IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO 70. OF 2021

(Arising from Judgment and Decree of the District Court of Kinondoni at Kinondoni Dated 30th December, 2020 before Hon. E.A Mwakalinga- SRM)

GROSS INVESTMENT LTD..... APPELLANT

VERSUS

GULF CONCRETE AND CEMENT PRODUCTS CO. LTD..... RESPONDENT

JUDGMENT

Date of last Order: 23/05/2023

Date of judgment: 02/06/2023

E.E. KAKOLAKI, J.

This appeal by Gross Investment Ltd arises from the decision of the District Court of Kinondoni in Civil Case No.256 of 2019, that was handed down in favour of the respondent, whereby the appellant was ordered to pay her a total sum of Tsh.14,810,000/= being the outstanding debt, arising from payment of construction materials supplied to the appellant.

For a better appreciation of what transpired, I find it pertinent to narrate, albeit briefly the facts that gave rise to this appeal. As per the records, the respondent a registered company under the Tanzania laws entered into oral

contract with the appellant a construction company for supply of aggregates and premix to her project. It appears appellant paid a large portion of the contractual amount and remain with the outstanding balance of Tsh.26,310,000/=, in which she promised to settle but regrettably the respondent was never paid the same. Thus, the respondent resorted into filing Civil Case No. 256 of 2019 before the District Court of Kinondoni claiming among other things for payment of the above stated outstanding amount, interest at commercial rate from the date of default to the final payment of the decretal amount and cost of the suit.

In response while filing her written statement of defence the appellant raised a counter claim against the respondent, claiming that she impounded her (appellant's) standby generator which suffered her loss of anticipated revenue in the estimated sum of Tsh.32,000,000, the claim which was resisted by the respondent. After full trial the trial court viewed that the appellant should pay Tsh.14,810,000/ instead of Tsh.26,310,000, as there was set off of Tshs. 11,500,000 being the value of impounded appellant's generator by the respondent. Aggrieved, the appellant preferred the instant appeal fronting two grounds of grievances going thus:

1. *That the trial Resident Magistrate erred in law and fact in failing to hold that the evidence on record overwhelmingly establishes and proves the appellant lost expected revenue as clearly exhibited by DW3.*
2. *The trial Resident Magistrate erred in law and fact in failing to hold that, in the balance of probabilities, the appellant established her case over the respondent.*

On the strength of the above grounds of appeal, appellant invited this Court to allow the appeal, and hold that, appellant is not indebted to the respondent in the extent of Tsh. 14,810,000 as decreed by the trial court and respondent be condemned to pay cost of this appeal.

Hearing of the appeal preceded viva voce as the appellant was represented by Ms. Irene Mchau and Ms. Ndehorio Ndesamburo while respondent had the services of Mr. Innocent Tairo, all learned counsel respectively.

From the outset, in her submission, Ms. Mchau intimated the Court that she was consolidating grounds No. 1 and 2 and argue them conjunctively. It was her contention that, the trial court failed to consider the evidence of DW3, the duty which is placed to the trial court as insisted in the decisions of this Court and Court of Appeal that, the trial court is duty bound to evaluate and analyze the evidence of both parties in deciding a case. She fortified her

stance by referring the Court to the case of **Kaimu Said vs R**, Criminal Appeal No.391 of 2019 (CAT) at page 13-14, where the Court of Appeal insisted on the lower court's duty to evaluate and analyze evidence in the course of determination of the suit. In her view, DW3 whose evidence was not evaluated and analyzed by the trial Court, was called by the appellant to testify and corroborate evidence of PW1 and PW2 on specific claim of loss of revenue of Tshs. 32 million incurred by her, after the respondent had illegally impounded the generator belonging to the appellant's company. According to her, DW3 being the managing director of BAMA Building Contractors Limited, proved to the trial court that, their company had intended to hire the said generator from the appellant company for using the same in its project at Moshi rural area, under the consideration of Tshs. 120,000/= per day for the period of eight (8) months from February 2016-October,2016, but could not conclude the deal as the generator was unlawful and illegally impounded by the respondent, hence the claimed loss of income.

