

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF MWANZA**

**AT MWANZA**

**CIVIL APPEAL NO. 20 OF 2020**

(Originating from RMs' Court of Geita in Civil Case No. 23/2014)

**INTENSIVE SECURICO LIMITED ..... APPELLANT**

**VERSUS**

**GEITA DISTRICT COUNCIL ..... RESPONDENT**

**JUDGMENT**

16/12/2022 & 17/3/2023

**ROBERT, J:-**

This is an appeal against the decision of the Resident Magistrates' Court of Geita in Civil Case No. 230 of 2014. The appellant preferred this appeal having been aggrieved by the judgment and decree of the trial Court.

Briefly, facts relevant to this appeal reveals that, the appellant and respondent entered into two contracts running from 1<sup>st</sup> July, 2013 to 30<sup>th</sup> October, 2013 and 1<sup>st</sup> November, 2013 to 30<sup>th</sup> June, 2014 respectively. In both contracts, the appellant was engaged by the respondent to provide security services to her properties located in various premises within the

district of Geita at the consideration of TZS 21,920,000/= and 43,840,000/= respectively. At the end of both contracts the respondent had paid the appellant TZS 28,930,000/= only for both contracts and retained the outstanding balance of TZS 36,830,000/= alleging it to be part of the total value of properties lost in various occasions when the appellant was providing security services to the respondent's premises.

In September, 2014 the respondent sued the appellant at the Resident Magistrates' Court of Geita for the sum of TZS 57,649,300/= being the value of the properties lost in various occasions when the appellant was providing security services to the respondent's premises. The trial Court passed judgment in favour of the respondent and gave an order allowing the respondent to retain the outstanding balance of TZS 36,830,000/- due for payment to the appellant in the two contracts mentioned above, interest on principal sum at the commercial rate, payment of TZS 10,000,000/- as general damages, interest to the decretal sum at 7% from the date of judgment to the date of payment in full and costs of the suit.

Aggrieved, the appellant preferred an appeal to this Court armed with four grounds of appeal which I take the liberty to reproduce below:-

- 1. That the trial court erred in law and fact by her conclusion that the appellant to pay the remaining 20,819,300 as loss which the respondent incurred. Hence the respondent to recover total payment of loss of 57,649,300/=, without the proof of such loss of Tsh. 57,649,300/=*
- 2. That, the trial magistrate erred in law and fact by not evaluating the evidence adduced by parties before the Court.*
- 3. That, the trial magistrate erred in law and fact by not going to the key element of the contract between parties.*
- 4. That, the trial magistrate erred in law by giving judgment and decree on court and registry different to that one the case was filled and entertained.*

The appellant prayed for the judgment and decree of the trial Court to be reversed and set aside, the respondent to be ordered to pay Tshs. 36,830,000/= and costs of the suit.

The appeal was argued by way of written submissions. Highlighting on the grounds of appeal, Mr. Erick Lutehanga, counsel for the appellant, opted to argue the first and second grounds of appeal together. The two grounds of appeal faulted the trial court for allegedly ordering the appellant to pay TZS 20,819,300 as the remaining amount of loss incurred by the respondent without proof of such loss and for failure to evaluate the evidence adduced by parties before the Court. He argued that both

witnesses for the respondent admitted during cross-examination that there was a daily register of respondent's properties guarded at each premise as shown at page 17 and 23 of the typed proceedings. However, the said registers were not tendered in Court to show that on the material dates the said properties were indeed present at the premises which were being guarded by the appellant.

He submitted further that, it was important to establish ownership of the properties alleged to be missing since the respondent being a local government is an entity capable of owning its own properties.

He argued further that the evidence adduced by respondent during hearing is contradictory. He maintained that the items and value of items alleged to be missing as indicated in exhibit PE1 (letter to appellant from respondent) is different from the one indicated in exhibit PE3 (valuation report). Further to that, respondent's witnesses failed to mention some of the spare parts allegedly stolen at the alleged period.

Furthermore, he maintained that, although the alleged theft took place in various times and was allegedly reported to police station, there was no evidence of police report book (RB) or case number mentioned or

produced to show that the alleged incidents of theft were indeed reported or existed. He reminded the Court that, since the issue in dispute was connected to criminality the burden of proof was required to be higher than the burden of proof in a normal civil suit. To buttress his argument, he referred the Court to the case of **Happy Kaittra Burilo t/a Irene Stationery and another versus International Commercial Bank (T) Ltd**, Civil Appeal No. 115 of 2016, CAT at Dsm.

