IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 53 OF 2021

MWESIGWA ZAIDI SIRAJI.....PLAINTIFF

VERSUS

MARA TEXTILES LIMITED..... DEFENDANT

RULING

Date of last order: 20/03/2023

Date of Judgment: 21/04/2023

E.E. KAKOLAKI, J.

This ruling seeks to address and determine the prayer made by defendant's advocate Mr. Msuya, relying on the case of **Mwalimu Paul John Mhozya Vs. Attorney General** (1996) TLR 229, for this Court to find that the defendant has no case to answer, against plaintiff claims in this suit upon closure of his case on 27th October, 2022. Briefly the plaintiff herein, Mwesigwa Zaidi Siraji by way of plaint instituted the instant suit against the above-named defendant for payment of USD 200,000 as specific damages for breach of contract for professional services, general damages to the tune of USD 100,000, interest for the claimed specific damages at the rate of 30% per annum from the date of breach to the date of judgment, interest of the

decretal amount at the rate of 12% per annum from the date of judgment till full payments and costs of the suit. It is deposed in paragraphs 4 and 5 of the amended plaint that, defendant's officers one Gulam Dewji and Mohamed Dewji, the chairman and managing director to the defendant respectively, initiated discussions with the plaintiff which culminated into his appointment vide a letter with reference No. Textile/Invest/2021/01/061 dated 6th January, 2021 (annexure A1 to the plaint) to represent the defendant in all issues of facilitation for repossession of her assets as a subsidiary company of Mohamed Enterprises (Tanzania) Limited (MeTL) group. It is stated that, after several discussions a consensus was reached for defendant to pay the plaintiff USD 200,000 as consideration for his appointment being an advocate and specialist in cooperate commercial and investment law, the consideration which is mentioned in the letter dated 6th January, 2021 with reference No. MARA/Textile/Invest/2021/2/061 (annexure A2 to the plaint), and meant to be paid to the plaintiff by 18th January, 2021. It is deposed further that, the plaintiff continued to handle the task assigned to perform by making follow ups with Government authorities and advise the defendant accordingly on the actions to be taken in order to achieve her desired goals. Following his appointment and

assurance of payments by the defendant it is contended, the plaintiff through its officers organized and conducted official meetings with various government officials including the president of the United Republic of Tanzania, Minister of Finance and Planning, Minister of industry and Trade, Minister of Investment, President's office, special committee under the Treasury Registrar's office, Director General of Tanzania Investment Center, and the Regional Commissioner for Mara region. It is the plaintiff's averment that, having effectively performed his professional obligations to the extent of achievements of defendant's goal, when demanded for the promised payments the defendant remained silent, until on 13th March, 2021, when she surprised him as without any prior notice, she withdrawn his instruction from the engaged contract vide her letter dated 29th January 2021 (annexure A4), the letter which does not disclose the reasons for such withdrawal or anything about his payments.

The plaintiff also asserts that, up to the time of filing this suit the defendant failed and neglected to pay him the claimed USD 200,000, which was due since 18th January, 2021 and that, efforts to recover the same through several demands proved futile as the defendant and his officers blocked

communication with him. It is on account of afore circumstances the instant suit was preferred by the plaintiff seeking for the following reliefs:

(a) A declaration that the agreement which was executed between the plaintiff and the defendant on the 16th January 2021 was valid.

(b) A declaration that, the defendant has failed to discharge its contractual obligations for failure to effect the agreed payments under the agreement in (a) above.

(c) A declaration that the defendant has breached the contract entered between him and the plaintiff.

(d) An order that, the plaintiff pay the defendant a total amount of USD 200,000 (two hundred Thousand Dollars) being specific damages arising from contractual relationship of 6th January 2021.

(e) An order for the defendant to pay the plaintiff USD 100,000 (One hundred Thousand Dollars) being general damages.

(f) An order against the defendant to pay 30% per annum interest on item (d) above from the date of breach to the date of judgment

(g) An order against the defendant to pay 12% per annum interest on item (e) above from the date of judgment till when the payment is made in full.

(h) Cost of this suit.

(i) Any other reliefs as the Court shall deem proper to grant in the circumstances.