She submitted further that, the negotiations on the hire price were done orally between DW3's company and the appellant's company and added that, oral contract is acceptable in law as the settled law is that, parties can prove

the terms of their agreements either orally or in writings. She relied on the cases of **Sixbert Bayi Sarka Vs. Rose Nehemia Samzungi**, Civil Appeal No.68 of 2022 (CAT) at page 8, and the case of **Leonard Dominic Rubuye t/a Rubuye Agro Chemical Supplies Vs. Yara Tanzania Ltd,** Civil Appeal No.219 of 2018 (CAT) at page 14-15, where the Court held that it is not necessary that an agreement should be in writing form. It was therefore her submission that the evidence of DW3 was credible to prove the claimed amount of 32 million as his evidence was corroborating the evidence of DW1 and DW2, as rightly stated at page 6 paragraph 4 and page 7 of the impugned judgment where the trial magistrate stated that, the evidence of DW1 and DW2 was corroborated by that of DW3 who have no interest to serve in the matter. To cement her position, she cited the case of **Abraham Wilson Saigurani and 2 Others Vs. R** (1981) TLR 265 wherein the Court held that, evidence of a person with an interest of his own must be corroborated by some other independent evidence. She was insistent that, much as the evidence of DW1 and DW2 was corroborated by DW3, trial court act of dismissing appellants counterclaim was not proper, as DW3's evidence even when considered on its own was sufficient enough to prove the claimed amount of 32 million as independent witness with no interest in the matter.

She took the view that, the respondents act of impounding the appellant's generator without court's order was illegal and rendered the appellant to incur loss of anticipated revenue to the tune of Tsh. 32,000,000/-, thus prayed the Court to consider the evidence of DW3 and proceed to hold that, the appellant is not indebted by the respondent to the tune of 14,800,000/= as decreed by the trial court. She therefore prayed the appeal to be allowed with cost.

In response Mr. Tairo attacked the submission by Ms. Mchau on the contention that DW3's evidence was not considered. He argued that, his evidence was properly evaluated and considered as shown at page 3,4, 5 and 7 of the trial court judgment before the trial court found that, there was a setoff of the impounded generator by the respondent worth Tshs. 11,500,000 out of the claimed amount of Tshs. 26,320,000 by the respondent, hence reached the judgment that, the appellant should pay the respondent Tsh. 14,800,000/, the fact which proves that the trial court considered the defence evidence including that of DW3 as demonstrated at page 9 and 10 of the impugned judgment. He added, it is a settled law that, the court which took evidence is better placed to evaluate it, hence the appellate court has no reason to fault the same unless miscarriage of justice

is occasioned. He cemented his position by citing the case of **Multichoice Tanzania Ltd Vs. Maimuna K. Kiganza**, Civil Appeal No. 166 of 2020. He said, writing a judgment is an art and each magistrate or judge has its own style but the critical thing is whether the evidence before him is critically evaluated as per the case of **Sabas Kuzirima Vs. R**, Criminal Appeal No. 40 of 2019 (CAT) at page 15, in which she insisted the trial court did, and that is why it came out with the award of Tsh. 14,810,000/=. Basing on the above submission he prayed that the appeal be dismissed with costs.

In a short rejoinder, Ms. Mchau contended that, the set off was done in the main suit but the trial magistrate dismissed the counter claim without considering the evidence of DW3 as submitted in submission in chief. She reiterated her submission in chief and prayers as stated in her submission in chief.

