

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF DODOMA
AT DODOMA

DC. CIVIL APPEAL NO. 22 OF 2020

ELIAS SEME MAGODI.....APPELLANT

VERSUS

BIOSUSTAIN (T) LTD.....RESPONDENT

(From the Judgment of Singida District Court-T.C. Tesha- RM)

Dated 05th day of November, 2020

In

Civil Case No.24 of 2017

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JUDGMENT

14th December, 2022 &10th February,2023

MDEMU, J:.

In the District Court of Singida, the Respondent herein lodged a claim against the Appellant for the payment of Tshs. 173,673,000/= being specific damages, payment of general damages for breach of contract and loss of business, payment of interest at the Court rate from the date of judgment to the date of full payment, payment of interest to decretal sum at bank rate from the date of filing this suit to the date of judgment and costs of the suit. The trial was conducted and on 05th of November, 2020, Tesha, RM decided in favour of the Respondent. The Appellant was ordered to pay Tshs.

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113,301,891/= being specific damages and Tshs. 20,000,000/= being general damages for breach of contract and loss of business, interests at the Court rate from the date of judgment to the date of full payment and interest to the decretal sum at bank rate from the date of filing this suit to the date of judgment. Aggrieved by that decision, the Appellant appealed to this Court on the following grounds:

- 1. That, the Resident Magistrate erred in law and fact by relying on weak and contradictory evidence of the Respondent who did not prove the case on the balance of probability.*
- 2. That, the trial Court erred in law and fact in holding that the Appellant was the one who breached the contract while it was the Respondent who breached the contract.*
- 3. That, the trial Court erred in law for receiving and relying on evidence which were departing from the pleadings.*

Parties appeared before me on 10th of November, 2022 in which the Appellant was represented by Mr. Erick Christopher and the Respondent enjoyed the service of Mr. Elias Subi who had the brief of Mr. Lawrance Godwill, both learned Advocates. Through consensus, it was resolved, and an order was made to that effect, to have the appeal disposed by way of written submissions. Parties complied.

In his written submissions filed on 21st of November, 2022, the learned counsel for the Appellant submitted in the 3rd ground of appeal that, the trial Court received and relied on evidence which departed from pleadings specifically the Respondent's plaint because, in it, the claim was for payment of either Tshs.173,673,000/= or Tsh. 172,636,000/= as specific damages. He also said that, exhibit E-1 indicated the amount to be Tshs.172,636,000/=: while the judgment of the trial Court shows the claim to be Tshs. 173,673,000/=. He contended that, when the Respondent testified in trial Court, he departed from the above stated amount and said specific damages was Tshs. 113,301,891.39/=. This was also stated in the audit report tendered by PW3. He said that, the act of departing from what was pleaded is unlawful. He cited the case of **Yara Tanzania Limited vs. Ikuwo General Enterprises Ltd, Civil Appeal No. 309/2019** (unreported) and Order VII, Rule 14(2) of the Civil Procedure Code, Cap. 33.

It was his further submissions that, tendering exhibit P-4 was wrong as it was not annexed to the plaint or being listed in a list of documents to be added as per Order VII, Rule 14(1) and (2) and Order XIII, Rule 1(1) and (2) of the Civil Procedure Code. He argued that, no leave was sought by the Respondent to tender exhibit P-4 which was neither annexed to the plaint

nor listed in the list to be added as per Order VIII, Rule 18(1) of the Civil Procedure Code. He said therefore that, such departure and tendering of exhibit-4 was wrong thus be expunged from the records. He also stated that, payment of Tshs. 173, 673,00/= as specific damages was not done since the adduced evidence stated the amount to be Tshs. 113,301,891.39/=. On this he cited the case of **Zuberi Augustion vs. Anicet Mugabe [1992] TLR 137.**

Regarding the first ground of appeal, he said that, the Respondent's evidence was weak and contradictory on the following aspects, firstly, the Respondent failed to show costs incurred by the Appellant in relation to 810860kg of cotton seeds. Secondly, no evidence was adduced to prove that the Appellant supplied only 810860kg of cotton seeds because all witnesses testified were not responsible for receiving and weighing the same. Thirdly, exhibits P-5 was wrongly admitted since it was tendered by PW5 who did not prepare them as they were automatically generated from the system. They were therefore, electronic evidence which was to be admitted and considered in accordance with the Electronic Transactions Act of 2015. Here therefore argued that, the case was not proved on balance of probabilities as required under section 110 and 111 of Evidence Act, Cap. 6.

He also said, there was no justification for the award of 20,000,000/= as general damages as there was no proof of the same. On this, he cited the case of **Tanzania Saruji Corporation vs. African Marble Company Limited [2004] TLR 155.**

Submitting in the 2nd ground of appeal, the learned Advocate stated that, it was the Respondent who breached the contract by reporting the Appellant to the Police and later criminal charges in relation to the said contract was preferred against the Appellant and later this case was instituted too. He said, reporting the Appellant to Police station hindered him to continue transacting with the Respondent.

In reply, the counsel for the Respondent filed hi written submissions on 01st of December, 2022. Replying in the 3rd ground of appeal, the learned counsel for the Respondent submitted that, the Respondent during the filing a case in the trial Court deposited a plaint showing specific damages to the tune of Tshs. 173,673,000/=. However, on 27th December, 2018, the plaint was amended to be Tshs.113,301,891.39/= as per exhibit P-4 and E-1.

Regarding the 1st ground of appeal, he submitted that, the Respondent accepted costs incurred by the Appellant during cotton purchases and it was deducted from the total sums given to the Appellant through his bank

account as per exhibit P-4. He submitted further that, the Appellant sent his buyers to deliver cotton at the ginnery and the said buyers witnessed the weighing and were issued with receipts. He argued that, PW5 was the custodian of the receipts and had knowledge thus was qualified to tender them as exhibits, as she did. On this, he cited the case of **Afriscan Group Tanzania Limited vs. David Joseph Mahende, Commercial Case No. 86/2013** (unreported).

