IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CIVIL APPEAL NO. 311 OF 2020

(Arising from the judgement and Decree of the District Court of Ilala at Kinyerezi in Civil Case No. 13 of 2019 dated 16th November, 2020 Hon.K.C. Mshomba, RM).)

WELLWORTH GROUP OF COMPANIES..... APPELLANT

VERSUS

TRANS AFRICA WATER SYSTEM LTD..... RESPONDENT

JUDGMENT

8th March & 28th March, 2023

POMO, J.

This is an appeal by the appellant herein upon being dissatisfied with the decision of the District Court of Ilala at Kinyerezi in Civil Case No. 13 of 2019. In that original suit, the respondent herein had successfully sued the appellant for breach of contract and claimed for specific and general damages thereof, costs of suit and interest at the commercial rate, as well as any other reliefs which the trial Court could deem fit and just to grant.

Briefly stated, the facts giving raise to the instant appeal are as follows;- the respondent herein entered into a contract with the appellant

under which, the respondent was to install the solar water heaters to the appellant's two camps located within Serengeti national park namely Turner Springs in central Serengeti and Koga Tende in Northen Serengeti near Kenya boundary. The consideration agreed was USD 24,970.00. It was agreed that, the respondent was to install 11 solar water heaters in each camp and the agreed amount was to be paid in two equal installments that is to say, 50% when placing the order and delivery and the remaining 50% upon completion of the installation of the solar water heaters in the appellant's two camps.

It was not in dispute that the first 50% was paid and the twenty two (22) water heaters were procured and transported to the camps. The dispute evolves on the payment of the second 50% installment by the appellant and the installation of the 11 water heaters by the respondent at the second camp. While the appellant states that not all the solar water heaters were installed and the parties were still discussing, the respondent alleges that they installed all the 22 water heaters per the agreement hence they are demanding for the full payment.

Besides, the appellant raised a counter claim to the effect that the respondent had failed to honor their contractual arrangement as it failed to install the remaining 11 water heaters at the second camp. Furthermore it

was alleged that, even the installed solar water heaters had consistently been malfunctioning or not functioning at all. Thus, they have always been under repair. On their part they claimed to have suffered loss covering for maintenance and repair, costs for transport, meals and accommodation for the technicians as well as endless complaints of its customers which had retarded her business. The appellant then claimed for payment of TZS. 200,000,000/= as specific damages for loss of business, the payment of USD 12,485 by the respondent to the appellant which was an advance payment, 20% interest at the commercial rate, 7% interest at the Court rate, general damages to a tune of TZS. 200,000,000/=, Costs of the suit and any other relief as the Court may deem just and proper to grant.

As earlier alluded, the decision was pronounced in favour of the respondent upon the trial Court satisfied that, the claims were proved against the appellant (defendant by then) and continued to order that, the remaining 50% which is USD 12,485 be paid by the appellant to the respondent, general damages to a tune of TZS. 15,000,000/=, costs of the suit to be paid by the appellant to the respondent, 7% interest per annum from the date of judgment until satisfaction of awarded amount and dismissal of counter claim.

The appellant is aggrieved with the decision and has lodged a memorandum of appeal fronting seven (7) grounds of appeal. The said grounds are hereunder reproduced: -

1. *That the Honourable Trial magistrate erred both in law and fact in holding that the plaintiff supplied and installed to the defendants camps total of 22 solar water heaters while there was no completion report signed by the site engineer and the technician who did the installation.*
2. *That, the Trial Magistrate erred both in law and in fact by not holding that the defendants had paid the plaintiff the agreed amount to the goods supplied and installed disregarding the testimony of DW1 and DW2 with regard to eleven solar heaters yet to be installed by the plaintiff as agreed in their agreement exhibit D1.*
3. *That, the Trial magistrate erred in law and fact by finding that the goods supplied by the plaintiff were in good condition despite the facts expressed in exhibit D4 where the plaintiff listed the fittings which were not functioning and agreed to replace those fittings.*
4. *That, the Trial Magistrate erred in law and fact by his failure to properly analyze the appellant's evidence in particular on the loss to the defendant of the business season having announced to tour*

operators that they will be operational as such the defendant was entitled to damages.