When served with the plaint, the defendant filed the WSD strenuously denying plaintiff's claim while deposing that, the plaintiff is neither entitled to any specific damage nor any other reliefs as claimed. She denied to have entered into any contract with the plaintiff as alleged claiming that, if at all she entered into any contract with him then the same would have been signed by her directors with the company seal, accompanied with company board of directors' resolution.

Throughout the trial of this suit, the plaintiff appeared in person and prosecuted the case on his own, while the defendant enjoyed the services of Mr. Elisa Msuya assisted by Ms. Neema Mahunga, both learned advocates. Before hearing could start and after fully engagement of parties the following issues were framed and recorded by the court for determination of parties' dispute in this suit. These are:

(1) Whether the defendant entered into contract with the plaintiff for a consideration of USD 200,000.

(2) Whether the said contract was breached?

(3) What reliefs are the parties entitled to.

In a bid to prove his case by addressing the above cited issues, the plaintiff paraded himself as a sole witness (PW1) and relied on four (4) exhibits, the appointment letter by the defendant to represent her on matters of facilitation for the repossession of the asset dated 6th January, 2021 (exhibit PE1), withdrawal of instruction letter dated 29th January, 2021, various WhatsApp and email communications (exhibit PE3 collectively) and MeTL Group company profile (exhibit PE4). It is after closure of his case and before the Court could invite the defendant to enter her defence, defendant's advocate Mr. Msuya raised and prayed for the Court's leave to hear the defendant on the submission of no case to answer against plaintiff's claim, the prayer which was cordially granted and the hearing ordered to proceed by way of written submissions, in which both parties complied with the filing schedule, hence the present judgment.

As alluded to above the defendant invited this Court to find her with no case to answer against the plaintiff's claims in this suit. On his side the plaintiff is resisting the prayer by the defendant submitting that, Court should hear both parties by inviting the defendant to enter her defence and consider both parties' evidence before entering its judgment.

I have had ample time to revisit the contending submission by the parties on the defendant's prayer for the Court to find her with no case to answer as well as perusing the pleadings filed in Court. Before venturing into determination of the issue as to whether the defendant has a case to answer or not against the plaintiff's claims, I find it apposite to revisit the law related to submission of no case to answer in civil cases. It is the law that, at the closure of plaintiff's case the defendant may submit on no case to answer as the position is the same as the one obtained in criminal case. See the case of **Mwalimu Paul John Mhozya**. The only different is that, in civil cases is that once the defendant elects to call no evidence in reliance of his submission of no case to answer either expressly or impliedly and the Court finds that, he has a case to answer, then it will be entitled to enter judgment against her/him without affording him/her with the right to enter defence unlike the position obtained in criminal cases. See the case of **Daikin Air Conditioning (E.A) Ltd Vs. Havard University** (1977) HCD 1, when made reference to the decision of the Court of Appeal for Eastern Africa in **Overseas Touring Company (Road Services) Limited Vs. African Produce Agency (1949) Limited and Another**. The test applicable in civil cases when making a finding that the defendant has no case to answer

is that, upon applying its mind reasonably to the evidence adduced by the plaintiff, *what might a reasonable court do?* Meaning that, if the Court is likely to mistakenly find the case in plaintiff's favour then should refrain from making a finding of no case to answer against the plaintiff instead should proceed to enter judgment in his favour. This test was well articulated by this Court in the case of **Mwalimu Paul John Muhozya** (supra) when speaking through Samatta, J (as he then was) where the Court observed thus:

> *"I understand the law, when the dismissal of the plaintiff's case on the basis of no case has been made out is prayed for, the court should not ask itself whether the evidence given and/or adduced by the plaintiff establishes what would finally be required to be established, but* ***whether there is evidence upon which as court, applying its mind reasonably to such evidence, could or might (not should nor ought to) find for the Plaintiff. The submission of no case to answer cannot be upheld if there is sufficient evidence on record on which a court might make reasonable mistake and enter a judgment for the plaintiff****. Whereas the test to be applied at the close of the Defendant's case is what ought a reasonable to court to do?* ***The one to be applied in determining the validity or otherwise of a submission of no case to answer is what might a***

reasonable court do? *See Supreme Service Station (1969) (PVt) Ltd Vs. Fox and Gooridge (Pvt) Ltd (2). The later test I have described in the one I must apply in determining Mr. Mwidunda's submission in the matter now before me." (Emphasis supplied)*

