

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY)**

AT MWANZA

PC CIVIL APPEAL NO. 10 OF 2021

*(Arising from Civil Appeal No. 31 of 2021 in the District Court of Geita at Geita
Original Civil Case No. 127 of 2020 of the primary court of Nyankumbu at Geita.)*

NHYAMA ANDREA KANYALA----- APPELLANT

VERSUS

MAJALIWA INVESTMENT CO. LIMITED -----RESPONDENT

JUDGMENT

Last Order: 22.03.2022

Judgement Date: 13.05.2022

M. MNYUKWA, J.

This is the second Appeal where the appellant, **NHYAMA ANDREA KANYALA** appealed against the decision of Geita District Court in Civil Appeal No. 31 of 2021 before Hon. S.L. Maweda, SRM. It goes that, the respondent filed a case in the Primary Court of Nyankhumbu claiming from the appellant a sum of Tshs. 7,500,000/=being the failure of the appellant to honour the terms of the contract. The trial court ruled in favour of the applicant. Dissatisfied, the respondent appealed to the District Court of Geita whereas the District Court upheld the decision of the trial court.



Dissatisfied again, the appellant appeared before this court with two grounds of appeal as follows: -

1. That the appellate court erred in law and in facts by holding that the civil Case No. 127 of 2020 filed in the trial court concerned a breach of contract and breach of contract is not a land-related matter.
2. That the appellate court erred in law by its failure to address, decide and resolve whether or not the purported breach of the said contract, if any, was accessioned by impossibility in performance by either party to it or otherwise, hence left the appeal undecided.

The appeal was argued orally whereas the appellant employed the service of Mr. Laurent Bugoti learned counsel and the respondent had the service of Mr. Ernest Makere learned advocate.

Submitting on the first ground of appeal, Mr. Bugoti submitted that section 167(1) of the Land Act Cap 113 R.E 2019 and section 3(1) of the Land Disputes courts Act Cap 216 R.E 2019 and reverting to the matter at hand he avers that the trial court is bared in terms of jurisdiction to entertain the land matter as was in the case at hand. He went on citing section 4(2) of the Land Disputes courts Act Cap 216 R.E 2019 insisting



that courts established under Magistrates Courts Act have no jurisdiction over land matters including the breach of contract which originates from land matters.

He cited the case of **Abdul Rahim Shadhili as guardian of Miss Fatuma A.R. Shadhili vs Mandhar Govind Rayker** Civil Appeal No. 296 of 2004 HC DSM, he refers to pages 12, 15, 17 and 25 which he claims that the circumstance of this case is similar to the case at hand. He avers that this court declared that the District Court had no power to entertain a breach of contract relating to land. He also cited the case of **Charles Riki Mlaki vs Wiliam Jackson Magero, Civil Appeal No 69 of 2017. HCT at Mwanza** referred by this court in the case of **Exim Bank Tanzania Limited vs Impex TZ & Others** land case No. 29 of 2008 insisting on the criteria that the court consider on whether a matter is a land dispute or not.

In the case at hand, he avers that at a trial court among reliefs prayed was that the defendant to pay land Tax from the date of the transfer of the right was done. He, therefore, insisted that based on the relief claimed, the matter was a land dispute and the primary court had no jurisdiction to entertain the same.



On the 2nd ground of appeal, he avers that the contract was frustrated by the government and as a result, parties failed to fulfil their agreement. He insisted that the 1st appellate court did not decide on that ground of appeal. He claims that the 1st appellate court determined the ground thereafter which was to be held as to whether the contract was frustrated or not.

He insisted that the failure of the 1st appellate court to determine that ground, left the rights of the parties not determined and the dispute was left unsolved. He, therefore, insisted that the appeal be allowed.

Responding to the appellant's submissions, Mr Ernest Makere learned advocate remarked on the appellant's submissions. On the 1st ground of appeal, he avers that the appellant who entered into an agreement to purchase a piece of surveyed land from the respondent on 10.06.2015, in respect of plot No. 240 Block B Kanyara Geita. The respondent fulfilled his obligation and handed to the appellant title No. 53338 for plot No. 240 Block B on 25.06.2015. the agreement requires the appellant to pay for the plot a sum of Tsh 7,500,000/= within 60 days after the signing of the agreement which was done on 10.06.2015. He went on that, the appellant failed to pay and that was the cause of action. He insisted that, the matter is not a land matter for the cause of action is



not attached to land but rather to a person for he failed to pay according to the agreement entered.