5. *That, the trial Magistrate erred both in law and fact by awarding the plaintiff the whole amount claimed as general damages Tshs. 15,000,000/= without any proof to the Court to substantiate the amount purported to have been incurred.*
6. *That, the Trial Magistrate erred both in law and fact to order the defendant to pay the unpaid contractual amount sum of USD 12,482 disregarding the terms as expressed in the agreement- Exhibit D1.*
7. *That, the Trial Magistrate erred in law and fact by not pronouncing judgement against the plaintiff in relation to the counter claim for contravening the provisions of Order VIII Rule 11 (1) of the Civil Procedure Code [Cap 33 R.E; 2019] for not filing written reply in answer to the Counter claim.*

During hearing of appeal, the appellant was represented by Mr. Methuselah Mafwele, learned advocate while the respondent was ably represented by Ms. Regina Mbaruku, learned advocate. The hearing of appeal was by way of written submissions to which the parties have filed their respective submissions timely. I commend the parties for their punctuality.

Submitting on the grounds of appeal, Mr. Mafwele consolidated the 1st, 2nd and 3rd grounds of appeal and argued them together and argued that, the Trial Magistrate erred in law and fact to hold that the respondent supplied and installed all the twenty two (22) solar water heaters into the appellants two camps while there was no Certificate of completion. His argument was that, in any project such as this, after its completion there must be the project completion report which states the project has been completed as per approved plan and that the project meets all the regulations. He went on to state that, the contents of completion certificate include the date of completion, contractor information of project any additional details which may be requested by the client and it must be signed by the authorized signatory. It was Mr. Mafwele's contention that, as per the record, the completion report which is the completion certificate was not signed nor handed over to the appellant. To spot to it, he said PW2, Adolf Mathew Shija who was the technician of the respondent company had testified that, he had prepared a report and the same was signed by the engineer but when cross examined PW2 testified that the site engineer did not sign the report and the unsigned report was in their office. Moreover, he said that once the report is signed, it indicates that the job is completed but where it is not signed, it indicates that the work is incomplete.

Mr. Mafwele further submitted that, the terms which form the agreement can be deduced from the correspondences and meetings between the parties as directed by the Court of Appeal in **Butter Machine Tool Company Ltd vs. EX-cell Corporation (England0 Ltd** [1979] /EPL 401 approved in **Simba Motors Ltd vs. Joh Achelis & Sohne GMBH and Another**, Civil Appeal No. 72 of 2022, CAT at Dar es Salaam (Unreported). Under those premises, Mr. Mafwele insisted that, the trial Court ought to have been taken into consideration of paragraph 11 of the Written Statement of Defence (WSD) which was collaborated by Exhibit D4 and could have come into conclusion that the respondent had breached the terms of the agreement for not installing all 22 solar water heaters in the appellant's camps. To support his argument, he cited the case of **Photo Production Ltd vs. Securior Transport Ltd** [1980] AL ER 566 cited in **Simba Motors Ltd** *(Supra)* which had held that every failure to perform a primary obligation is a breach of contract.

It was therefore Mr. Mfwele submission that, in absence of the valid certificate of completion of the project, the Trial Court ought to have decided in favour of the appellant. He then prayed for the 1st, 2nd and 3rd ground to be allowed.

In respect to ground 4 of appeal, Mr. Mafwele did submit that, the Trial Court failed to analyze the appellant's evidence on the loss that the appellant had incurred due to breach of contract by the respondent. The appellant's counsel underscored that, DW1, Komail Ismail who was the principal officer of the appellant company testified that there were endless complaints from their customers due to malfunctioning of the solar water heaters a situation which retarded their business reputation and loss of business. That the situation was notified to the respondent and the respondent opted to file a case claiming to be paid for the work which was yet to be completed and handed over through the completion certificate.

