed the appellant for failure to pay taxes and other charges timely and caused the vehicles to remain at the border for seven (7) months. The same allegations are found in the pleadings filed by the respondent at the trial court.

On the other hand, DW1 had conceded and acknowledged the existence of the oral contract entered between the parties as deponed by PW1. However, he contended that the appellant agreed to pay the respondent for 15 days only, the period estimated for delivery of the cargo to Congo DRC. The agreed sum was Tshs. 19,000,000/= which the appellant duly paid. However, DW1 could not prove the purported payment though he claimed the respondent was paid through the bank. Otherwise, DW1 blamed the appellant for the delay of the hauling vehicles to cross the border without furnishing particulars. The written statement of defence contains the averment that the appellant didn't fail to pay charges and

taxes at the border, but had opted to localize the cargo whereas the respondent refused to offload the cargo until paid transportation costs. No further particulars were given pertaining to the actual unpaid amount and when exactly the appellant had opted to localize the cargo to clear itself from the blame that it occasioned the delay for the vehicles to cross the border.

It is obvious, the evidence adduced by PW1 and DW1 doesn't provide sufficient information pertaining to the agreed transportation costs, and this court opts to resort to documentary evidence. The exhibit PE1 is the statement of the account authored by PW1 in his capacity as the General Manager, on behalf of the respondent, and communicated to the appellant. It contains particulars of the claim for the transportation costs and incidental charges accrued against the appellant. It comprised hire fees of the two hauling vehicles and allowances paid to the drivers. The total claim was Tshs. 114,000,000/=. The document is dated 23rd January, 2019.

In the same vein, Exhibit PE3 is the payment plan authored by one Wilfred Rwiza, identified as Head of Logistics of the appellant. The document is dated 25th January, 2019. For ease of reference, this court finds it fit to reproduce the contents of the letter as under:

"REF: MAMMUT/01/FM/19

25TH JAN. 2019

TO: MANAGING DIRECTOR,

FM CARGO LIMITED,

P.O. BOX 4618,

DAR ES SALAAM

RE: PAYMENT PLAN FOR THE TWO HORSE TRUCKS RENTAL WITH REG. NO. T 609 CXC AND T. 505.

Reference is made from the last statement of account received on 24/01/2019 with Ref. no. FM 20191. The Board has gone through the statement and has acknowledged it but has suggestions also on the matter.

- *There was a meeting held before regarding the payment and you agreed to reconsider the amount raised due to the situation of each side. As we are all doing business, we agreed to at least give us some relief on the charges per truck per day due to the time passed.*
- *As for this, we have sat and agreed to pay you with this plan according to our financial status:*
    - *Total amount to be paid –* ***Tshs. 86,000,000/=.*** *Thus, we ask for a discount on the charge for the driver's cost and make* ***Tshs. 200,000/=*** *for each truck per day.*
    - *We will pay* ***Tshs. 20,000,000/=*** *immediately after acceptance of our payment plan through the bank.*
    - *We will pay the rest of the amount for six-month installments equally, thus* ***Tshs. 11,000,000/=*** *each month.*

- *We will give you a registration card of our one machine- **Back Hoe Loader 4cx** with a value of **USD 40,000/=** as security for the amount remaining.*

Regards,

signed

WILFRED RWIZA

HEAD OF LOGISTICS."

It is a glaring fact that the correspondence cited above refers to the claim stated in the statement of accounts (exhibit PE1) prior communicated by the respondent's principal officer (PW1). Further, the email conversation between Mr. Wilfred Rwiza and PW1 is indicated in exhibit PE2 whereas, in substance, the respondent refused the offer made by the appellant based on the length of duration proposed for debt payment. It is apparent that the document produced above bears concessions that: **"The Board has gone through the statement and has acknowledged it,...total amount to be paid is 86,000,000/.**" This court finds it safe to rely on the payment plan (exhibit PE3) to ascertain the agreed payable transportation costs. It is obvious the claimed costs for drivers' allowances were not part of the agreement. Therefore, this court subscribes to the submission made by the counsel for the appellant in that the purported allowances were in fact special damages which were

supposed to be strictly proved. In this respect, this court finds substance in the second limb of the 6th ground of appeal.

Otherwise, this court refuses to purchase the argument that one Wilfred Rwiza, who identified himself as the Head of Logistics, is a stranger to the company who could not communicate concessions made by the appellant. It is obvious that a stranger could not have possessed so much information depicted in the pleadings filed hereto and the claim made by the respondent against the appellant herein. Likewise, this court rejects the averment made in the written statement of defence and replicated in the testimony of DW1 that the appellant had discharged its contractual obligation by effecting payment to the respondent at the tune of Tshs. 19,000,000/= through the bank. The defendant had all means to prove the fact albeit by bank statement. Assuming the appellant had proved the payment purported to have been made, yet it could not have freed itself from the liability as the payment would have covered 19 days only of using the hauling vehicles whereas it is a fact that the vehicles remained bogged at the border for seven (7) months.

This court is of the considered opinion that had the delay solely occasioned by the respondent, the appellant would have given sufficient particulars in the pleadings filed hereto and, or in evidence adduced by

DW1. The reason explained in the pleading that the vehicles couldn't cross the border following their resolution to localize the cargo doesn't account for the lengthy period the vehicle remained bogged down at the border. And, the averment that the respondent refused to offload the cargo at the border until paid their transportation costs, further justify the respondent's claim since there are no particulars explaining the reason behind the failure to pay the respondent timely.

It suffices to point out that the appellant seeks to avoid the contract and liabilities emanating therefrom to the financial detriment of the respondent. Justice forbids it. There is no gainsaying that efficient contract enforcement in any society is essential to economic development and sustained growth. For this reason, it is a public policy that commitments made freely between parties must be honoured. This principle is implicit in the case of **Simon Kichele Chacha v. Aveline M. Kilawe**, Civil Appeal No. 160 of 2018, CA (unreported) whereas it was aptly held:

> *"It is settled law that parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is, there should be sanctity of the contract"*

Further, citing the case of **Abualy Alibhai Azizi Vs. Bhatia Brothers Ltd** [2000] T.L.R 288 the court said:

> *"The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) of misrepresentation, and no principle of public policy prohibiting enforcement"*

The above principle is a restatement of the law of this land under the provisions of s.37 of the Law of Contract Act whereas it is aptly provided:

> *"The parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or of any other law."*

In fine, this court finds merit in the complaint that the special damages included in the decretal sum were not proved. Appeal partly allowed. For clarity, it is hereby ordered as follows:

1. The decretal sum awarded by the trial court against the appellant is hereby altered and reduced to the tune of Tshs. 86,000,000/= only.

2. The interest of 7% shall accrue to the judgment debt from the date of judgment to the date of satisfaction in full to insulate the decretal sum from inflation and devaluation.
3. Order of payment of costs entered by the trial court against the appellant remains undisturbed.

DATED at **DAR ES SALAAM** this 18th of October, 2022.

O. F. BWEGOGE

JUDGE

The judgment has been delivered this 18th October, 2022 in the presence of Mr. Deogratias Ogunde, Counsel for the respondent who has also held a brief for Mr. Ally Jamal, counsel for the appellant.

Right of appeal explained.

O. F. BWEGOGE

JUDGE