He went on that, the primary court under section 18(1)(a) of the Magistrates' Courts Act, Cap 11 R.E 2019 has jurisdiction to entertain the matter and the case cited by the appellant of **Abdallah Rahim** (supra) is distinguishable for the plaintiff demanded a piece of land and not payments as to this appeal at hand.

He went on that, the case at hand the cause of action is the breach of the contract for the appellant failed to honour the terms of the contract and the cited cases of **Charles Riki Mkaki** (supra) is also distinguishable. He went on that the court was proper to frame issues in respect of the breach of the contract. He, therefore, prays this ground to be dismissed.

On the second ground of appeal, he insisted that issues between parties lied on the agreement and the appellant failed to honour the agreement for more than four years. He avers that, the appellant did not present any written directive by the government and therefore fails to prove his claim. He avers that the respondent tendered both the contract and the title to show how he fulfilled his obligation under the contract. Referring to section 25 of the Law of Contract Act, Cap 345 RE: 2019, he avers that the contract had all qualities needed and also referring to



section 65 of the Law of Contract Act, Cap 345 RE: 2019 avers that after the respondent performed his part as agreed and it was the obligation of the appellant to perform his part. In his final tone, he prays this court to dismiss the appeal for lack of merit with costs.

In a brief rejoinder, Mr. Bugoti learned advocate reiterating his submission in chief, he insisted that the matter at hand is a land matter and it is a breach of contract in relation to a land matter for which the trial court has no jurisdiction.

On the 2nd ground of appeal, he avers that frustration is the unforeseen event which cannot be kept in the agreement and the government frustrated the agreement by terminating the pension of the appellant that could have enabled him to pay for the debt. He retires and prays this court to allow the appeal with costs.

After the submissions from both learned counsels, I am now placed in the position to determine the two raised grounds of appeal. Having in mind that this is the second appeal, I am settled that the duty of this court is to evaluate the matter of law and not the matter of facts. In the case of **Helmina Nyoni vs Yeremi Magoti** Civil Appeal No. 61 of 2020, it was held that: -



"...the jurisdiction of the court sitting as the second appellate court is limited to consideration of points of law only, as this court has stated on several occasions, on the second appeal the court can only interfere with findings of facts by the courts below if in evaluating the evidence the courts below misdirected themselves and in so doing occasioned miscarriage of justice to the appellants".

On the determination of the first ground of appeal, it is on records that Mr. Bugoti claims that the cause of action was based on land and it was wrong for the trial court and the 1st appellate court to hold that their cause of action resulted from the contractual relationship between parties and was a breach of a contract. The respondent learned counsel opposed the appellant's claims and insisted that the cause of action resulted from the breach of contract as rightly held by the trial court and the 1st appellate court. In determining as to what was the cause of action, it is clear that to determine the cause of action, the court must go to the parties' pleadings. It was stated in the case of **Musanga Ng'anda Andwa v. Chief Japheth Wanzagi and Eight Others** [2006] TLR 351 that: -

"...a cause of action means every fact which would be necessary for the plaintiff to prove in order to support his title to a decree; in other words, a cause of action is the sum total of those allegations upon which the right to relief claimed is founded the



court went further that, in determining a cause of action, only the plaint together with anything attached should be looked at”.

I agree with the cited case of **Charles Riki Mlaki** (supra) which held inter alia that for the court to find out the cause of action, the court has to resolve to the pleadings. (See also **Stanbic Finance Tanzania Ltd v. Giuseppe Trupia and Chiara Malavasi** [2002] TLR 217 **Hussein Bhanjee v. National Insurance Corporation (T) Ltd** [1977] LRT No. 26.

