

**THE UNITED REPUBLIC OF TANZANIA
(JUDICIARY)
THE HIGH COURT
(MUSOMA SUB REGISTRY)**

AT MUSOMA

CIVIL APPEAL No. 5 OF 2023

*(Arising from the Resident Magistrates' Court of Musoma at
Musoma in Civil Case No. 15 of 2022)*

HAJIALI HASHAM BACHOO APPELLANT

Versus

JOZAM SOLOMON PHILIPO RESPONDENT

JUDGMENT

**30.08.2023 & 08.09.2023
Mtulya, J.:**

The **Resident Magistrates' Court of Musoma at Musoma** (the court) was invited on 28th February this year to resolve a contest of breach of contract in **Civil Case No. 15 of 2022** (the case) between **Mr. Hajiali Hasham Bachoo** (the appellant) and **Mr. Jozam Solomon Philipo** (the respondent). According to the appellant in the case, he had partly oral agreement to supply the respondent with toner cartridges of various species in return of monies. However, the respondent had declined payment for eight (8) months causing a loss Tanzanian Shillings One Hundred Eighty Million (180,000,000/=). The appellant then invited the court in the case to issue an order for the respondent to pay the indicated monies.

The parties were summoned to appear before the court in the case in August last year to produce relevant materials for and against the case, and accordingly registered with assistance of exhibits. After registration of all relevant materials, the court in the case on 25th February this year had resolved in favor of the appellant and at page 20 of the judgment issued a total of six (6) orders, namely, in brief, that:

- i. Payment of Tanzania shilling 3,000,000/= which defendant borrowed from plaintiff but still outstanding;
- ii. Defendant to return to plaintiff the toner cartridges valued Tanzania Shillings 46,866,000/= arrived by taking the value for whole cargo 165,475,000/= minus that toner cartridges re-taken by plaintiff which worth 9,400,000/= one gets 156,075,000/= as actual value of toner cartridges in defendant's custody. From 156,075,000/= minus 92,550,000/= being actual cash money given to plaintiff, one gets 63,525,000/=. From 63,525,00/= minus 18% of Value Added Tax 16,659,000, one gets Tanzanian Shillings 46,86,000/= as debt due as of moment;
- iii. Remittance of aforesaid toner cartridges by defendant to plaintiff be done within seven days computing from 28.02.2023 and must be done in writing witnessed by at least a witness each side, handing over location shall be at Musoma;
- iv. Where the toner cartridges which are all still at defendant's possession do not tally with outstanding

amount which is Tanzania Shillings 46,866,000/= defendant shall be obliged supplement the deficient by paying case money to plaintiff after deduction of Value Added Tax for it will be taken, he has had solid the missing toner cartridge.

- v. Each party to bear its own costs; and
- vi. Saves for extent indicated above, other plaintiff's prayers are dismissed for lack of substance.

The decision of the court and some of the orders in the case had aggrieved the appellant hence hired the legal services of **Mr. Victor Kisaka**, learned counsel to draft, file and argue five (5) reasons of appeal in **Civil Appeal No. 5 of 2023** (the appeal) registered in this court. The reasons of appeal in brief, show that: first, the court failed to analyze evidence; second, the evidence of the appellant proved the case on a balance of probabilities; third, the court departed from pleadings; fourth, exhibit D.3 was inconsistent with the written statement of defence; and finally, the court was in error to grant the respondent 18% VAT.

The appeal was scheduled for hearing in this court on 30th August 2023, and the appellant had called Mr. Kisaka to argue the points of appeal whereas the respondent invited the legal services of **Mr. Thomas Makongo**, learned counsel. Before the appeal hearing could take its course, Mr. Kisaka prayed before this court to join and argued the first, second and fifth reasons of appeal together,

whereas the third and fourth grounds of appeal separately, and the prayer was granted.

In his submission, Mr. Kisaka stated that the first, second and fifth reasons of appeal relate to complaints on the oral agreement which was reduced into a written contract signed and stamped by both parties as exhibited in P.3, which was not positively considered by the court in the case. According to Mr. Kisaka, exhibit P.3 had two price list which was intended to benefit all parties in toner cartridges businesses, but was declined by the court in favor of exhibit D.3 which has a variation of Tanzanian shillings 700,000/=. In the opinion of Mr. Kisaka, parties are bounds by the terms of the agreements as indicated in the judgment of **Hotel Travertine v, NBC Limited**, Civil Appeal No. 82 of 2002.