As the law stands, the onus of proving that, evidence adduced is sufficient enough for the Court to apply its mind and find the case in his favour lies on the shoulder of that party who would desires any court to enter judgment in his favour against any legal right or liability as it is well provided in sections 110(1), (2) and 111 of the Law of Evidence Act, [Cap 6 R.E 2019]. In discharging that noble duty the standard of proof no doubt is that of balance of probabilities as described in section 3(2)(b) of Evidence Act, which simply means that, court is satisfied an event occurred if the court considers that, on the evidence the occurrence of the event was more likely than not. See also the case of **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2004, **Mathias Erasto Manga Vs. M/S Simon Group (T) Limited**, Civil Appeal No. 43 of 2013, **Paulina Samson Ndawavya Vs. Theresia Thomasi Madaha**, Civil Appeal No. 53 of 2017 (CAT-unreported), and **Berelia Karangirangi Vs. Asteria Nyalwambwa,** Civil Appeal No. 237 of 2017 (All CAT -Unreported). In **Mathias Erasto Manga** (supra) the Court of Appeal when considering the standard of proof

applicable in civil case which is on the balance of probabilities, made reference to the case of **Re Minor** (1996) AC 563 where it was held that:

> *"The balance of probability standard means a court is satisfied an event occurred if the court considers that, on the evidence the occurrence of the event was more likely than not."*

It is also a principle of law in proving civil cases that, unlike general damages, specific damages must be **pleaded**, **particularized** and strictly **proved** as it was stated in the cases of **Zuberi Augustino Vs. Anicet Mugabe** (1992) TLR 137, **Masolele General Agencies Vs. African Inland Church Tanzania** [1994] TLR 192, **M/s. Universal Electronics and Hardware (T) Limited Vs. Strabag International GmbH (Tanzania Branch)**, Civil Appeal No.122 of 2017 and **Reliance Insurance Company (T) Ltd and 2 Others Vs. Festo Mgomapayo**, Civil Appeal No. 23 of 2019 (All CAT) On the above principle of the law, I am also inspired by observation by Justice Yaw Appau, Justice of the Court of Appeal, in his Paper Presented at Induction course for newly appointed circuit judges at the Judicial Training Institute (Ghana), **Assessment of Damages**, *(www.jtighana.org),* where the three (3) Ps were stressed to be observed, the observation which I find to be good law, whereon at page 6 on the proof of special damages, His Lordship had the following comments to make and I quote:

"Unlike general damages, a claim for Special damages should be specifically pleaded, particularized and proved. I call them three P's."

With the above principles in mind, I now proceed to make findings on the issue as to whether the defendant has no case to answer against the claims by the plaintiff amongst others for USD 200,000 as specific damage for breach of contract of professional services, as submitted on by Mr. Msuya. In so doing as alluded to above, I will be guided by the above cited principles while making reference to the submission made by the parties and evidence adduced by plaintiff in addressing the three (3) issues framed by the Court. To start with the first issue as to whether the defendant entered into a contract with the plaintiff for consideration of USD 200,000, it was Mr. Msuya's submission that, this Court has to satisfy itself whether the plaintiff has given evidence upon which if applies its mind thereto reasonably can find for the plaintiff and/or whether on the evidence adduced a reasonable court might make a mistake and find for the plaintiff. According to him there is no such evidence tabled by the plaintiff before the Court proving that such contract for consideration of USD 200,000 was entered between parties as the only documents relied on by the defendant to establish his case are exhibits PE1, PE2 and PE3. As for exhibit PE2, which is the appointment letter