On the 5th ground of appeal, Mr. Mafwele argued that, the general damages stand awarded by the Trial Magistrate without assigning reasons. He submitted that, damages are awarded where the injured has presented a valid reason to recover whatever it is that may been lost. According to Mr. Mafwele, the respondent had not filed anything to substantiate her claim to warrant the Court to award the damages. He went on to articulate that, the respondent had not incurred any costs whatsoever in the respective project to warrant the award by the Trial Court as general damages. It was his submission that, general damages are awarded in four grounds of which the respondent do not fit. The same are; pain and suffering, loss of amenity or

enjoyment of life, loss of consortium or companionship and loss of peace of mind. He prayed, the 5th ground to be allowed.

On the 6th ground of appeal, Mr. Mafwele submitted that, the Trial Magistrate had erred to order the appellant to pay the unpaid USD 12,482 as he disregarded the terms expressed in the parties agreement as indicated in Exhibit D1. The appellant's counsel had explicated that, the agreement required the respondent to install all 22 solar water heaters but it was only 11 heaters that were installed, and the rest 11 were still in their boxes at the second site of Kagatende Camp. That non installation of the 11 solar water heaters was a breach of a primary obligation of the agreement and thus it was wrong for the Trial magistrate to order the defendant to pay the unpaid contractual amount (50%) of USD 12, 482.

On the 7th ground the appellant's counsel did submit that, the respondent did not file a reply to the counter claim before the trial Court to which it contravened the provisions of Order VIII Rule 11 (1) of the Civil Procedure Code [Cap 33 R.E: 2019] (herein the CPC). He went on to state that, the said provision required the respondent to lodge a reply containing a statement of defence and failure of which Order VIII Rule 5 of the CPC makes the allegation so admitted. Mr. Mafwele then concluded that, the Trial

Court ought to have pronounced the judgment against the respondent in relation to Counter Claim.

In reply thereof, Ms. Mbaruku for the respondent did briefly replied as follows; in respect of the 1st, 2nd and 3rd grounds she submitted that, basing on the evidence so adduced, the trial Court was satisfied that all the solar water heaters were installed and that the case of **Butter Machine Tool Company Ltd** *(Supra)* is irrelevant as the trial Court satisfied itself that all documents passed between the parties and glean from them or from conduct of the parties they have reached material points. She further argued that, the appellant's submission is silent on number of solar water heaters which were not installed and stressed that the appellant has only raised a new issue of valid certificate of completion. It was her submission that, from the appellant's submission to ground 1, 2 and 3 there is no doubt that the appellant did not fully pay the amount agreed to the respondent but they are now trying to hide on the new issue of valid certificate.

On the 4th ground of appeal, it was her submission that the issue of whether the appellant's reputation was lowered by the respondent or not cannot be discussed at this stage as it requires evidence and ought to be raised and proved before the trial Court. According to her, it was not among

the issues framed and analysed by the trial Court and the trial Court only dealt with the framed issues.

On the 5th and 6th ground of appeal, Ms. Mbaruku submitted that the respondent had proved its case at the trial Court and that persuaded the Court to award the general damages as prayed in the plaint. It was Ms. Mbaruku submission that section 110 (1) and (2) of the Evidence Act, [Cap 6 R.E: 2022] provides that a burden of proof lies on the person who is bound to prove an existence of any fact and the respondent had proved at the standard of probability that it supplied the goods and installed them as agreed.

On the 7th ground of appeal; the respondent's counsel submitted that, the appellant had never adduced any evidence to prove its case in a counter claim. Again according to Ms. Mbaruku, the appellant is trying to mislead the Court that there was no reply to counter claim while the same was filed on 11th April 2019. She then prayed for dismissal of the appeal with costs.

