UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOROGORO DISTRICT REGISTRY

AT MOROGORO

CIVIL APPEAL NO 1 OF 2023

(Arising from Civil Case no. 15 of 2021 at Morogoro District Court)

EFTA EQUIPMENT LOANS ..... APPELLANT

VERSUS

ARMSTRONG CHARLES KIWELO ..... RESPONDENT

JUDGEMENT

Date of last order: 17/5/2023

Date of judgement: 16/06/2023

MALATA, J

In this appeal, the appellant challenges the decision of the District Court for Morogoro which entered decision in favour of the respondent herein.

Before I delve into the nitty gritty of this matter, I find it apposite to briefly state some of the facts constituting this suit as may be gathered from the pleadings.

The trail of events began on 12th day November 2019 when the parties herein entered into a financial lease agreement of the equipment to wit tractor on the agreement that when the respondent complete payment of instalments according to the lease agreement the tractor will be into respondent ownership. Later on, 19th November 2020 the appellant officials invaded the respondents farm located at Majengo Street, Pandahill ward in Kongwa district, Dodoma Region forcefully entered and took the tractor and plough under the instruction of the appellant.

The plough was not the property of the appellant herein, the respondent bought it from one Geofrey Kangale Jeremiah, and by the time the plough was taken from the respondent he had undertaken to cultivate the farm of Chalo Mwibaya for agreement of payment of TZS 100,000,000, the contract which was terminated for failure of the respondent to cultivate the farm according to the agreement as the plough was in the possession of the appellant.

On several occasions the respondent made a follow up to the recover the plough without success. The respondent further testified that following the incidence he incurred the damages of TZS 15,000,000.

The appellant testimony was that the respondent was their client who took the tractor on credit, he failed to pay on time and according the contract when the client failed to pay, he was obliged to take the tractor subject to fourteen days' notice to be given to the defaulter to show cause as to why he failed to make the payment on time as agreed, the respondent herein was given the notice and he failed to comply with.

The appellant decided to take the tractor and plough which belong to the respondent, they took it expecting the respondent would make a follow up to recover the tractor and the plough, the respondent did not do so. They tried to communicate with the respondent after fourteen days so that he can took his plough, the respondent did not show up.

Being dissatisfied by the acts of the appellant the respondent instituted the suit at Morogoro Urban Primary Court for the recovery of plough and payments of damages arising from the appellants acts of taking the plough, upon served with the summons on 13th June the appellant prayed for the transfer of the case to Morogoro district court. The appellant prayer was granted and the case was transferred to District Court.

The plaintiff, now the respondent prayed to the District Court to be re-instated with his plough as it was before or equivalent amount, payment of specific damages and general damages for the loss of income for the whole time the respondent failed to use the plough to be assessed by the court, costs of the suit and other reliefs the court deemed fit. The District Court entered decided in favour of the respondent, where the appellant was ordered to return the plough to the respondent on their costs to the place of the plaintiff's needs, the appellant to pay the respondent the sum of forty million Tanzanian Shillings (TZS 40,000,000) as specific damages and ten million Tanzanian Shillings (TZS 10,000,000) as general damages.

Being aggrieved by that decision of the District Court the appellants now appeal and to this court on the following grounds;

1. That the Honourable Magistrate erred in law and facts by deciding the matter which was out of jurisdiction.
2. That the Honourable Magistrate erred in law and fact by deciding the matter in favour of the respondent for failure to evaluate properly the evidence adduced by both parties.
3. That the trial Magistrate erred in law and fact by deciding the matter in favour of the respondent without taking into consideration on the contents of the lease agreement existed between the parties.

4. That the trial Magistrate erred in law and fact by deciding the matter in favour of the respondent without taking into consideration of heavy appellant testimony adduced before the trial court

When this appeal came for hearing both parties were represented, the appellant was represented by Mr. Christopher Mgallah, learned counsel while the respondent enjoyed the service of Ms. Alpha Sikalumba, learned counsel.