It was his submissions further that, the entire evidence portrays existence of an agreement between the Appellant and the Respondent for buying cotton and monies paid by the Respondent to the Appellant. He added that, Bank statement tendered and audit report articulates the whole operations of buying cotton and outstanding balance to the Appellant. He argued that, the evidence adduced complied with the requirement of sections 110 (1) and (2) of the Evidence Act and as decided in the case of **Hemed Said vs. Mohamedi Mbilu [1984] TLR 113.**


On the second ground of appeal, he argued that, the Respondent and Appellant entered into principal agent contract admitted as exhibit P-1. The said contract provides among other things that, the Appellant, as an agent, should ensure submission of daily and weekly reports on activities of buying

and delivering cotton to the Respondent. However, he said that, since September 2017, the Appellant disappeared from Igunga and Nzega for more than 30 days. Nonetheless, money deposited in his bank account by Respondent. The Respondent thus reported to the Police station in which he was arrested at Mwanza. By then, had already spend the money for his own use contrary to the agreement. In his view, this act shows that it was the Appellant who breached the contract. He therefore, prayed this Court to dismiss the appeal with costs. The Appellant didn't file a rejoinder.

I have considered the parties' submissions, record of the trial Court as well as applicable laws. Beginning with the third ground of appeal, added on 10th of November, 2022 on departure from pleadings; Appellant's Advocate stated that, the amount claimed by the Respondent in the plaint as specific damages was Tshs. 173,673,000/= or Tshs. 172,636,000/= but the evidence adduced proved the claim to be Tshs. 113,301,891.39/=. In reply to this ground, the Respondent submitted that, the plaint was amended to make the claim to be of Tshs. 113,301,891.39/= and the same was proved the reason why the trial Court decided in her favour.

I have read the trial Court proceedings and discovered that, the original plaint was filed on 14th of September, 2017, written statement of

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defence was filed on 1st November, 2017 and reply to written statement of defence was filed on 28th December, 2017. Thereafter, on 27th of December, 2018 Mr. Lawrance, Counsel for the Respondent/ plaintiff at the trial Court prayed to file amended plaint. Such prayer was granted. On 31st December, 2018, Mr. Lawrence informed the trial Court that, they have filed the amended plaint. Then, the case was adjourned thrice for mention that is on 14th of January 2019, 24th of January 2019 and 7th of February 2019. It was on 21st February, 2019 when the Appellant/' 1st Defendant at trial Court filed amended written statement of defence. On 7th of March 2019, it was recorded that, the amended written statement of defence was filed and served to the Respondent.

It is settled law that Courts have discretion to order amendment of pleadings at any stage before judgement but it is advisable to effect them earlier because it may be detrimental to the parties. See the case of **Matohov vs. Auto Garage Ltd (1971) HCD 81** where it was held that:-

"The making of amendments is not merely a matter of the power of Court but it is a duty so that substantive justice will be made"

Furthermore, it has been held by various Courts decisions that, upon amendment of pleadings, the previous one ceases to have any legal effect.

In **Tanga Hardware and Autoparts Ltd. and 6 Others vs. CRDB Bank Ltd, Civil Application No. 144 of 2005** (unreported), the Court referred to the observation made in the case of **Warner vs. Sampson and Another [1959] 1 Q.B 297** that: -

".....once pleadings are amended that which stood before amendment is no longer material before the Court."

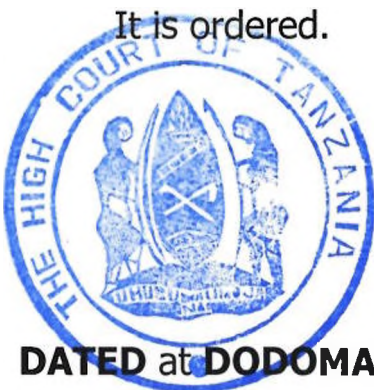
The above holding has been followed in **Ashraf Akber Khan vs. Rauji Govind Varsan, Civil Appeal No. 5 of 2017; Morogoro Hunting Safaris Limited vs. Halima Mohamed Mamuya, Civil Appeal No. 117 of 2011; General Manager African Barrick Gold Mine Ltd vs. Chacha Kiguha and 5 Others, Civil Appeal No. 50 of 2017** and **Sarbit Singh Bharya and Aother vs. NIC Bank Tanzania Ltd and Another, Civil Appeal No. 94 of 2011** (all unreported).

That being the law, I find that, all was stated in plaint, written statement of defence and reply to written statement of defence prior to amendment ceased to have legal effect particularly as the amendment order was complied with. Since the amended pleadings are nowhere to be found in the trial Court's file, and since upon reading the judgment of the trial Court reference was made to the original plaint, it is speculative that, may

be the amended pleadings were not filed or were misplaced after they were filed. The trial Magistrate didn't note it when composing the judgment.

Basing on the above findings, I nullify the proceedings from the post dates the amended written statement was filed, judgment is quashed and I set aside the decree and all resultant orders therefrom. Since this ground suffices to dispose of the appeal, the remaining grounds of appeal are not going for deliberation. The suit is thus remitted for trial "denovo" before another Magistrate who should start determining the suit from the date the amended written statement of defence was filed in Court. Each part to bear own costs.

It is ordered.



DATED at DODOMA this 10th day of February, 2023


Gerson J. Mdemu

JUDGE

10/02/2023




Gerson J. Mdemu

JUDGE

10/02/2023