

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOPA DISTRICT REGISTRY

AT BUKOPA

(PC) CIVIL APPEAL NO. 13 OF 2022

(Arising from Civil Appeal No. 15 of 2021 in the District Court of Bukoba at Bukoba and Originating from Civil Case No. 19 of 2021 in the Bukoba Urban Primary Court)

NLAM KABANGE----- APPELLANT

VERSUS

SARAPION CHRISTIAN----- RESPONDENT

JUDGMENT

Date of Last Order: 21/03/2022

Date of Judgment: 01/04/2022

A. E. Mwipopo, J.

This appeal originate from Civil Case No. 19 of 2021 in the Bukoba Urban Primary Court. The appellant namely Nlam Kabange was sued in the Primary Court by the respondent namely Sarapion Christian claiming for payment of 1,454,000/= shillings for breach of contract. The trial Primary Court dismissed the case for want of merits after it found that the respondent is the one who breached the contract. The respondent appealed successfully to the District Court which found that the respondent to the large extent has fulfilled the terms of agreement. The District

Court ordered the appellant to pay a total of 1,000,000/= shillings to the respondent where he has to pay by instalment of 125,000/= shillings each month for eight months. The appellant was not satisfied with the decision of the District Court and he filed the present appeal.

The Petition of Appeal filed by the appellant contains six grounds of appeal as follows hereunder:-

1. *That, the Resident Magistrate erred in law and fact for holding that the appellant breached the terms of contract.*
2. *That, the Resident Magistrate erred in law and fact for holding that the respondent breached minor term of contract which cannot end the contract.*
3. *That, the Resident Magistrate erred in law and fact by disregarding and not giving due weight the evidence of the appellant and his witness which was heavier than that of the respondent.*
4. *That, the first appellate Court erred in law and fact for not holding that the respondent failed to prove his case on balance of probabilities.*
5. *That, the learned Magistrate erred in law and fact for ordering the appellant to pay the respondent the amount of 1,000,000/= shillings without any justifiable reasons and evidence to prove the same.*
6. *That, the learned Magistrate erred in law and facts to act as an executing officer while the matter was on appeal.*

The appellant, who appeared in person, said on the first ground of appeal that the contract clearly shows that the respondent breached the contract by failure to pay 10,000/= shillings each day for 3 consecutive months as it was

agreed in the contract. On the second ground of appeal, he said that it is not true that the respondent fulfilled the terms of contract to a large extent as the term of contract which was breached was not minor. He said on the 3rd ground of appeal that the Resident Magistrate did not give weight to the evidence adduced by the appellant and his witnesses. On the 4th ground he said it is clear from the evidence that the respondent failed to prove his claims against the appellant. On the 5th ground of appeal appellant said there is no evidence at all to prove that the respondent has claims of 1,000,000/= shillings the applicant was ordered to pay the respondent without any justifiable reasons. He said on the last ground of appeal that trial court erred to order payment of specific amount of money as cost while the matter was on appeal and not as application for execution.

In his response, the respondent who also appeared in person said on the 1st ground of appeal that it was the appellant who breached the contract. The contract does not say he has to pay 10,000/= shillings per day every day. The respondent said on the second ground that it was the appellant who cancelled the contract. On the 3rd ground of appeal, he said that the amount to be paid was agreed by both parties. He said on the appellant's 4th ground of appeal that there is nothing to show that it is the respondent who breached the contract as he proved that there was breach of contract as result the appellant has to compensate him. He said on the 5th ground of appeal that they agreed the appellant has to pay

1,000,000/= shillings following the prayer by the appellant to plea for reduced amount of compensation. The appellant was supposed to pay all cost he has incurred in the contract. On the last ground of appeal, the respondent said that there was no execution order given but it was the judgment of the court that the payment of the compensation was ordered.

In his brief rejoinder the appellant said that the evidence in record proved that the respondent admitted to commit the breach of contract and it was his Guarantor who took the motorcycle from the respondent and handled it to the appellant. Thus, he was not the one who breached the terms of contract.

From submissions, the issue for determination is whether or not the appeal has merits.