Submitting in support of appeal Mr. Mgallah stated that at the trial court the suit was attached by Preliminary Objection that the Court had no jurisdiction on the ground that, in the contract on page 9 paragraph 14 of the lease agreement the parties agreed that in case of any dispute they shall refer the matter to the arbitrator. Thus, the court had no jurisdiction to entertain the matter, the learned counsel cited the case of **SCOVA Engineering and another vs. Mtibwa Sugar Estate and 3 others** at page 18 – 19 of the judgement where the court ordered that the court had no jurisdiction.

As to the 2nd and 4th ground of appeal, the trial court failed to properly analyse the evidence on record as the respondent tendered the contracts of which the appellant was not privy to. When the appellant adduced evidence as to how the relationship was as opposed to the contract the

same was not honoured. There is no contract ever been centred between the appellant and respondent to cultivate a farm. If the respondent could have disclosed the existence of such contract the appellant could have repossessed the tractor and respondent plough and settle the outstanding balance. This is evidenced by the appellant that from the first day of repossession there have been communication between appellant and respondent as to where the appellant should bring back the plough, he was negatively responding.

All these were not objected by the respondent. The learned counsel prayed to withdraw the 3rd ground and prayed the appeal to be allowed with costs.

Replying to the submission by the appellant, Ms. Sikalumba stated that the matter before the trial court is different from the contract being referred to by the appellant. The contract referred by the appellant was on agreement for lease of the tractor while the case before the trial court was the return of the plough which was wrongly taken by the appellant when taking the tractor which was the subject matter of the referred contract.

The case was in respect of the return of the plough and not tractor and that there was no contract of taking plough or the appellant hiring the

plough from the respondent. Thus, the referred contract had no relationship with the issue at hand.

Assuming the contract had relationship, thus subject to a clause of arbitration the respondent could have applied for stay of proceedings and not filing of written statement of defence, as stated in the case of **Trade Union Congress of Tanzania (TUCTA) vs. Engineering Systems Consultants and two others**, Civil Appeal no. 51 of 2016 also in the case of **Equity for Tanzania (EFTA) vs. Enock Nobert Malihela**, Civil Appeal no. 31 of 2020 page 7 to 8 of the judgement, reference can also be made to the Arbitration Act section 13. As the defendant filed the Written Statement of Defence waived his right of raising the issue, thus the court had jurisdiction to entertain the same.

As to the 2nd and 4th ground of appeal, the respondent stated that, the trial court properly evaluated the evidence and ruled it correctly, the fact that the contract tendered by the respondent was not known to the appellant is unfounded.

In the application for lease, the respondent was required to demonstrate how he was going to use the said tractor and pay the lease consideration, one of the conditions was to show the presence of plough.

As such they had knowledge to the existence of such contract, the allegation that there was communication between the appellant and respondent on how to return the plough is not true, the appellant did not prove such communication.

The appellant's testimony was to the effect that they took the plough which belong to the appellant and that they took it expecting the respondent to make a follow up, at page 5 paragraph 3 of the judgement and page 6 of the proceedings. At paragraph 2 the appellant admitted that the plough belongs to the respondent.

Ms. Sikalumba submitted that, the trial court correctly evaluated the evidence and ended with correct findings, and they pray for appeal to be dismissed with costs.

On rejoinder, Mr. Mgallah had this to say, the plough was not part of the lease agreement, however the leased tractor was using the respondent's plough, at page 5 the trial magistrate failed to properly interpret the clause as it provides for any dispute arising from lease agreement. As to the argument that the contract was well known to the appellant it is not correct and the same was not raised at the trial, he prayed for the appeal to be allowed.

Having heard the submission by both the parties this court has assembled the following issues

The issue for determination before this court is

1. whether the subject matter at the trial court and this appeal (the plough) fall within the lease agreement thus amenable by arbitration under Article 14 of the Lease Agreement
2. whether the appellant waived the right to raise objection to refer the matter upon filing Written Statement of Defence.
3. Whether either party was in breach of lease agreement
4. To what remedies are the parties entitled to.