In his rejoinder sunmission. Mr. Mafwele in respect of the 1st , 2nd and 3rd ground; he argued that, as to the certificate of completion it is a settled practice and law to contractors that, upon completion of the work, the contractor should notify owner that the work is ready for final inspection and

acceptance. And when the owner finds the work acceptable and that work had been fully completed in accordance with the contract documents then entire balance of contract price becomes due and payable. He further insisted that, the only duty of the Court is to see that the terms of the agreement were adhered to by both parties as held at page 30 in **The Private Agricultural Sector Support & Another vs. Kilimanjaro Cooperative Bnak Ltd,** Consolidated Civil Appeal No. 171 & 172 of 2019 (Unreported).

Furthermore, in generality Mr. Mafwele accentuated that, the court never evaluated nor analyzed DW1 evidence. Again, the Court ought to have considered all the documents passing between the parties and their conduct which were enough to show that the respondent knew the appellant would incur costs and that the evidence of DW1 as corroborated by exhibit D4 proved that the work done by the respondent did not adhere to the terms of the agreement and that the appellant reputation was damaged.

Upon digesting the submissions by both parties, it is now my duty to determine whether the appeal is meritorious or not. I wish to make it certain at juncture; that parties to a contract are bound to perform their respective

promises as it is so provided under section 37 (1) and (2) of the Law of Contract Act, [Cap 345 R.E 2019]. The sections reads: -

> *"S.37.- (1) 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.*
> *(2) Promises bind the representatives of the promisor in case of the death of such promisor before performance, unless a contrary intention appears from the contract."*

In **Abualy Alibhai Azizi vs. Bhatia Brothers Ltd [2000] T.L.R 288,** the Court of Appeal expounding on the above provision it 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) or misrepresentation and no principle of public policy prohibiting enforcement."*

Besides, the Apex Court in ***Unilever Tanzania Ltd vs. Benedict Mkasa t/a Bema Enterprises*** Civil Appeal No. 41 of 2009 (Unreported) at page 16 held that: -

"Strictly speaking under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the Courts to change those clauses which parties have agreed between themselves. It was up to the parties concerned to renegotiate and to freely rectify clauses which parties find to be onerous. It is not the role of the Courts to re-draft clauses in agreements but to enforce those clauses where parties are in dispute."

Guided by the above, I am now embarking to the appeal at hand, starting with the 1st, 2nd and 3rd ground to which in essence the appellant contends that, the trial Court erred to conclude that the respondent had installed all 22 solar water heaters in two camps as agreed while it did not tender a certificate of completion and insisted that, it is the settled practice and law that contractors after completion of work must notify the owner and upon the owner inspection, the certificate of completion is issued stating that the work is done and according to the appellant is that this was not done. On the other hand, the respondent is contending that, the issue of certificate of completion was never an issue before the trial Court and thus it is a new issue.

I have taken trouble to observe the pleadings, proceedings of the trial Court when the witnesses of the respondent (plaintiff by then) testifying in Court and the exhibits tendered. In neither occasion, the parties had brought into attention the issue of "valid certificate of completion of work." From pleadings, the appellant herein (the defendant by then) pleaded nothing on the aspect. Again, during the trial, in neither occasion when the respondent's witnesses (defendant by then) when testifying, were cross examined as to this crucial issue of failure to issue a certificate of completion upon completion of work at the two sites.

It is a trite law that proceedings in matters and decision thereof, has to come from what has been pleaded and so goes the parlance that parties are bound to their own pleadings. [See the cases of **James Funke Gwagilo vs. Attorney General** [2004] T.L.R 161, **Astepro Investment Co Ltd vs. Jawiga Company Ltd**, Civil Appeal no. 8/2015, **Peter Ng'homango vs. Attorney General,** Civil Appeal No. 214/2011 and **Scan TAN Tours Ltd vs. Catholic Diocese of Mbulu,** Civil Appeal No. 78/2012 (All Unreported).