There is no dispute that the appellant and the respondent signed a contract where the appellant lend the motorcycle with No. MC 447 CHX to the respondent on condition that the respondent has to pay a total of 4 million shillings within 400 days for the motorcycle to be his property and that the respondent has to pay on each day shillings 10,000/= for all 400 days. The only dispute is who breached the said contract between them. The trial Primary Court held that it was the respondent who breached the contract for his failure to pay any amount of money to the appellant for 3 months and 12 days. In the appeal, the District Court held that it was the appellant who breached the contract as the failure to pay on daily

basis for 3 months and 12 days was a minor breach of contract and the respondent has fulfilled the contract to the large extent.

The Law of Contract Act, Cap. 345, R.E. 2019, provides in section 37 (1) for the duty of the parties to the contract to perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or of any other law. The said promises are found in the terms specified in the said contract or implied by the nature of it or implied by law. It is a cardinal principle of the law of contract that parties are bound by their agreements they freely entered into. Further, it is a settled law that there should be a sanctity of the contract. In the case of **Abualy Alibhai Azizi v. Bhatia Brothers Ltd [2000] T.L.R 288** it was held at page 289 that: -

"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"

In the present case, the evidence available in record shows that the respondent who testified as SM1 said that on 16th June, 2020 he entered into a contract with the appellant where he was given motorcycle by the appellant on condition that he deposit shillings 10,000 on each day. He said that after some time he failed to deposit the said amount to the appellant for three months and twelve days as he got some problems and he pleaded to the appellant to persevere

him. He said that after sometime the respondent received a call from his surety that he has to return the motorcycle to the owner and after he handled the motorcycle to the appellant the surety discharged himself from guaranteeing him. The respondent said that at the time the motorcycle was in his possession he deposited a total of 1,230,000/= shillings.

The appellant who testified as SU1 in the trial court said that it was the surety (SU2) who asked the respondent to return the motorcycle to him after the respondent failed to deposit anything for more than three months. The appellant said that he is not indebted by the respondent. The SU2 testified that he was the surety of the contract between the applicant and the respondent. He knew that the respondent was supposed to deposit to the appellant 10,000/= shillings everyday but the respondent breached the agreement for three months. He discharged himself as respondent surety and the motorcycle was returned to the appellant.

From this evidence in record, the condition in the said contract was for the respondent to deposit 10,000/= shillings each day until a total of 4,000,000/= shillings is reached within 400 days for the said motorcycle to be respondent's property. The respondent failed to meet the condition following failure to deposit any amount of money for 3 months and 12 days. It is clear that it was the respondent who breached the said contract. The SU2 testified that it was him who

ordered the respondent to return the said motorcycle to the appellant and he discharged himself from guaranteeing him as surety following the breach of contract. Thus, it was not the appellant who asked the respondent to return the motorcycle.

The District Court when determining the appeal filed by the respondent held that it was the appellant who breached the contract for the reason that the breach of contract by the respondent for not paying the agreed daily amount for 3 months and 10 days was minor and it does not go to the gist of the said contract. The condition breached is not the main consideration in the contract.

I do not agree with this holding of the District Court. The agreement in the said contract was for the appellant to hand his motorcycle to the respondent who has to pay on each day the motorcycle was on his possession 10,000/= shillings for 400 days for the motorcycle to be respondent's property. The payment of 10,000/= shillings on each day for 400 day is the core condition of the said contract. It is the consideration in the said agreement between the appellant and the respondent. The evidence in record reveals that the respondent paid the said amount up to 10.11.2020 which is almost five months after the commencement of the contract and he stayed with the said motorcycle for 3 months and 12 days without paying anything. This could not be said that it was a minor breach in the said contract bearing in mind that the contract was supposed to end on 26.07.2021

without paying anything. Ineptly, the record shows that the appellate Magistrate went further by asking the appellant how he was going to pay for the said amount awarded to the respondent after the judgment was delivered. This was expected to be done at execution stage and not in appeal stage.

From the above discussed points, I find that the appeal has merits and I allow it. The decision of the District Court is revised and the order made therefrom is set aside. The decision of the trial Primary Court is hereby upheld. Under the circumstances of this case, each party has to take care of his own cost. It is so ordered accordingly.



A.E. Mwipopo

Judge

01.04.2022

The Judgment was delivered today, this 01.04.02022 in chamber under the seal of this court in the presence of the Appellant and the Respondent. Right of appeal explained.



A. E. Mwipopo

Judge

01.04.2022