dated 6th January, 2021, for his appointment to represent the defendant on matters relating to repossession of her assets of Mara Textiles Ltd, it is his views that, the same does not mention any remuneration for such appointment to prove his claim of existence of contract for USD 200,000. Regarding exhibit PE2, the termination letter he submitted the same discloses the reason leading to termination of plaintiff's engagement due to disappointment caused to the defendant by him in handling his appointment. He argued further that, the other evidence relied on is a long list of email correspondences and whatsApp messages (exhibit PE3) allegedly exchanged between Gulam Dewji and Mohamed Dewji and the plaintiff, WhatsApp messages bearing the phone number printed by the plaintiff himself, hence failure to qualify as authentic electronic evidence in terms of the provisions of section 18(1)(2)(a),(b),(c),(d) and 3(a),(b) and (c) of the Electronic Data Transaction Act, as data massage. He argued since the said WhatsApp messages are not authentic and none of the documentary evidence in exhibits PE1 PE2 and PE3 is mentioning the alleged remuneration of USD 200,000, as per the case of **Mwalim Paul John Mhozya** (supra) there is no established evidence by the plaintiff that would reasonably call this Court to find the case in his favour that, there existed a contract between

parties under consideration of USD 200,000 which allegedly was breached by the defendant. He further argued, even assuming the said contract is in existence still the plaintiff had no legal mandate such huge amount in contravention of Advocates Remuneration Order of 2015, GN. No. 263 of 17th July, 2015, for being engaged as an advocate. To him since the plaintiff has failed to establish existence of the Contract whose consideration is specific damage of USD 200,000, as per the requirement of the law on the proof of specific damage as stated in **M/s. Universal Electronics and Hardware (T) Limited** (supra), the second issue as to whether there is breach of contract becomes obsolete and irrelevant. On that basis and as held in the case of **Mwalimu Paul John Mhozya** (supra), Mr. Msuya submitted the only consequence the plaintiff's is to suffer for failure to establish his claims is dismissal of the suit with costs, as the defendant has no case to answer. He therefore prayed this Court to find the defendant has no case to answer and proceed to dismiss the case against her with costs.

Responding to defendant's submission, the plaintiff Mr. Mwesigwa viewed the test to be applied by the the court on submission of no case to answer to be as that of '*what might a reasonable court do'*, and invited this Court to apply the same by making a finding that it is reasonable to call a forensic

expert and tender the report so as to allow the court and parties to examine him instead of dismissing the case as per Mr. Msuya's invitation to this Court. He argued that, in the present case there is still pending evidence not yet tendered, which is the forensic report pleaded by the plaintiff in para 7 of the amended plaint and paragraph 11 of the reply to the amended WSD, thus the submission of no case to answer should not be upheld by this Court as given pendency of that evidence, the procedure is inapplicable. The plaintiff said, it is so as this Court on 14/06/2021 ordered for investigation of disputed signature of Gulam Dewji in annexure A2 of the amended plaint and the forensic expert report is in plaintiffs favour thus, it is unreasonable for this court to dismiss the case before the forensic expert is called to appear and tender his report and subjected to cross examination. He supported his argument by citing Article 107 A (2) (e) of the Constitution of URT, section 3A (1) and (2) and section 3B (1) of the Civil Procedure Code, [Cap 33 R.E 2019], calling for this Court not to be tied up with technicalities.

Concerning the onus prove, he adopted Mr. Msuya's submission on application of section 110 (1) and (2) and 111 of the Evidence Act, but with reservation that the same is applicable only when both parties have adduced their evidence and the Court made its evaluation but not before the

defendant is called to enter his defence. He said as the burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on their side, to him since the plaintiff adduced and tendered his evidence namely Exhibit PE1, PE2, and PE3, then the defendant should be required to respond to it for the Court to decide and not to end up the matter without calling her to enter her defence. He also attacked the case of **Paulina Paul Ndawavya** cited by Mr. Msuya on the balance of probabilities as standard of proof in civil case submitting that, the same applies only after all parties have been heard and not on the plaintiff's part only. In his view, the court cannot establish whether the plaintiff has established his claims on the balance of probabilities without hearing from the defendant. It was his submission that, this Court should dismiss the submission on no case to answer, as to hold otherwise is tantamount to block usage of forensic report in determining this case while the report is already in courts record and forms party of proceedings for being referred on when admitting exhibit P1.