According to him, the appellant had imported the toner cartridges and had paid a total of Tanzanian Shillings 20,821,039/= as import taxes in accordance to section 8 of the **Value Added Tax Act [Cap. 148 R.E. 2019]** (VAT Act), and any value added in selling cartridges in borne by the buyer and remitted to **Tanzania Revenue Authority** (TRA) by the seller (the respondent). In the opinion of Mr. Kisaka, the court was in error to order the respondent to deduct VAT in already sold cartridges at the detriment of the appellant, who had already paid the value added tax during importation of the cartridges.

According to Mr. Kisaka, pursuant to section 28 of VAT Act and **Regulation 14 of the Value Added Tax (General Regulations) 2015** (the Regulations) all traders are agents of collecting VAT at their selling points and are required to issue EFD receipts and collect VAT on behalf of the TRA and finally remit the collected VAT on every 20th day of the next month. Mr. Kisaka submitted further that the respondent was required to pay VAT to TRA after receipts from customers. Mr. Kisaka finally prayed the deducted amount of VAT be returned to the appellant as per requirement of the law regulating VAT and businesses.

Arguing ground number three (3) of the appeal, Mr. Kisaka submitted that parties are bound by their pleadings, which is Plaint and Written Statement of Defence (the WSD). According to him, the judgment in **Makori Wassanga v. Joshua Mwaikambo** [1987] TLR 88 indicates that parties are bound by their pleadings, but in the present case pleadings are at variance with the materials produced during the hearing of the case. In order to substantiate his statement, Mr. Kisaka cited the seventh paragraph in the WSD and submitted that the respondent had admitted payment of Tanzanian Shillings 68,750,000/= while during the hearing of the case he admitted Tanzanian Shillings 59,350,000/= displaying a variance of Tanzanian Shillings 9,400,000/=. According to Mr. Kisaka, the

variance is not allowed in law and this court may scrutinize the evidence in search of the truth of the matter.

In the final reason of appeal, Mr. Kisaka submitted that the respondent had registered forged document showing summary payments from the respondent to the appellant and it was protested by the appellant's learned counsel, but the court in the case had admitted it as an exhibit D.3. According to Mr. Kisaka, exhibit D.3 was not signed and stamped by both parties as exhibit P.3 where both parties have authenticated their transactions with signature and stamp. Mr. Kisaka submitted further that the variance of the figures in exhibit P.3 and D.3, are to be resolved at this court.

Replying the submission, Mr. Makongo submitted that exhibit D.3 is not forged and it followed all necessary legal steps to find its admission into the case, including being produced in additional documents and the appellant was given an opportunity to dispute in pleadings and hearing stages, but had declined. According to Mr. Makongo, issues of forgery cannot crop up in an appeal stage as it was stated in the precedent of **Eupharacie Mathew Rimisho t/a Emari Provision Store & Another v. Tema Entreprises Limited & Another**, Civil Appeal No. 270 of 2018. In the opinion of the Mr. Makongo, a serious allegation of forgery was supposed to be reported to the police for appropriate steps, and not at the appellate level in this court.

Regarding the third reasons of appeal, Mr. Makongo conceded that parties are bound by their pleadings and supported the move with the authority in **Happy Kaitira Burilo t/a Irene Stationery v. International Commercial Bank (T) Ltd**, Civil Appeal No. 115 of 2016, that held un-pleaded facts are to be ignored. In his opinion, in the present case, the appellant had pleaded specific damages of Tanzanian Shillings 180,000,000/= without specific proof of the same. According to Mr. Makongo, specific damages are to be specifically pleaded and strictly proved, as it was emphasized in the case of **Registered Trustees of St. Anita's Greenland Schools (T) & Six Others v. Azania Bank Limited**, Civil Appeal No. 225 of 2019.

On the submission of Mr. Kisaka that the defendant had admitted the allegations of total payment up to 14th April 2022 was a Tanzanian Shillings 68,750,000/=, Mr. Makongo disputed the admission stating that nowhere in the seventh paragraph of WSD, where the respondent admitted the claim. Similarly, Mr. Makongo submitted that the record is silent on payment of VAT to the TRA by the appellant.

