IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA SUB REGISTRY)

AT IRINGA

CIVIL APPEAL NO. 1 OF 2023

(Originating from Civil Case No. 10/2020 of the Resident Magistrate Court of Iringa before Hon. S. A. Mkasiwa, PRM.)

PYRETHRUM COMPANY

OF TANZANIA LIMITED ..... APPELLANT

VERSUS

HOMANGE KASTORY KUNZULAGA ..... RESPONDENT

JUDGMENT

2nd March & 27th April, 2023

I.C MUGETA, J:

The respondent sued the appellant in the Resident Magistrate Court (trial court) for breach of contract which occasioned financial loss of Tshs. 228,880,000. The respondent claimed for among others, a declaration that the appellant breached the contract, specific damages to the tune of Tshs. 60,000,000, general damages to the tune of 1,668,880,000 and costs of the suit. At the end of trial, the respondent was awarded Tshs. 23,000,000 as general damages and costs of the suit. Aggrieved by the trial court's decision the appellant filed this appeal based on five grounds namely;

1. *That the Honorable trial Magistrate erred in law and facts by making decision contrary to weight of the evidence that it was in fact the respondent who breached the contract and not the appellant.*
2. *The honorable Magistrate erred in law and fact by raising the issue of general damages suo motto without involving the parties and ending up awarding general damages without the respondent proving the same.*
3. *That the honorable Magistrate erred in law and fact by considering the exhibits that were not read by the respondent after they were admitted by the court.*
4. *The honorable magistrate erred in law and fact by proceeding with the hearing of the matter whilst the speed truck set had expired.*
5. *The judgment of the trial magistrate is otherwise faulty, wrong in law and incapable of any legal support.*

The appeal was argued by way of filing written submissions. For the appellant, the submissions were filed by Mr. Barnabas Nyalusi, learned advocate while those of the respondent were filed by Mr. Moses Ambindwile, learned advocate. I shall recapitulate their submission starting with the submissions for the appellant.

In his submissions, the appellant's counsel abandoned the 4th ground and argued the rest one after another. On the 1st ground of appeal, he

Mgeta

submitted the trial court decided against the weight of evidence which shows that it is the respondent who breached the contract. That according to respondent's evidence he stopped working as there were no flowers to collect without establishing that the appellant had terminated the contract. The learned counsel argued further that it is the respondent who breached the contract when he stopped collecting flowers without reason as found at paragraph 35 of the proceedings.

On the 2nd ground, the learned counsel contended that the respondent did not prove the extent of general damages he is entitled. That the issue of general damages was raised *suo moto* by the trial court when composing the judgment without involving the parties. He cited the cases of **Jayant Kumar Chandubhai Patel @ Jeetu Patel & 3 Others v. The Attorney General & 2 Others**, Civil Application No. 160 of 2016, Court of Appeal of Tanzania at Dar es Salaam (unreported), **M/s Darsh Industries Limited v. M/s Mount Meru Millers Limited**, Civil Appeal No. 144 of 2015, Court of Appeal of Tanzania at Arusha (unreported), **Frolida Emmanuel & Others v. Winifrida Emmanuel 7 Others**, Land Appeal No. 110 of 2020, High Court of Tanzania, Bukoba Registry (unreported) and **Witness Johanes v. Fredy Tyenyi & Sinda Samson Tyenyi**, P.C Criminal Appeal

Ngeta

No. 15 of 2022, High Court of Tanzania, Musoma Registry (unreported). Those cases, he argued, provide that where a matter is raised *suo moto* by the court, parties must be afforded a chance to address it on the issue. Failure to do so, he contended, renders the whole proceedings a nullity.

Regarding the 3rd ground, the appellant's advocate argued that the exhibits which were tendered by the respondent and admitted during trial were not read or explained to the appellant which renders them of no evidential value. To buttress his argument, he cited the case of **Bulungu Nzungu v. The Republic**, Criminal Appeal No. 39 of 2018, Court of Appeal of Tanzania at Shinyanga (unreported) and **Nkolozi Sawa and Chona Sebaya v. Republic**, Criminal Appeal No. 574 of 2016, Court of Appeal of Tanzania at Tabora (unreported).

Arguing the 5th ground of appeal, the learned counsel submitted that that on 19th July 2021 and 2nd August 2021 Hon. E. Nsangalufu made orders to proceed with Final PTC although she was not a presiding magistrate. This, in his view, renders the subsequent "judgment and proceedings wrong in law and incapable of legal support".