Having considered the submission advanced by the learned counsels for the parties concerning the two raised grounds and examined the lower courts records, I am in agreement with Ms. Mchau that, the setoff was done by the trial court when determining the main suit, that is why it ordered the appellant to pay the respondent Tshs. 14,810,000/- the decision which I find no reason to interfere for being arrived at after proper evaluation of evidence

of both parties, having considered the uncontroverted fact that, the appellant was indebted to the respondent to the tune of Tshs. 26,310,000 and that, the value of the impounded generator for setoff was Tshs. 11,500,000/-. What remains in dispute is the issue as to whether the trial court evaluated and analyzed evidence of DW3 in determining appellant's counterclaim of Tshs. 32,000,000/- as loss of anticipated revenue following respondent's act of impounding her generator in realization of the outstanding amount of Tshs. 26,310,000/ in which the appellant was indebted to the respondent. Mr. Tairo says DW3's evidence was evaluated and analyzed that it why the trial found there was a setoff of Tshs. 11,500,000/-, the claimed impounded generator by the respondent out of the claimed amount of Tshs. 26,320,000 by the respondent, hence a judgment that, the appellant should pay the respondent Tsh. 14,800,000/. Ms. Mchau is of the opposite view submitting that, DW3's evidence on their company's failure to execute its intention of hiring the disputed generator under consideration of Tshs. 120,000 per day for eight (8) months, which was impounded by the respondent was never evaluated and analysed to prove the claim of loss of anticipated revenue to the tune Tshs. 32,000,000/- but rather the setoff was done when considering the claims in the main suit by the respondent.

Glancing at the record especially at page 5, 6,7 of the typed judgment mentioned by Mr Tairo, it is apparent to this Court that, apart from being mentioned in the summary of evidence, the evidence of DW3, was insufficiently evaluated and analyzed in establishing as to whether the same was proving appellant's claim of loss of expected income of Tshs. 32,000,000, due to respondent's act of impounding her generator. What was discussed at length by the trial Court in particular at page 7 of the impugned judgment was the credibility of DW3's evidence as well as that of DW1 and DW2 in which the court was satisfied that, his evidence was credible enough to corroborate that of DW1 and DW2. There was no findings as to whether his evidence proved the claim of loss of anticipated revenue of Tshs. 32,000,000/ by the appellant or corroborated the evidence of DW1 and DW2 or not. In so doing the trial Court voiced itself and I quote:

> *"The testimony of DW1 and DW2 in corroborated by DW3 who has no interest in the matter, he is the Managing Director of Bahi Building Contractors Co. Ltd. According to DW3 his attempt to hire this generator proved futile when he went to collect it in February, 2016 and was told by DW2 that, the same has been impounded by the plaintiff.*

I have no reason not to believe this witness (DW3) who has no interest to protect in the case unlike PW1 who is the employee of the plaintiff…"

As there was no evaluation and analysis of DW3's evidence concerning the claim of loss of anticipated revenue by the appellant to the tune of Tshs. 32,000,000 as rightly stated by Mr. Tairo this Court being the first appellate court enjoys the powers to rehear the evidence and come up with its own findings, the course which I am prepared to take. See also the case of **Multichoice Tanzania Ltd** (supra) and **Demaay Daat Vs. Republic**, Criminal Appeal No. 80 of 1994 (CAT-unreported), where in **Demaay Daat** (supra) the Court of Appeal on the powers of the Appellate Court to interfere with the finding of the lower court had this to say:

"It is common knowledge that where there is misdirection and non-direction on the evidence or the lower courts have misapprehended the substance, nature and quality of the evidence, an appellate court is entitled to look at the evidence and make its own findings of fact.".

In this matter it is not disputed that, the appellant raised a counter claim against the respondent in Civil Case No. 256 of 2019, claiming for loss of anticipated revenue in the estimated sum of Tshs. 32,000,000/ for failure to hire the said disputed generator to DW3's company, **Baha Building**