In a brief rejoinder, Mr. Kisaka submitted that the case of **Eupharacie Mathew Rimisho t/a Emari Provision Store & Another v. Tema Entreprises Limited & Another** (supra) cited by Mr. Makongo is correct, but the appellant was sick when exhibit D.3 was brought in the case and that the appellant's learned counsel could

not communicate to the appellant on the same and in any case, it is the parties who know their dispute. Regarding the claim of specific damages of Tanzanian Shillings 180,000,000/=, Mr. Kisaka contended that the plaintiff displays all on how it was arrived. Finally, Mr. Kisaka submitted that the issue of evidence on payment of VAT did not transpire during hearing of the case at the court hence he has no need to produce any relevant materials, and in any case, Mr. Makongo had declined to reply on collected VAT by the respondent as an agent of TRA.

I have perused the record of appeal and found that the appellant had approached the court on 11th August 2022 and lodged the case to enforce his oral agreement which was reduced into writing in exhibit P.3. In contesting the allegation, the respondent had produced exhibit D.3. The two (2) exhibits do not tally in terms of the amount cited in the documents. According to Mr. Kisaka, the authentic document in that case is exhibit P.3, which was duly signed and stamped by both parties, whereas exhibit D.3 is a forged document without signature and stamp of the appellant.

In reply Mr. Makongo stated that the document was not protested during its admission and no appropriate steps were initiated during pleadings stages. In a brief rejoinder, Mr. Kisaka submitted that the appellant was sick and his learned counsel had not consulted the appellant during pleadings stages. The record of

appeal on the other hand is silent on sickness of the appellant and failure of his counsel to consult him. Even if his learned counsel had not informed the appellant, that would be negligence on his part. In any case negligence on part of learned counsels, is not a good cause for non-consideration of exhibits by the court.

The record of appeal shows that on 12th October 2022, the respondent had registered eight (8) additional documents to be relied by the respondent, including exhibit D.3. However, the record is silent on any claim of forgery or any protest of the document. At page 51 of the proceedings conducted on 30th January 2023, the appellant's learned counsel, during admission of the document, was recorded to have said that: *exhibit [D.3] was signed by DW1 alone. It might be forged.* The reply from the respondent's learned counsel was that: *no proof that the signature is forged by relevant authority.* Finally, the court had resolved in favor of the admission of exhibit D.3 and reasoned that forgery cannot be determined by a mere guess without proof.

I have also read the judgment of the Court of Appeal in the precedent of **Eupharacie Mathew Rimisho t/a Emari Provision Store & Another v. Tema Entreprises Limited & Another** (supra), and at its page 21 of the decision, the Court stated that the appropriate available remedy in allegation of forgeries, is to invite

the appropriate authority of scrutinizing the alleged forgeries. In its own words, the Court resolved that:

...even if the signatures were forged as alleged, it was incumbent on the appellants to act promptly, invoke other remedies by reporting the matter to the police...the appellants had knowledge on the existence of exhibit P.2 which was annexed to the plaint.

In the present case, exhibit D.3 was annexed to the additional list of documents to be relied by the respondent on 12th October 2022, three (3) months before the hearing and admission of exhibit D.3 on 30th January 2023. This protest number four (4) on variance of exhibit P.3 and D.3, brought by the appellant at this stage of appeal has no any merit whatsoever.

Similarly, the submission on ground number three (3) of appeal on variance of WSD and testimony produced by the respondent on record, has no any merit. As rightly submitted by Mr. Makongo, reading between the lines, there is nowhere in the seventh paragraph of the WSD where the respondent admitted the claim of Tanzanian Shilling 68, 750,000/=. For reasons of clarity, I quote the seventh paragraph in the WSD, as follows:

That, the defendant dispute entirety the averment in paragraph 11 of the plaint. It is disputed that the

total payment up to 14/04/2022 is 68, 750,000/= based on the reasons and the fact that there are goods which have been taken by the plaintiff from the defendant for the purposes of sold out, but also the defendant was ready to deliver the remained good to the plaintiff, otherwise the plaintiff is placed under the strict proof thereof.

As from this paragraph, it is obvious and vivid that the respondent was disputing the claimed amounting of Tanzanian Shillings 68,750,000/= indicated by the appellant in his eleventh paragraph of the plaint. In that case, it was upon the court to decide depending on the evidence tendered. The evidence during the hearing of the case in the court shows that the complaint of variances of Tanzanian Shillings 9,400,000/= has no any merit, as I indicated in ground number four (4) of appeal in this judgment, that exhibit D.3 cannot be disputed at this stage.

In the present appeal, I have perused the record and grounds number one (1), two (2) and five (5) together as were submitted by the learned counsels. The record is quietly clear on the analysis of the materials registered, save for an allegation of payment of VAT to be deducted from respondent as indicated in order number II in the decision of the court. Section 8 of the VAT Act provides that:

8 (1) The value added tax payable on a taxable import shall be paid:

(a) where goods are entered for home consumption in Mainland Tanzania, in accordance with the provisions of this Act and procedures applicable under the East African Customs Management Act; or
(b) in any other case, where goods are imported for use in Mainland Tanzania, on the day the goods are brought into Mainland Tanzania and in the manner prescribed by the regulations;

(2) The liability to pay value added tax on a taxable import shall arise by the operation of this Act and shall not depend on the making of an assessment by the Commissioner General of the amount of value added tax due;

(3) The Commissioner General shall collect value added tax due under this Act on a taxable import at the time of import.

From the enactment, it is obvious that the value added tax for imported goods is paid/collected at the importation point. In the present case, the appellant had testified on 30th January 2023, as indicated at pages 31 to 36 of the proceedings, and exhibits P.1 and P.2, that he imported the toner cartridges from **Printer Mayin** in China to Dar Es Salaam Tanzania and finally to Musoma in Mara Region. From the materials produced on record, it is presumed that the appellant had followed all prerequisite procedures, including the enactment of section 8 of the VAT Act, unless other necessary

materials from appropriate authority TRA were registered in the case.

Similarly, section 66 (1) of the VAT Act provides that any taxable person is required to lodge a value added tax return to the **Commissioner General of TRA** (the Commissioner) on the twentieth day of a month after the end of the tax period to which it relates. In that case, it is presumed that the respondent had registered the returns of the value added tax to the Commissioner in the complained period of contract where the sales took their courses.

It would be unfair and against the indicated provisions of the VAT Act to order payment of the eighteen percent (18%) VAT to the amount due to the appellant in a situation where Mr. Makongo has totally escaped a reply on how the respondent had complied with the requirements of the cited provisions. It is also unfortunate that there are no materials from the relevant authority TRA which display the appellant had not remitted the same to the Commissioner. In such situation it may be assumed that the deducted Tanzanian Shillings 16, 659,000/= was wrongly deducted from the amount due to the appellant, from the total amount of Tanzanian Shillings 63, 525,000/= ordered by the court in the case.

I am aware that the respondent had admitted during the hearing of the case at the court that the appellant had paid VAT during importation of the toner cartridges, but had refused to pay

during the sale, as reflected at page 55 and 59 of the proceedings conducted on 30th January 2023. However, the record shows that it was the respondent who was at the selling point with his company, **East African Toner Mart**. The VAT Act requires him to remit VAT to the Commissioner according to the law.

The respondent had no options of choosing which course to follow between the appellant's directives and provisions in the VAT Act. In any case, there is no record to show that the respondent had reported the incidences of the alleged refusal of the appellant to pay VAT to the appropriate authority TRA. His allegations have no any merit whatsoever. If the respondent had not remitted the same to the Commissioner, the wrong cannot be shifted to the appellant. Any agreement in breach of the provisions of the law, cannot be promoted by this court. The respondent has to be accountable for his action, not the appellant.

Having said so, I maintain the judgment and its associated orders number I to VI of the court in the case save for minor alteration in order number II issued by the court, as I indicated above. After the alteration, the second order should read as follows:

Defendant to return to plaintiff the toner cartridges valued Tshs. 63,525,000/= arrived by taking the value for whole cargo 165,475,000/= minus the toner cartridges re-taken by plaintiff which worth Tshs. 9,400,000/=. After the deduction of the Tshs.

9,400,000/=, the remaining amount of Tshs. 156,075,000/= shall be the actual value of toner cartridges in defendant's custody. From the Tshs. 156,075,000/= minus 92,550,000/=, being actual cash money given to the plaintiff, one gets Tshs. 63,525,000/= to be paid to the plaintiff.

In the end, I mark this appeal partly allowed. In that case, I decline award of costs as each party had produced good reasons for and against the appeal to arrive at this judgment.

Ordered accordingly.



F.H. Mtulya
Judge
08.09.2023

This Judgment was delivered in Chambers under the Seal of this court in the presence of the appellant's learned counsel **Mr. Victor Kisaka**, and in the presence of the respondent's learned counsel, **Mr. Thomas Makongo**, through teleconference attached in this court.



F.H. Mtulya
Judge
08.09.2023