To start with, this court being the first appellate court has the duty to re-evaluate the evidence on records and put it under critical scrutiny and came out with its own conclusion. In the case of **Mapambano Michael @ Mayanga vs. Republic, Criminal Appeal no. 268 of 2015** unreported at Dodoma, the court placed the special duty on the first appellate court as follows;

> *"The duty of the first appellate court is to subject the entire evidence on record to a fresh re-evaluation in order to arrive at decision which may coincide with the trial court decision or maybe different altogether."*

Having in mind the duty of the first appellate court, and this being the first appellate court, I am going to do what the law requires to be done.

It is trite law that, whoever alleges existence of any fact bears the duty to prove the same. This principle is gathered from **sections 110. 112 and 115 of the Evidence Act, Cap. 6 R.E. 2022** and judicial precedent including the case of **Manager NBC Tarime Vs. Enock M. Chacha [1993] TLR 228.**

It follows, therefore that, in determining cases, courts/ tribunals are guided by the evidence adduced by the parties and Constitution, Laws, Regulations/Rules, Tradition and customs.

It is undisputed fact that, in the lease agreement between the parties herein plough was neither part of nor supplied by the lender to the respondent. The evidence on record proves that, plough belonged to the respondent. It is on record that, the respondent was required to have plough and appellant was to supply a tractor, each part to lease agreement performed his obligations, thence execution of contract up to when it was claimed to have been breached.

Further, the parties to this appeal are in agreement on one thing, that in the contract of lease of tractor there was a clause that in case of any

dispute arising from or in connection with the lease agreement shall be settled through arbitration to be conducted in Dar es Salaam.

Based on that clause, the appellant is of the view that the District Court had no jurisdiction to entertain the matter as the parties were obliged to go to arbitration.

The requirement to abide to an arbitration clause contained in an agreement entered by the parties was emphasizes in the case of **Construction Engineers and Builders Ltd vs. Sugar Development Corporation** [1983] TLR 13, where it was stated that;

> *"Where it is clear that the parties to a contract have agreed to submit all their disputes or differences arising under the contract to an arbitrator the disputes must go to arbitration unless there is a good and sufficient reasons to justify the court to override the agreement of the parties."*

On 16th August, 2021, the respondent herein filed a suit in the District Court for Morogoro in response thereto, the appellant filed Written Statement of Defence raising among others that, the court had no jurisdiction.

As stated above, the parties had agreed any dispute arising from or in any connection with this agreement' be referred to arbitration.

This court read the lease agreement, in particular article 4 and noted that, as correctly position by both parties that, the lease agreement was in respect to lease of a Tractor Made **"Tractor SWARAJ 744EA".**

The respondent purchased the plough as evidenced by sale agreement admitted as **exhibits PE1 and PE2**.

Further, the appellant does not claim for ownership of the said plough but the respondent was using it with the leased tractor by the appellant herein. At the time the tractor was taken by appellant it was with plough the property of respondent.

In that regard, this court conclusive satisfied that, the plough was the property of respondent but at the time appellant took the tractor the plough was with the tractor. Appellant stayed with plough which belonged to the respondent without any agreement thus the claimed damages.

As such, the plough was neither party nor subject to the financing lease agreement. Since, it was not part of it, then any dispute arising from plough cannot be subjected and handled under the conditions of the financing lease agreement. There was no lease for a plough but a tractor made **"Tractor SWARAJ 744EA".**

This marks the end of discussion in respect to issue no. 1 herein above.

Assuming, the plough was covered under financing lease agreement thus subject itself to arbitration in case of any dispute there from, Ms. Sikalumba submitted that, the appellant ought to have applied for application for stay of proceedings under section 13 of the Arbitration Act and not to step in and filing written statement of defence. Filing of written statement of defence amount to nothing but a waiver of arbitration clause, thus subjecting to normal court procedures. This position is gathered from the case of **Trade Union Congress of Tanzania (TUCTA) Vs. Engineering Consultants Ltd** (supra) where the court held that;

> *"We agree with both learned Judge and the respondents counsel in that* ***after filing the written statement of defence the appellant lost the right to refer the matter to an arbitrator because that signified the preparedness to resort to court."***

Appellant's counsel did not counter the above position vigorously but just maintained that, the mere fact that, the appellant raised it in the defence, it was enough and not applying for stay of proceedings.