In the decision by the Cort of Appeal in ***Barclays Bank (T) Ltd vs Jacob Muro***, Civil Appeal No. 357 of 2019 (unreported), the Court of Appeal cited with approval a passage in an article by Sir Jack I. H. Jacob Titled **"The**

Present Importance of Pleadings" published in Current Legal problems (1960) at page 174 that: -

> *"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... For the sake of certainty and finality, each party is bound by his own pleadings …Each party thus knows the case he has to meet and cannot be taken by surprise at the trial.* ***The court itself is as bound by the pleadings of the parties as they are themselves...*** [Emphasis is added]

Besides, it is the principle of law that failure to cross-examine on a crucial point, ordinarily implies the acceptance of the truth of the witness evidence and any response to the contrary is taken as an afterthought if raised subsequently. This has been held in plethora of authorities by the Court of Appeal of Tanzania, just to mention few; in **Damiani Ruhele vs. Republic**, Criminal Appeal No. 501 of 2007, **Cyprian Athanas Kibogoyo vs. Republic**, Criminal Appeal No. 88 of 1992, **George Maili Kembonge vs. Republic**, Criminal Appeal No. 327 of 2013 **Nyerere Nyague vs. Republic**, Criminal Appeal No. 67 of 2010 and **Martin Misara vs. Republic**, Criminal Appeal No. 428 of 2016 (All Unreported).

In ***Damiani Ruhele*** (supra), for instance, it was observed inter alia that:-

> *"It is trite law that failure to cross-examine a witness on an important matter ordinarily implies* ***the acceptance of the truth of the witness evidence."***

The advanced portrayal was expounded in ***Martin Misara*** (Supra) where the Court of Appeal had this to say: -

> *"…No cross examination was done when PW1 testified. It is the law in this jurisdiction founded upon prudence that failure to cross-examine on a vital point, ordinarily, implies the acceptance of the truth of the witness evidence; and* ***any alarm to the contrary is taken as an afterthought if raised thereafter…"***

Guided by the above principles, *one,* it is obvious that the aspect of valid certificate of completion is an afterthought which did not feature in neither pleadings nor proceedings and the trial Court could not adjudicate over it. *Two,* the fact that cross examination by the appellant did not touch on the valid certificate of completion of work, thus the issue now is

afterthought. *Three,* this Court being an appellate Court only deals with matters verily transpired and adjudicated by the trial Court. It can not deal with a new issue of this nature which requires evidence. Basing on this, the 1st, 2nd and 3rd grounds are dismissed for want of merit.

Coming to the 4th ground of appeal, the appellant's counsel argued that, DW1, Komail Ismail who was the principal officer of the appellant company testified that there were endless complaints from their customers due to malfunctioning of the solar water heaters a situation which retarded their business reputation and loss of business. However, in the records, neither a specific number of the malfunctioning solar water heaters is given nor expressive explanations were given as to how there was a loss of business on their part.

It is an elementary principle that he who alleges is the one responsible to prove his allegation. That the burden of proof to be discharged on the balance of probabilities lies with the one who alleges. (See **Abdul Karim Haji vs. Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2014 and **Pauline Samson Ndawavya vs. Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017(Both Unreported)

Besides, under **section 110 (1) and (2) of the Evidence Act**, [Cap 6 R.E:2019] provides for the effect that;

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

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

Guided by the above provision, it's prudent to state at juncture that the purported claims on loss of business had not been proved to the satisfaction of the Court. This ground also fails.

On the 5th ground of Appeal, the appellant complain that the trial Court had awarded TZS. 15,000,000/= as general damages to the respondent without any proof to the Court to substantiate the same. On the other side, the respondent had resisted that, it had proved the same. I have read the decision keenly by the trial Court and the proceedings thereof, and without wasting must energy, the trial Magistrate at page 13 of the Judgement had assigned the reason for his award to it. He had held that: -

'…From the above gathering evidence as narrated at length in this Court justifies an award of the unpaid USD 12,485 in favour of the plaintiff. This Court as well awards the sought general damages amounting to Tshs. 15,000,000/= ***found on the long***

stood unpaid contractual sum *even after installation of the solar water pumps."*

The fact that, the said amount stood an unpaid for long time, it is obvious there was the inconvenience and uncertainties in the respondent's business. Point to be noted here is that the general damages are principally awarded at the discretion of the Court and unlike specific damages which must be specifically pleaded and proved and there is plethora of Court's decisions to that effects. [To mention the few, see the case of **Zuberi Augustino vs. Anicent Mugabe** [1992] T.L.R 137, **Juma Misanya and Another vs. Lista Ndurumai** (1983) T.L.R 245 and **Cooper Motors Corporation (T) Ltd vs. Arusha International Conference Centre** (1991) T.L.R 165].