Mr. Mick Chotta, State Attorney, started his submissions by attacking the first ground of appeal. He argued that, the trial court did not make an order as alleged by the appellant in the first ground of appeal. He submitted that, page 6 of the impugned judgment and page 2 of the decree indicates clearly that, the court ordered the respondent to retain TZS 36,830,000/=, interest at principle sum at commercial rate, TZS 10,000,000/= as general damages, interest of 7% on decretal sum from the date of judgment to the date of payment in full and the cost of the suit. Hence, he maintained that the first ground of appeal is fabricated and misleading.

I have examined records of the trial Court and observed that, the respondent's claim against the appellant, as indicated in the pleadings, was



for payment of the sum of TZS 57,649,300/= being the total value of the lost properties when the appellant was providing security services to the respondent. In her prayers, the Plaintiff (respondent herein) prayed for an order to retain the remaining TZS 36,830,000/= being unpaid balance to the appellant in the two contracts of security services and for the appellant to pay TZS 20,819,000/= as the remaining amount of loss to the respondent in order to recover the total amount of TZS 57,649,300/= which is the value of the properties lost when the appellant was providing security services. In the impugned decision of the trial Court, the Court decided as follows:

*"As a result of the claim of TZS 57,649,300/= claimed by the plaintiff which included TZS 36,830,000/= and TZS 20,819,300/= as specific damage is not granted to the plaintiff because it is not proper for the plaintiff to claim from the defendant TZS 36,830,000/= being the amount which the plaintiff is retained or the unpaid sum to the defendant. Therefore from the explanations made; the plaintiff entitled to the following orders:- To retain TZS 36,830,000/= interest on principal sum at the commercial rate, TZS 10,000,000/= as general damages, interest to the decretal sum at 7% from the date of judgment to date of payment in full and costs of the suit."*

It is apparent from the quotation above that the trial Court did not conclude or give an order which requires the appellant to pay the remaining TZS 20,819,300/= being loss incurred by the respondent as alleged by the appellant in the first ground of appeal. I therefore find no merit in the first ground of appeal.

With regards to the issue of evaluation of evidence as raised in the second ground of appeal, Mr. Chotta indicated in his response that evidence adduced was well evaluated. He submitted that, the proceedings indicates that the plaintiff (respondent herein) is the only party who tendered documents in Court to prove the alleged loss which was duly communicated to the appellant who admitted liability and requested the respondent to use the government agency responsible for evaluation to conduct evaluation of the items stolen in Toyota RAV4 and Land cruiser. The appellant also asked for time to make thorough investigation by the aid of relevant authorities as indicated in exhibit PE2.

He submitted further that, the issues of registration and ownership of the stolen properties which are raised by the appellant in this appeal were not disputed both in the pleadings and in the proceedings of the trial court. Hence, he argued that they cannot be raised at this stage. To support his

argument, he referred the court to the case of **Pasinetti Adriano vs. Giro Gest Ltd & another** (2001) T.L.R 89. He submitted further that, the respondent is the local government with ownership of vehicles from various sources such as donor funded vehicles which are registered with "DFP" numbers; central government funded vehicles which are registered with "STK, STL" numbers and own purchased vehicles which are registered with "SM" numbers. He clarified that STL 683 mentioned by the appellant to be owned by TANROAD was not part of the respondent's claim as alleged by the appellant.

On the allegations of contradictions between exhibit PE1 and PE3 as testified by PW1 and PW2, he submitted that exhibit PE1 was written by the respondent aiming at notifying the appellant about the loss and the issue of indemnity according to clause 6 of the contract (exhibit P4 and P5), the appellant admitted to indemnify the respondent but requested the use of government agency to evaluate the loss (exhibit PE2). He maintained that TEMESA being a government agency with mandate to conduct valuation, their valuation supersedes that of the respondent. Hence, the claimed amount was based on exhibit P3 which was done by TEMESA.



With regards to the issue of RB number, he responded that this is clearly shown at page 16 of the proceedings where PW1 testified that the incident was reported at Geita Police station RB No. GE/RB/795/2014 and RB No. GE/RB/4094/2014. Hence, he maintained that the appellant's allegations are baseless and should be disregarded.

I have perused the records of this case and noted that, the trial Court raised three issues for determination of this matter. **One**, whether there was contract between the parties; **two**, whether the parties honoured the terms of the contract; and **three**, what are the reliefs parties are entitled to.

Apparently, records indicate that the first issue above was not disputed by either of the parties. The analysis done by the trial Magistrate at page 4 of the impugned judgment indicates that the two contracts entered by the parties having been admitted in court without dispute as exhibit P4 and P5 respectively, the trial court was satisfied that there was a valid contract between parties in this dispute. This Court finds no reasons to fault the analysis of the trial court in the determination of the first issue.