Contractors Co. Ltd for being impounded by the respondent. In dismissing the counter claim the trial court reasoned that, the claim of Tshs. 32,000,000/ was not specifically proved as required by the law to be specifically pleaded and proved. Ms. Mchau relying on the cases of **Sixbert Bayi Sarka** (supra) and **Leonard Dominic Rubuye t/a Rubuye Agro Chemical Supplies** (supra) submitted that, the negotiations and agreement for hiring the said generator between the appellant and Baha Building Contractors Co. Ltd was done orally, oral agreement which is recognized under the law, and it existence and the agreed consideration of Tshs. 120,000 per day was proved by DW3 in his testimony. It is settled law that, parties are bound by their own pleadings. See the case of **Charles Richard Kombe t/a Building Vs. Evarani Mtungi and 2 Others**, Civil Appeal No. 38 of 2012 and **Astepro Investament Co. Ltd Vs. Jawinga Company Limited**, Civil appeal No. 8 of 2015 (all CAT-unreported). It is also trite law that, claimed specific damages must be specifically pleaded, particularised and strictly proved. See the cases of **Masolele General Agencies Vs. African Inland Church Tanzania** [1994] TLR 192 and **Reliance Insurance Company (T) Ltd and 2 Others Vs. Festo Mgomapayo**, Civil Appeal No. 23 of 2019 (all CAT-unreported). It is further

a guiding principle in proof of Civil cases that, he who alleges must prove and the onus of so proving lies on the party who would lose the case if the alleged existing facts are not proved, as the standard of proof is on the balance of probabilities. This is in terms of sections 3(2)(b), 110 and 111 of the Evidence Act, [Cap. 6 R.E 2019], and the case of **Paulina Samson Ndawavya Vs Theresia Thomas Madaha**, Civil Appeal No 45 of 2017 CAT at Mwanza (Unreported) where it was held that;

> *"…it is a trite and indeed elementary that he who alleges has a burden of proof as per section 110 of Evidence Act Cap 6 [R.E 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on balance of probabilities which simply means* ***that the Court will sustain such evidence which is more credible than the other on a particular fact to be prove***." (Emphasis supplied).

See also the case of **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2004 (CAT-unreported)

Going by the records, as per paragraphs 8,9 and 10 of the appellant's counter claim apart from deposing that, she bought the standby generator model Cummis 17KVA Sound proof DG set and that he claiming for Tshs. 32,000,000/- as loss of anticipated revenue for failure to lease the generator which was illegally and forceful impounded by the respondent, there was

no particulars as to who was to hire it and under what consideration. These particulars I find were so vital to establish and prove to the court's satisfaction that, actually it was Baha Building Contractors Co. Ltd that was to hire the said generator under the specified amount, absence of which it cannot be concluded that, the claim of anticipated loss revenue was proved. That aside, while Ms. Mchau impressed upon the Court that, the negotiation and finally agreement for leasing the said generator made orally, it is DW3's evidence located at page 40 of the typed proceedings is contrary to her submission for stating that, the lease agreement was entered in writing. To hear from the horse's mouth I find it imperative to reproduce the excerpt from his evidence at page 40 of the proceedings:

> *"**We entered written agreement.** When were ready to collect the said generator. We came to be informed that, the generator was taken by one who '"aliekuwa anamdai"…"* (Emphasis supplied).

Since the alleged lease agreement of the generator is claimed to have been executed in writing it was expect that, DW3 would have attempted to prove its existence by tendering it in court despite the fact that, it was not pleaded. As the there is no proof that there was lease agreement as claimed by the

appellant, it is the findings of this Court that, the claims in the counter claim by the plaintiff were not proved to the required standard.

In the circumstances and for the fore stated reasons which I have endeavoured to provide, I find no justification to interfere with the trial court's findings as the appeal is devoid of merit, which I hereby dismiss with costs.

It is so ordered.

Dated at Dar es Salaam this 02nd day of June, 2023.

E. E. KAKOLAKI

JUDGE

02/06/2023.

The Judgment has been delivered at Dar es Salaam today 02nd day of June, 2023 in the presence of Ms. Ndehorio Ndesamburo, advocate for the appellant, and Ms. Asha Livanga, Court clerk and in the absence of the respondent.

Right of Appeal explained.

E. E. KAKOLAKI

JUDGE

02/06/2023.


IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY