IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

PC CIVIL APPEAL NO. 08 OF 2023

(Originating from the District Court of Mpanda at Mpanda in Civil Appeal No. 39 of 2022 which originated from Civil Case No. 192 of 2022 of Mpanda Urban Primary Court)

JOYCE ELIAS @ MICHAEL.....APPELLANT

VERSUS

GUNYA BUCHEYEKI.....RESPONDENT

JUDGMENT

16/10/2023 & 30/10/2023

MWENEMPAZI, J.

The appellant herein sued the respondent at Mpanda Urban Primary Court (trial court) claiming for Tshs. 4,527,000/= being the value of alleged 105 bags of paddy. The two sides had entered into an agreement which included deliverance of 105 sacks of paddy by the respondent to the appellant. It is in the records that, the appellant at different intervals had given the respondent cash money so that he pays back the money in terms of sacks of paddy, in which the appellant firstly gave the respondent

cash money in the tune of Tshs. 1,050,000/= for 50 sacks of paddy and later on, she gave him the same amount of money to make the total of 100 sacks of paddy required to be delivered by the respondent, and Tshs. 100,000/= for 5 sacks of paddy which adds the number of sacks of paddy to be 105 sacks.

Upon hearing the suit, the trial court was convinced that the appellant had not sufficiently proved her claim of 105 sacks of paddy and that she only proved to be claiming 23 sacks of paddy weighing 90 Kilograms. The trial court did order that the respondent should pay only 23 sacks of paddy weighing 90 Kilograms, and the costs of the suit in the tune of Tshs. 10,000/=.

Aggrieved by that decision, the appellant filed her appeal to the District Court of Mpanda at Mpanda (first appellate court) where the appellate learned trial magistrate upheld the decision of the trial court by holding that the appellant did not prove her claim of the remaining sacks of paddy at the trial court on the balance of probabilities, and so it was dismissed.

Again, being unsatisfied with the decision of the first appellate court, the appellant appealed to this court holding her petition of appeal which consisted of four (4) grounds which are as reproduced herein: -

1. *That the first appellate court erred at law by siding with the decision of the trial court which held that the appellant was paid 60 bags of rice out of 83 bags agreed upon by the parties before the Makanyagio Ward Executive Officer contrary to the evidence adduced.*
2. *That, the first appellate court erred at law by siding with the decision of the trial court which held that the respondent paid the appellant 22 bags of rice without any proof whatsoever.*
3. *That, the first appellate court having sided with the decision of the trial court that the appellant had partly proved her claims, it erred at law by denying the appellant her claim for cost without giving any reason for the denial.*
4. *That, the first appellate court erred at law by giving its decision relying on what it termed as "Exhibit N_2" while no such exhibit was adduced at the trial court.*

As per the grounds of appeal above, the appellant prayed for judgment on her favour with the orders that the respondent owes the appellant 105 sacks of paddy and the latter should pay the former that number of sacks of paddy and costs of this appeal be borne by the respondent and any other relief this court deems just to grant.

The respondent in his reply to the grounds of appeal as filed by the appellant did deny all the grounds by suggesting that the appellate court being the first court of appeal, did re-evaluate all the evidence adduced at the trial court and was fortified that the appellant did not prove her case on the balance of probabilities, and that no wonder the appeal was dismissed, and both parties were ordered to bare their own costs. The respondent prayed for this court to dismiss this appeal with costs as it has no merits before this court, and that the decision of the first appellate court be upheld.

On the 19th day of June 2023, this matter was scheduled for hearing both parties appeared for themselves without legal representations, and they both sought leave of this court to battle out this appeal by way of written submissions, a prayer which was gladly granted by this court, and both sides adhered to the scheduling of the submissions.

The appellant submitted first that, it is apparent on the face of record that, the appellant claims some of the bags of rice paddy from the defendant, and also it is clear that according to the evidence which was adduced by the appellant before Mpanda Urban primary court that she was claiming a Total of 105 sacks of rice paddy weighing Ninety kilograms (90 kg) each.

She added that, it is also apparent that on the 07th of July 2021 the appellant and the respondent herein executed an agreement before one **Donarth Chatuwa** who was the Makanyagio Ward Executive officer (WEO) and, in that Contract the respondent promised to pay to the appellant 60 sacks of rice and the remaining 23 sacks of rice to be paid later on the 23rd of June 2023.

In emphasizing her point, the appellant cited the case of **Simon Kichele Chacha vs Aveline M. Kilawe, Civil Appeal No. 160 of 2018** CAT at Mwanza (Unreported) on page 08 where the court stated that: -

> *"It is a settled law that parties are bound by the agreements they freely entered into and this is the cardinal principle of the law."*

She then submitted further that, to her surprise, the respondent failed to honour the said agreement and hence the appellant instituted her claim before the Mpanda Urban primary court for breach of the aforestated agreement. She proceeded that the trial court together with the first appellate court both erred by holding that, the respondent had paid 60 sacks of rice while there were no proof of such payment, as it is the principle of law that the one who alleges must prove as it was stated in various case laws including the case of **Charles Mwita Siaga vs National Microfinance Bank PLC, Civil Appeal No. 112 of 2017** CAT at Dar es Salaam (Unreported).

Referring to the instant case the appellant insists that she alleged that the respondent didn't pay anything and there was no evidence which shows that the respondent paid the same, and therefore it was not proper for the court on its own to rule out that the respondent paid 60 sacks of rice pads without any proof.

She added that, it is also clear that the standard of proof in civil cases like the instant one is in the balance of probability. That the phrase balance of probability means that the act done is more probable than not, in the sense that there is high possibility that the respondent did not pay

rather than paying. That, in order to arrive to that conclusion, the trial Court and the first appellate court had the duty to evaluate evidence from both sides, but surprisingly the court ruled that the respondent paid 60 sacks of rice without proof of the same.