Going to the records, it is clear that the plaintiff before the trial court sued the respondent for the unpaid monies amounted to Tshs 7,500,000/- being a sum agreed to be paid to the plaintiff in the contract of sale which was partly performed by the plaintiff. It is obvious to me that, the claim was directed to the sum of unpaid monies and not to the land as rightly heard by the two courts below. It is clearly shown on the pleadings that parties entered into a contract of sale of a plot of land exhibit KEP 5 in consideration of Tshs 7,500,000/-. The seller performed his obligation as stipulated and prepared all necessary documents including exhibit KEP6 (title deed on plot No. 240) bearing the name of the appellant as agreed on the contract. The other party was required to fulfil his part by paying the agreed sum which he did not do. Based on what transpires, it is far-



fetches that the cause of action is based on a land dispute but a breach of contract as rightly held by the trial court and the first appellate court. In light of what was stated in the cited cases above, I find this ground has no merit and consequently fails.

Reverting on the 2nd ground of appeal, where it was alleged by the appellant that the contract was frustrated by the government and as a result parties failed to fulfil their obligations as agreed, it was the same objected by the respondent. In his arguments, the appellant's learned counsel claimed that the 1st appellate court failed to determine this ground that, the act of the government to cancel the payment of retirement funds to the appellant frustrated the contract. The respondent learned counsel objected insisting that the appellant did not exhibit the court with any document as proof that the contract was frustrated by the government and the appellant was required to fulfil his obligations as required by the contract.

It is worth to note that, the appellant raised a concern that this issue was not decided by the first appellate court and therefore the appeal remain undecided. Upon going through the available record, I agree with the appellant's learned counsel that this issue was skipped by the first appellate court. Thus, for the interest of justice, this court step into the



shoed of the first appellate court and determine it. Therefore, I proceed to determine it based on the evidence tendered by the parties.

As I have determined the 1st ground that the cause of action was on the breach of the contract between parties, the issue as to whether the contract was frustrated by the government could not be backed up with sustainable evidence. As testified by the appellant at trial court, I find that the trial magistrate ruled out based on the weight of evidence presented before it that could not negate the contents of Exhibit KEP5. It is settled position of law that oral evidence cannot be given to contradict documentary evidence. This is also the position of the Court of Appeal in the case of **Charles Richard Kombe t/a buildings Vs Evaran Mtungi** and 2 others, Civil Appeal No. 38 of 2012, where it was held that;

"... Once it is shown as in this case, that the contract was reduced into writing then in terms of section 101 of the Law of Evidence Act, Cap 6 R:E 2002 (The TEA), a party to such contract is not permitted to adduce oral evidence for the purpose of contradicting varying, adding or subtracting from its terms..".

In our case at hand, having the matter originated from Primary Courts, the Magistrates' Courts (Rules of Evidence in Primary Court) Regulation is applicable. Rule 14(1) of the said Regulations provides that;



"Where an agreement is in writing, no oral evidence may be given to parties to the agreement or their representatives in civil case, to contradict or vary the written terms."

The centre of the matter at hand was a written contract Exhibit KEP5 which was adhered to by both parties. As the base of this matter is the claim of breach of terms agreed by parties under exhibit KEP 5, when looked upon, there was no term in the agreement that the proceeds of sale to be paid in honour of the terms could be a result of retirement funds which were to be paid by the government for the two courts to hold that the contract was frustrated by the government. I agree with the respondent's learned counsel that the appellant falls short of exhibiting that there was an involvement of the government in the failure of the appellant to perform the contract by the appellant.

Guided by the above provisions of the law and decided case, it is my finding that the trial court properly considered Exhibit KEP5 in reaching its decision.

It is worth to note that, the law of Contract, Cap 345 R:E 2019 under section 73(1) requires that any person who breached the contract to compensate the other party over the breach.



73.-(1) Where a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Based on what has been discussed above, I see no reasons to fault the decision of the trial court and the 1st appellate court. The two courts' decisions stand undisturbed and, In the upshot, I proceed to dismiss the appeal with costs.

The right of appeal fully explained.




M.MNYUKWA
JUDGE
13/5/2022

Court: Judgement delivered today on 13th May, 2022 in presence of both parties.


M.MNYUKWA
JUDGE
13/5/2022