Regarding to existence of the contract of USD 200,000 and its breach, he argued, there is sufficient evidence on record that, plaintiff and defendant entered into contract for a consideration of USD 200,000 as the defendant in the WSD admitted to have not paid the money to the plaintiff and there

is proof in the forensic report for the defendants officers to have signed the letter carrying consideration of USD 200,000 (annexure A2 to the amended plaint) which its admission in court was wrongly refused, as that report is pleaded in paragraph 7 of the amended plaint and 11 of the rejoinder to amend WSD. He argued further that, since the pleaded facts on the conversation between him and defendant's officers are not disputed in the amended WSD then the said fact is considered as admission on the defendant's part hence, do not require proof as per the requirement of section 60 of the evidence Act. He insisted that, if the court applies its mind reasonably to the referred evidence, it is more probable than not that, it will enter judgment in favour of the plaintiff, hence the prayer by the defendant for the findings of no case to answer be dismissed.

Concerning proof of specific damages, it was his submission that, the same cannot be determined at this stage unless both parties are heard on the same. Regarding the claimed remuneration of USD 200,000 he contended that, plaintiff was appointed at capacity of specialist in Cooperate, Commercial and Investment Lawyer and not in the capacity of an advocate thus, his payments could not be regulated by Advocates Remuneration Orders. He stressed that, his work was beyond advocate activities and that

his termination letter exhibit PE2 had no terms of reference to justify plaintiffs' failure to perform his duties which would have led to his termination by the defendant.

On the authenticity of exhibit PE3, he said the defendants counsel ought to have raised the objection during its admission, otherwise raising it at this time is irrelevant. Regarding the submission that, the plaintiff did not tender any contract proving that he entered into contract of USD 200,000 with the defendant it was his submission that, he tendered and submitted that document dated 6th January 2021, with a consideration of USD 200,000 and a certified copy of that document is annexed to the amended plaint.

He submitted further that, at paragraph 4 of the plaint, plaintiff deposed to have negotiated and reach consensus with Gulam Dewji and Mohamed Dewji on behalf of the defendants, and argued that, in his WSD defendant does not dispute Gulam Dewji and Mohamed Dewji to be his officers and the fact that, forensic report proved Gulam Dewji to have signed Exhibit P1 and P2. Hence to him that was a proof of existing contract of USD 200,000 which was breached by the defendant. In light of the above submission he implored this Court to dismiss the submission of no case to answer by the defendant

and allow the forensic expert to tender his evidence in Court before the Court enters its judgment.

In rejoinder submission Mr. Msuya argued that, the plaintiff is misconceived of both law and facts. In his view the test to be applied as per the case of **Mwalimu Paul Mhozya** is 'what ought a reasonable court to do', thus the court has to traverse through all evidence tendered by the plaintiff. He was of the view that, in this case the plaintiff has tendered none concerning existence of the contract of USD 200,000 and its breach. Regarding the allegations that, there is still evidence of an expert to be produced and parties would be given right to cross examine Mr. Msuya contended that, the same is a total misconception as plaintiff never made any prayer that expert witness be called. He argued further that, the plaintiff is trying to suggest that, his case is not yet closed. However, his submission is not backed by the proceedings of the case which speaks the opposite. On when submission of no case to answer can be enter, he took the view, in determining whether there is a case to answer the law does not require all parties to a case to tender evidence as provided for in **Mwalimu Paul John Mhozya.**

Concerning the allegations that annexure A-2 was rejected without a reasonable cause, it was Mr. Msuya's submission that, once the decision to

reject admission of documentary evidence is entered the issue cannot be raised again as the court becomes functus officio. He took the view that, if the plaintiff was aggrieved, he had to challenge the same by way of appeal to the court of appeal.

Having considered the above fighting submission it is in the considered opinion of this Court that, the plaintiff failed to establish by evidence to the standard required that there was that contract for consideration of USD 200,000 entered between him and the defendant which allegedly was breached. The reasons I am so holding are not farfetched. Looking at his evidence there is no single contract tendered by to prove that there existed an agreement for a consideration of USD 200,000, on the contrary, the plaintiff tendered in Court and relied on the appointment letter by the defendant to represent her on matters of facilitation for the repossession of the asset dated 6th January, 2021 (exhibit PE1), withdrawal of instruction letter dated 29th January, 2021, various WhatsApp and email communications (exhibit PE3 collectively) and MeTL Group company profile (exhibit PE4). Exhibits PE1 and PE 2 reveal no more than appointment of the plaintiff to represent the defendant on matters of facilitation for the repossession of her asset and withdraw of instruction which in general do