Counsel for the respondent opposed the appeal in the order of submission made by the counsel for the appellant. On the first ground of appeal he

Mgeta

contended that the appellant did not follow the procedures in terminating the contract by providing notice of such intention as provided under clause No. 1.1. That the appellant contracted another transporter which rendered the respondent redundant as far as the execution of the contract is concerned.

Regarding the second ground of appeal, the respondent's counsel submitted that the award of general damages is the trial court's discretion. In this case, he contended, the trial court exercised the discretion based on the evidence adduced by the respondent which proved that he suffered general damages. In his view, the appellant's contention that the court awarded general damages *suo moto* is misplaced. Such a relief was pleaded in his plaint and also alluded to in evidence in court. To cement his argument that such reliefs are at the court's discretion, he cited the case of **Ashraf Akber Khan v. Ravji Govind Varsan**, Civil Appeal No. 5 of 2017, Court of Appeal of Tanzania at Arusha (unreported).

Challenging the 3rd ground of appeal, the learned advocate for the respondent submitted that all documents tendered during trial were "read and cross examined by the parties' counsel" (sic). He argued that it is trite law that if documents were explained and the other party given

opportunity to cross examine on it, the other party cannot then allege that he was denied opportunity to know the contents of the exhibit as it was held in **Ernest Jackson @ Mwandikaupesi & Another v. Republic**, Criminal Appeal No. 408 of 2019, Court of Appeal of Tanzania at Dar es Salaam (unreported).

In the last ground, the respondent's advocate argued that on 2nd August 2021, Hon. Nsangalufu only adjourned the matter. The final PTC was conducted by the presiding Magistrate on 18th August 2021. In the alternative, he argued, the appellant was not prejudiced in any way and that overriding objective principle can cure the omission, if any.

In rejoinder, the appellant's advocate essentially reiterated his submissions in chief.

It is my view that the main complaint in the first ground of appeal is that the trial court erred to hold the appellant accountable for breach of the contract while it is the respondent who is the defaulting party.

It is undisputed that there was a contract between the parties. The question is who breached the contract? The appellant alleges the respondent had no motor vehicles to execute the contract while the respondent alleges that the appellant frustrated the contract by engaging

Mageta

another service provider. The appellant did not dispute the evidence that she engaged another service provider which denied the respondent works to perform, therefore, the allegation of incapacity is immaterial.

Item 1.1 of the contract provides for the requirement of notice, where a party intends to terminate a contract. Such a party shall issue a thirty days' written notice to the other party. It is my view that the appellant having observed that the respondent did not have enough motor vehicles for executing the contract, she ought to have issued a written notice for termination to the respondent. I understand that item 1.2 of the contract mandates the appellant to terminate the contract without notice. However, this is upon breach of any term of the contract or a misconduct on part of the respondent. The alleged misconduct or breach of terms of the contract on part of respondent is a misrepresentation that he had in his possession enough motorvehicles to execute the contract which fact the appellant later found to be false.

It is my view that despite the contract not providing that the respondent ought own transportation motorvehicles, the evidence that he was inspected and found to own not transportation motorvehicles is an afterthought evidence. This is because this fact is not pleaded at all. It just

Mugeta

cropped up in defence evidence which amounts to taking the respondent by surprise. Further, there is no details on how such inspection was conducted.

The appellant evidence that the respondent breached the contract rely on the fact that he refused to take up the contract issued in July, 2020. I think this is missing the point. The suit by the respondent is founded on engaging another transporter between April, 2020 and July, 2020. The appellant did not rebut the evidence of PW1 and PW2 on this fact. Therefore, as held by the trial court, by unilaterally engaging another contractor amounted to the appellant's constructive termination of contract. I find that, the trial court was right to hold that the appellant breached the contract. The first ground of appeal lacks merit.

The 2nd ground need not to detain me as principles governing general damages are clear that general damages are awarded in the discretion of the trial court and no evidence, unlike with specific damages, is required to prove general damages. The respondent pleaded in his plaint and also during trial he prayed for general damages to the tune of Tshs. 50,000,000. The trial court awarded Tshs. 23,000,000/=. Therefore, the court correctly exercised its discretion. This ground fails too.