The answer to above legal divergence by the counsels is provided in section 15 of the Arbitration Act Cap.15 R.E.2020 which provides that;

(1) A party to an agreement against whom legal proceedings are brought, whether by way of claim or counterclaim in respect of a matter which under the agreement is to be referred to arbitration may, upon notice to the other party to the proceedings, apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

(2) An application under subsection (1) may be made notwithstanding that the matter is to be referred to arbitration after the exhaustion of other dispute resolution procedures.

(3) A person shall not make an application under this section unless he has taken appropriate procedural step to acknowledge the legal proceedings against him or he has taken any step in those proceedings to answer the substantive claim.

(4) The court shall, except where it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed, grant a stay on any application brought before it.

(5) Where the court refuses to stay the legal proceedings, any provision in the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter shall be of no effect in relation to those proceedings

In consideration of the above cited authorities and section of the Arbitration Act, this court finds that, since the appellant did not apply for stay of proceedings as mandatory required by section 15 cited herein above, then he waived such right of raising the jurisdiction issue.

In arbitration proceedings, one is required to apply for stay of proceedings and move the court to determine on the issue of jurisdiction without entering a defence. In this case the appellant entered defence meaning that, he waived his right complained about. One cannot enter a defence at the same time raising jurisdictional issue in arbitration cases. Legally, it is not permissible. Finally, the trial court was vested with jurisdiction and the raised preliminary objection on jurisdiction met a death upon the appellant filing a defence. **This marks the end of discussion in respect to issue no. 2 herein above.**

As to 2nd and 4th grounds, the appellant attacks trial court that, it failed to analyse the evidence on records. On this aspect, the appellant complaints that, the respondent tendered a contract which the appellant was not privy to it. It is true that, the contract tendered was not between the appellant and respondent. It is on record that, the appellant and respondent had only one agreement, that is financing lease agreement.

This court noted that, the contract to purchase the plough and the contract to cultivate the farm of one Chalo Mwibaya **(Exhibits PE1 and PE2)** were for the purposes of establishing ownership of plough and engagement between the respondent and third party. The agreement at issue was that of financing lease agreement of the breach is centred.

The allegation by the appellant that, they had no knowledge of the existence of the contract of plough or cultivation is of no importance to the case at hand, parties are bound by terms of the contract they entered, that is lease agreement.

Clearly the respondent tendered the contract especially exhibit PE2 which is the contract for cultivation where the respondent had already taken down payment from third party to show how much loss the respondent incurred

following the act of the appellant as reflected at page 8 of the trial court judgement.

There was a contractual agreement between the appellant and the respondent, the appellant had discharged his contractual obligation under the lease agreement by handing over the tractor to the respondent, it a settled law that a person who seeks to enforce a remedy under the contract must show that all the conditions precedent have been fulfilled.

The respondent herein was under obligation to make payment of the leased tractor to the final instalment and handed over the tractor without default. When the respondent failed to pay and the fourteen days' notice issued upon him, he was under obligation to explain to the appellant as to why he failed to honour the contractual terms. This means that the respondent was in breach by failure to discharge his obligation under the contract.

The act by the appellant to take the tractor and plough was due to respondent's failure to pay the instalment of the leased tractor. The respondent was the source of all the dispute for failure to honour his contractual obligation, thus the appellant's action to collect the tractor. However, the plough taken wasn't part of their lease agreement. The

respondent did not at all bother either to report to the appellant after his failure to pay or give reasons as to why he failed to pay, in my view that was wrong and no one can benefit from his wrong doing.