not establish that plaintiff entered into contract with defendant for a consideration of the claimed amount of USD 200,000. In his evident the plaintiff gave a detailed oral account on how he was engaged in discussions and negotiations with the defendant's officers and reached to the agreed terms of the remuneration of USD 200,000, before he was issued with appointment letter (exhibit PE1) which lasted for 23 days only after being terminated vide exhibit PE2. In paragraph 6 of the amended plaint the plaintiff avers that, the agreed remuneration of USD 200,000 was reduced in writing as shown in the letter annexure A2. He however failed to tender the same in Court as it was rejected hence no proof that there existed such term on remuneration of USD 200,000, leave alone specific terms and obligations of his engagement. Section 101 of the Evidence Act, prohibits admission of oral evidence contract which terms are reduced into writing as provided under section 100 of the same Act. In other words oral evidence cannot supersede documentary evidence. It is law as stated above in **Masolele General Agencies** (supra), **M/s. Universal Electronics and Hardware (T) Limited** (supra) and **Reliance Insurance Company (T) Ltd and 2 Others** (supra) is that, specific damage must be pleaded, particularized and proved. Much as in this matter the plaintiff averred that

there was documentary evidence on the claimed term of remuneration of USD 200,000, which he failed to tender in court, his oral account that, there was oral agreement on that term I find is unfounded and reject it for want of proof.

That aside, in his evidence the plaintiff gave a detailed account on how he engaged with different government authorities and official for 23 days in performing his obligations under claimed contract not as an advocate but as a specialist in Cooperate, Commercial and Investment law. I am alive to the fact that, a contract is not only established by presence of a written and signed document but can be established from the conduct of the parties. See the decision of this Court in **Wananchi Group Tanzania Ltd Vs. Maxcom Africa Ltd**, Commercial Case No. 120 2019 (HC-unreported). It is however noted in this case that, there is no evidence by plaintiff's conduct proving to the court's satisfaction that, when engaged was to act as a consultant and not advocate for the defendant in repossession of his assets. I so view as even when subjected to cross examination on the proof of his performance admitted to have not tendered any document describing the kind of task he performed on those 23 days, or opinion given to the defendant on how to repossess the assets so as to justify is engagement not as advocate and

subject of Advocates Remuneration Order of 2015, but as specialist in Cooperate, Commercial and Investment law entitled to USD 200,000. In absence of such evidence it is difficult to prove that, there was a contract for consideration of USD 200,000 between parties and that the defendant breached the same.

There is also a another submission by the plaintiff that, this Court should consider the contents of the letter dated 6th January, 2021 carrying terms of his remuneration of USD 200,000 (annexure A2 to the amended plaint) which is also subject of forensic report yet to tendered evidence by forensic expert since the same was pleaded in paragraph 7 of the amended plaint and paragraph 11 of the reply to amended WSD as well as referred in the ruling for admission of exhibit PE1. Mr. Msuya is of the contrary view that, the plaintiff never requested to call the said forensic expert and the court proceedings so speak loudly, hence to him that evidence cannot be relied on by this Court. While I am in agreement with Mr. Msuya that, as the court record speaks the plaintiff never requested this Court to summon the forensic expert as court witness before closure of his case, I refuse the invitation by the plaintiff to treat the pleaded letter annexure A2 in paragraph 6 of the amended plaint as evidence on the mere fact that, the same was pleaded

and forms part of the Forensic report not tendered in court but pleaded in paragraphs 7 of the amended plaint. The reason I am so turning down that offer is not far-fetched, as it is based on the principle of law that, evidence improperly adduced or not adduced at all should not be relied on by the court to base its decision. This proposition was well articulated in the case of **Shemsa Khalifa and Two others Vs Suleiman Hamed Abdalla,** Civil Appeal No. 82 of 2012, (CAT-unreported) where the Court had this to say:

> *"….we think our main task is to examine whether it was proper for the trial court and other subsequent courts in appeals to rely upon, in their judgments, the said document which was not tendered and admitted in court.* ***We out-rightly are of the considered opinion that, it was improper and substantial error for the High Court and all other courts below in this case to have relied on a document which was neither tendered nor admitted in court as exhibit.*** *We hold that this led to a grave miscarriage of justice."*

It is also noteworthy that, there was a prayer by the plaintiff to tender in Court the alleged annexure A2, the prayer which was refused. The plaintiff in his submission complained that the same was wrongly rejected, the submission which was countered by Mr. Msuya that, this Court is functus officio to comment on admission of that document and if aggrieved with the

decision the plaintiff ought to have appealed against it and not to re-raise it before same court. It is true and I am at one with Mr. Msuya that, this Court having decided on the admission of the said document is rendered functus officio to comment on it as to whether it was wrongly rejected or not since that mandate in the sphere of higher court. I therefore discount the argument for being misconceived.

Again the plaintiff convincingly submitted that, the evidence in exhibit PE3 which are email and WhatsApp message communication allegedly exchanged between him and defendant's officers, hence proving existence of the contract subject of this suit. Mr. Msuya is resisting that submission contending that, none of the conversation therein discloses the alleged agreement or its terms of remuneration of USD 200,000 leave alone authenticity of WhatApp messages in which there is an insertion of phone number of the alleged officer of the defendant. I appreciate the efforts exerted by the plaintiff in making this argument, but with due respect to him upon glancing an eye in all documents collectively, I was unable to trace even single line referring to the terms of the contract in dispute of USD 200,000, nor is there any discussions on the terms of the said agreement

apart from the conversation on different agenda. I therefore find this argument wanting in merit.

In view of the fore going, and applying the test in **Mwalimu Paul Muhozya's** case in the first issue, it is apparent that, the plaintiff has failed to established sufficient evidence which if this Court applies its mind would have moved it to make a finding that, alleged contract of professional services for consideration of USD 200,000 was executed between the parties and breached by the defendant, thereof requiring the defendant to enter defence.

Again I have also considered the plaintiff's allegations that, section 110 (1) (2) of the Evidence Act cannot be applicable until both parties have adduced their evidence which I find to be unfounded and in total misconception of the law. I so view as in civil cases, the standard is on balance of probabilities and the burden of proof never shift unless the party on whom the onus lies discharges his burden. This Principle was lucidly adumbrated by Court of Appeal in the case of **Paulina Ndawavya Vs. Theresia Thomas Madaha** (supra) where the Court echoed thus:

> *"…the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his and the burden of*

proof is not diluted on account of the weakness of the opposite party's case."

In this case, The Court of Appeal also quoted **Sarkar's Laws of Evidence**, 18th Edition M.C. Sarkar, S.C. Sarkar and P. C. Sarkar, published by Lexis Nexis in which the later provides that:

> *"It is again trite that the burden of proof never shifts to the adverse" … The burden of proving a fact rest on the party who substantially assert the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason…. **Until such burden is discharged the other party is not required to be called upon to prove his case**. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden, until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party (At page 1896)". (Emphasis added)*

Applying the above principle in the present matter it is apparent that, convincingly there is no prima facie case established by the plaintiff sufficient enough to call the defendant to adduce her evidence in defence as the plaintiff has failed to discharge the noble duty of proving his allegations. It

is in the view of the forgoing reasons I consider the first issue answered in negative.

The above being the position, the 2nd and the 3rd issues are also bound to fail as their survival depend on the first issue because in absence of the alleged contract for consideration of USD 200,000 between parties there cannot be breach of the same.

In the event, it is the findings of this Court that, the defendant has no case to answer against the plaintiff's claims, the result of which is to dismiss this suit, the order which I hereby enter with costs.

It is so ordered.

Dated at Dar es Salaam this 21st April, 2023.

E. E. KAKOLAKI

JUDGE

21/04/2023.

The Ruling has been delivered at Dar es Salaam today 21th day of April, 2023 in the presence of the plaintiff in person, Ms. Neema Mahunga, advocate for the defendant and Ms. Tumaini Kisanga.

Right of Appeal explained.

E. E. KAKOLAKI

JUDGE
21/04/2023.