The main complaint in the 3rd ground is that exhibits P.1 and P.2 were admitted but they were not read or explained thus the appellant did not know its contents. This is a matter of fact. Indeed, they were not read after they had been cleared for admission. However, exhibit P.1 is a contract between the parties which both parties admitted to have executed and binding between them. In the WSD at paragraph 3, the appellant admitted to have a contract with the respondent for transportation. When testifying in court as PW1, the respondent explained on important terms of the contract such as contract duration and termination conditions.

Exhibit P.2 on the other hand were bank statements. Exhibit P2 was served to the appellant before trial as it forms part of the list of additional documents filed on 31/8/2021. Therefore, the appellant was aware of its contents. As argued by the counsel for the appellant in **Bulungu Nzungu V. R,** Criminal Appeal No. 39 of 2018, Court of Appeal at Shinyanga (unreported) it was held:

> *"It is now a well established principle of the law of evidence as applicable in trial of cases, both civil and criminal, that generally once a document is admitted in evidence after clearance by the person against whom it is tendered, it must be read over to that person".*

I have traced the history of this principle from **Robinson Mwanjisi & 3 Others V. R** [2003] TLR 218 to the most recent cases including the Bulungu Nzungu V. R case (supra), it is my humble view that this principle is not absolute. Its use is limited to a trial where the other party was not supplied with the document prior to the trial. I hold this view because if it is applied equally to cases where parties exchange pleadings, the utility of such exercise would be rendered nugatory.

In **Robin Mwanjisi case** (supra) and **Bulungu Nzungu case** (supra) the trials started at district courts of Chunya and Maswa respectively. In **Mwinyi Jamal Kitalamba @ Igonza and four Others v. R** [2020] T.L.R 508, which has a similar holding, the trial was in the Resident Magistrates' Court of Dodoma. All these cases are criminal cases in subordinate courts. Criminal trials in subordinate courts does not involve exchange of documents prior to the hearing, therefore, if an exhibit is not read in such trials, indeed, the opposite party would be prejudiced. The purpose of the rule as was held in **Mwinyi Jamal Kitalamba @ Igonza and Four Others** (supra) is to bring about a fair trial in situations where the opposing party had no opportunity to access the content of the document prior to its tendering and admission. Consequently, the principle,

Mrgeta

in my view, is inapplicable, for example, to trials in criminal cases in the High Court where the contents of documents is read to the accused person during committal proceedings and the documents are supplied to him to keep and read for the whole period pending trial.

In this case, the appellant was in possession of the documents in issue, namely, the contract (exhibit P1), prior to the trial. This document was pleaded and annexed to the plaint which offered the appellant the opportunity to know its contents. Therefore, the cited cases are distinguishable.

Further, like in **Ernest Jackson @ Mwandikaupesi & Another case** (supra), the respondent in this case canvased the content of the document in evidence in chief and was cross examined on it. The appellant was, therefore, aware of its contents. In **Stanley Murithi Mwaura v. R**, Criminal Appeal No. 144 of 2019, Court of Appeal – Dar es Salaam (unreported) it was held that failure to read the document is fatal when, in the context of evidence in the concerned case, it occasioned failure of justice which is not the case here. No failure of justice has been occasioned.

Regarding exhibit P2 (the bank statement), this document, as I have said was served to the appellant before trial. Further, this notwithstanding, the trial magistrate did not consider the bank statements in reaching its decision. The complaint, I hold, has no merits.

The appellant's last ground is not clear as to what the learned advocate intended to complain about. Even the counsel's submissions have not been able to clear that ambiguity. This notwithstanding, I have perused the trial court's record for 19/7/2021 and 2/8/2021 it shows that on those dates, Hon. E. Nsangalufu only adjourned the matter and the parties were given dates to appear before the trial magistrate for final PTC which was conducted on 18/8/2021 by the trial magistrate. I see nothing illegal in that process upon which the trial in this case can be faulted. This ground of appeal has no merits too.

In the event, this appeal is, hereby, dismissed with costs for want of merits. I uphold the decision of the trial court.

THE HIGH COURT OF TANZANIA

I.C MUGETA

JUDGE

27/04/2022

Court: Judgment delivered in chambers in the presence of Eveta Lukango (legal officer of the appellant), Neema Chacha, advocate for the appellant and Cosmas Masimo, advocate for the respondent who is absent.

Sgd. I.C. MUGETA

JUDGE

27/04/2022