Therefore, the fact that the reason for awarding the general damages as quoted above was sound and given by the trial magistrate, it goes without saying that the general damages was just and fair. This ground also fail and I dismiss it.

On ground 6 of appeal, the appellant is contending that the trial Court had erred to order the appellant to pay the USD 12, 482 which was the remain 50% installment and the appellant contended that the trial Magistrate ought not to do so as the, the agreement required the respondent to install all 22 solar water heaters but it was only 11 heaters that were installed, and

the rest 11 were still in their boxes at the second site of Kagatende Camp. That non installation of the 11 solar water heaters was a breach of a primary obligation of the agreement and thus it was wrong for the Trial magistrate to order the defendant to pay the unpaid contractual amount (50%) of USD 12, 482.

Section 112 of the Evidence Act (Supra) reads: -

> *"S.112. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person."*

Guided by the above provision, it was expected from the appellant to provide evidence to the satisfaction of the trial Court that the said facts were existing. Taking into account the evidence by the respondent (plaintiff by then), the demand letter (Exhibit P1) and the response thereof by the appellant (Exhibit P2); the respondent had called for unpaid sum arising from the supplied and installation solar water heaters. From the reply, the respondent had not denied the allegations but it only responded that, there are several issues to be sorted out by the parties including the actual amount owed. The fact that, it is disputed that 50% had already been paid and

50% remained until completion of installation, and the fact that the evidence of PW1 and PW2 are to the effect that, all 22 solar water heaters were installed, and the fact that no evidence was given by the defendant to substantiate as to what number of the installed heaters were malfunctioning nor satisfactory evidence that the remained 11 heaters were not installed, it is obvious that the respondent's evidence was heaver than that of the appellant.

It is common knowledge that in civil proceedings the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities. But again it is a trite law that both parties to suit cannot tie but the person whose evidence is heavier than that of the other is the one who must win as the English case of **Re B L[2008]UKHL 35**, the court made it clear that;

> *"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not."*

Guided by the above, the fact that the respondent's evidence was heavier compared to that of the appellant over the issue, the trial magistrate was right to order the appellant to pay the unpaid up installation of USD 12, 482. This ground also lacks merit.

On the 7th ground of appeal, the appellant contends that the respondent did not file a reply to a counter claim and thus in accordance to Order VIII Rule 5 of the CPC, it was deemed to have admitted the facts stated by the appellant in its Counter claim and thus the trial Court ought to have been pronounced a judgment against the respondent. On the other hand, the respondent had denied the allegations and claimed that she had filed the same. To determine this ground, I had to look into the records of which it took me just a minute to realize that, on the 11th April 2019 the respondent had lodged her Reply to the Counter claim which was filed on 18th March 2019.

The principle of sanctity of the record entails that the trial court record accurately represents what happened in court. (*See* the case of **Halfani Sudi vs. Abieza Chilichili,** Civil Reference no. 11 of 1996, CAT at Dsm and **Flano Alphonce Masalu @ Singu & 4 others vs the Republic,** Criminal Appeal No. 366 of 2018, CAT at Dsm, (All unreported). It follows therefore

that the appellant's allegation are mere accusations which are not exhibited in the records and thus vacant. Thus, this ground also falls short.

In the event, the grounds of appeal raised by the Appellant are addressed negatively, and thus the appeal is hereby dismissed in it's entirely with costs.

Order accordingly.

Rights of appeal fully explained.

DATED at **DAR ES SALAAM** this 28th day of March, 2023.

MUSA K. POMO

JUDGE

28.03.2023