Similarly, with regards to the 2<sup>nd</sup> issue as to whether parties honoured the terms of the contract, the trial court made its analysis at page 4 and 5 of the impugned judgment and observed that, clause 6 of the contracts (exhibit P4 and P5) imposed a duty on the appellant to pay the respondent for the loss, damage and theft of properties incurred by the respondent when the appellant is providing security services to the respondent's premises.

The trial court observed that the respondent wrote a letter (exhibit P1) to the appellant informing her about theft of items which took place on 8/2/2014 when the appellant was providing security services to the respondent and demanded payment of the loss caused. The trial Court observed that the appellant herein admitted that theft took place on 8/2/2014 and requested for time to resolve the matter but failed to resolve it, hence, the court concluded that the appellant herein dishonored clause 6 of the parties' contract and proceeded to make a determination on the payment of the said stolen items at the third issue.

Looking at the evidence adduced, this Court finds no reason to fault the findings of the trial court given that the appellant expressed his willingness to pay for the loss caused through his letter dated 3/2/2014

(exhibit PE2) once a thorough investigation of the loss caused was conducted and a government agency responsible for valuation is involved. The appellant also undertook to probe into the matter together with law enforcement agents in order to resolve the matter. The valuation report dated 12/6/2014 was admitted in Court as exhibit PE3 indicating in detail the missing items and the cost of each item. However, the appellant did not pay for the claimed loss. Further to that, other losses of items were reported to her including incidents on 14/3/2014 (loss of microscope) and on 11/6/2014 (loss of one motorcycle) as testified by PW1 and PW2. In the circumstances, this Court finds that the evidence adduced was properly evaluated by the trial Court. Thus, this ground of appeal has no merit.

On the third ground, counsel for the appellant submitted that, the contract was supposed to be respected by both parties. He questioned why the respondent failed to terminate the contract immediately after the occurrence of the alleged theft instead of waiting until the appellant started to claim for his payment.

In response, Mr. Chotta argued that the claims by the respondent were based on a contract which set obligations to the parties and provided for the sanctions to the defaulting party and reliefs to the aggrieved party.

He maintained that, the defendant (appellant herein) having failed in his duty to protect the respondent's properties in various premises, he was required under clause 6 of the contract to compensate the respondent for the damage, loss or theft of the said properties.

This issue will not detain me. I am aware that reliefs for enforcement of a contract or remedies available for breach of a contract depends on a variety of factors, such as the nature of the contract, the terms of the agreement and the applicable law. Therefore, if a party is concerned about the other party's performance under the contract, terminating the contract may not be the only or best option available. A party to the contract may choose to rely on the provisions of the contract to enforce performance by seeking specific performance, damages or compensation. As rightly argued by Mr. Chotta, the respondent in this matter opted to rely on clause 6 of the contract to seek compensation for the loss of the properties. In the circumstances, I find no merit in this ground of appeal and I dismiss it accordingly.

Coming to the last ground, the appellant submitted that, records of this matter indicates that the case was filed at Geita District Court registry but the judgment and decree are of another court which is the Resident

Magistrates' Court of Geita and the records are silent on when the case was shifted from the District Court to Resident Magistrates' Court.

Responding to this argument, Mr. Chotta argued that this ground is baseless because in HC Civil Appeal No. 62 of 2018, the High Court having decided to remit the matter back to the trial Court to be tried by a different magistrate and the District Court had only one Magistrate who had tried the matter at a time, the Court and parties had a meeting and both parties agreed to commence the matter before the assigned magistrate who was in the Resident Magistrates' Court using the same pleadings. He explained that this position is well explained in the impugned judgment at page 2, second paragraph.

This issue was not raised at the trial Court. However, records indicate that in HC Civil Appeal No. 62 of 2018 filed by the appellant herein against the respondent, this Court made an order by consent of the parties that the matter be remitted back to the trial Court for it to be determined before a different magistrate on the same plaint and written statement of defence.



Proceedings indicate that, following an order of this Court for rehearing of the matter, on 25/2/2019 Hon. G.N. Kurwijila, RM reassigned the matter from Hon. Mrisho, PDM to Hon. N.R. Bigirwa, RM who heard the matter to the end. Hence, the appellant's allegations that records are silent on the shifting of this matter are not accurate.

That said, I find no merit in this appeal and I proceed to dismiss it in its entirety. The respondent to have her costs.

It is so ordered.



  
K.N. ROBERT  
JUDGE  
17/3/2023