For that reason, the appellant was entitled for payment of the tractor leased to the respondent while the respondent was entitled to enjoy peaceful use of the tractor. The respondent's failure to pay the agreed amount of the instalment even for a single day amounted to nothing but to breach of lease agreement. This breach entitled the appellant to have remedy against the respondent. The appellant exercised his right of; ***one,*** collecting the tractor which was in use by the respondent without benefits to the appellant and ***two,*** claim for damages arising from breach of lease agreement for failure to pay agreed instalment without any justification.

To cement the above position, I make reference to the Court of appeal decision in the case of **National Bank of Commerce Limited Vs Stephen Kyando T/A Asky Intertrade Civil appeal no.162 of 2019** where it principled that;

> *"We have considered the submissions of parties in seeking to resolve the issues raised in these grounds of appeal and we will start with what the learned trial Judge observed at page 396 of the record of appeal. According to the record, the trial*

Judge held, and correctly so, in our view, that it was not the appellant who breached the credit facility agreement, adding that it was

actually, the respondent who violated it, leading into all that followed including rescheduling of the credit facility from an overdraft accommodation to the term loan. On this aspect, that the respondent failed to pay the due debt in order to comply with the facilities agreement, we agree with the trial Judge because, according to his own evidence, after the respondent entrusted management of his business to his relatives, it failed to generate sufficient revenues to regularly service his overdraft account. He defaulted and wrote a letter requesting for rescheduling of the debt which was converted into a term loan.

Even after rescheduling his liability into a loan, still the deed of undertaking was breached by the respondent whereupon he had to sell his Morogoro property. ***According to law, where one instalment in a series of instalments is breached in terms of repayment, the entire contract is breached.*** *In this respect, regulation 10 (1) of the 2014 Regulations provides as follows:*

*"10-(1) A credit accommodation with **specific repayment dates shall be considered as past due in its entirety** if any of its contractual obligation for payment has become due and unpaid."*

That is what had been the position of law even before the 2014

*Regulations. In the case of **Abdallah Yussuf Omar v. The People's Bank of Zanzibar and Another** [2004] T.L.R. 399 at page 400, this Court stated:*

> ***"By failing to repay any of the instalments due** until May 2002, when he was served with a demand notice, the appellant was in breach of the loan repayment terms and the bank was entitled to exercise its power of sale of the mortgaged property."* [Emphasis added].

Based on the above position, the appellant is protected by ***section 73 (1) of the Law of Contract Act***, which provides that;

"Where a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach,

or which the parties knew, when they made the contract, to be likely to result from the breach of it."

Had the District court considered the evidence as to who was the source of the problem, it wouldn't have reached such the decision, the District Court therefore had failed to exercise the duty of analysing the evidence and law governing such kind of engagement, the lease agreement, being the law made by the parties themselves through mutual agreement. The trial court ought to have asked as to who in breach of the law (Lease agreement)?, Was the appellant justified to take action against the respondent?.

Due to the breach of contract by the respondent both parties have incurred loss, the act of the respondent's failure to pay the appellant in time caused loss to the appellant's business. On the other hand, the respondent incurred loss when the appellant took the plough as he was stopped from using it while he had contracts with other people to cultivate their farms using the appellant's tractor and plough.

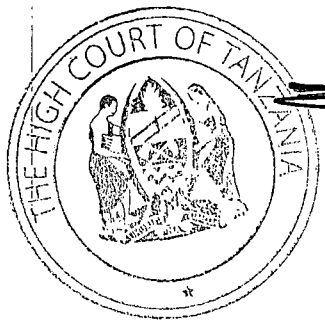
This marks the end of discussion in respect to issue no. 3 herein above.

All said and done, I am of the settled position that, the respondent cannot benefit from his own wrong doing and emerge the victory while he was the source of problems which led to dispute between the parties herein.

In the final result, I hereby reverse the decision of District Court and order that, the appellant should return the respondent's plough in good condition. The appeal succeeds to that extent as stated here in above. Each party to bear his own costs.

IT IS SO ORDERED.

DATED at **MOROGORO** this 16th June, 2023.



G. P. MALATA

JUDGE

16/06/2023