As for the first ground of appeal, the appellant winds it up by submitting that, due to the shortfalls of both courts below, she humbly prays for this appeal to be allowed as it is clear that the respondent breached the contract by failing to pay the appellant the amount as agreed upon.

Coming to the 2nd ground of appeal, the appellant stated that the first appellate court misdirected itself by siding with the trial court in holding that the payment which was made to one **Lucy Bisate,** the mother of the appellant was meant for paying the debt which the respondent owed to the appellant. That, the true fact as proved by the evidence adduced is that the said payment was made for a quite different purpose but not settling the debt he owed to the respondent.

She added further that, Madam **Lucy Bisate** was not part to the agreement between the appellant and the respondent and by her own words when testifying in the trial court clearly stated that, the payment

done to her came from separate transaction between herself and the appellant and not from the transaction in dispute.

The appellant proceeded that, according to the doctrine of privity to contract Which have been stated in various case laws including **Dunlop Pneumatic tyre Co. Ltd vs Selfridge & Co. Ltd 11D151 All ER 887**, it shows that the only party which can perform contract are the parties to the contract and it excludes third parties to the contract, and she referred further the case of **Puma Energy Tanzania Ltd vs Spec-Check Enterprises Ltd, Commercial case No. 19 of 2014,** HC, Commercial Division at Dar es Salaam (Unreported), where the court stated that;

"Its only parties who are privy to the contract who are obliged to perform it".

That, the mother of the Appellant by virtue of not being party to the contract or privy to such contract, hence one cannot claim to have furnished consideration to the party which do not relate to the contract or privy to it. Also, that was not the way which was agreed by both parties in paying the sacks of paddy.

As for the 2nd ground of appeal, the appellant concluded that, the trial court and the first appellate court reached the conclusion wrongly for that Matter that the appellant was paid 22 sacks of rice paddy while the same was paid to the mother of the Appellant.

Submitting for the 3rd ground of appeal, the appellant started off by stating that, it is the law that costs follow the event, according to Mulla's Code of Civil Procedure 12th Edition of 1953 at page 150 which provides that, and she quoted:

> *"The general rule is that costs shall follow the event unless the court, for good reason otherwise orders. This means that the successful party is entitled to costs unless he is guilty of misconduct or there is some other good cause for not awarding costs to him. The court may not only consider the conduct of the party in the actual litigation, but the matters which led up the litigation."*

That, the above proposition was more emphasized by his Lordship Justice Ndika J. A in the Case of **DP Shapriya & Company Limited vs Regional Manager, Tanroads Lindi, Civil reference No. 1 of 2018,** CAT at Dar es Salaam (Unreported) which **he** stressed that;

"The general rule is that costs should follow the event and the successful part should not be deprived of them except for good cause."

The appellant then insisted that, from the above proposition it is clear that a successful party should be awarded costs and if not, the court is supposed to assert reasons for doing so. That, in the instant case the trial court and the first appellate court agreed that the appellant proved part of her claim, but surprisingly the first Appellate court didn't award costs to the appellant and worse enough without assigning good reasons for doing so, contrary to the law as above demonstrated. Therefore, it is the appellant's humble prayer that this court will award costs to the her.

Submitting for the 4th ground, the appellant submitted that, the **Exhibits Management guidelines of September 2020 issued by the Judiciary of Tanzania (JOT)** defines the term "Exhibit" to mean a document, record or any other tangible object formally admitted in court as evidence. Therefore, this definition clearly shows that for a document or any other tangible object to be referred to as an exhibit such document must be admitted in court as evidence.

She proceeded that, in order to arrive to a certain decision a court is crowned with jurisdiction to consider either oral, documentary evidence or any other tangible evidence which may be useful in determination of the matter, and for documentary evidence or other tangible evidence which are being referred to as exhibits must be endorsed effectively. She then referred me to the case of **Tengeru Flowers Limited vs Dal Forwarding (T) Limited a.k.a Kuehne & 3 others, Civil appeal No. 12 of 2011** (Unreported) as cited in **SGS Societe Generale De Surveillance SA & Another vs VIP Engineering & Marketing Limited & Another, Civil Appeal No. 124 of 2017** CAT at Dar es Salaam (Unreported) where it was stated that Failure to include endorsed exhibit in record of appeal it makes an appeal incompetent and liable to be struck out.

That, it is from that jurisprudence where we grasp how endorsement of exhibits is important. She added that, in the instant case during the trial, the court admitted various exhibits including "Exhibit KN2" which was the agreement between the parties herein before the WEO of Makanyagio ward, in which the respondent had agreed to pay 83 Sacks of rice paddy. That, this exhibit was the basis of the appellant's claim.

The appellant added that, to her surprise, in the determination of the appeal in the first appellate court, the court used exhibit N2 which was not produced before the trial court neither was it admitted. That, this cannot be taken as a mere irregularity caused by typing error as the first appellate court want us to believe.

She added further that, if one considers the first page of the first appellate court's decision particularly on the first paragraph where the court stated that, "*Facts on record are too easy to Comprehend.*" That phrase shows how the court took the matter lightly hence using an exhibit which was not adduced at the trial in which it is not something which can be taken as typing error as the respondent claims in his reply to the petition of appeal.

That, if the first appellate court could have considered the exhibits as they were tendered in the trial primary court and look into the matter seriously, it wouldn't have reached to the conclusion which is subject to this appeal. And therefore, it the appellant's humble prayer that this appeal be allowed with costs.

In response, the respondent replied that he has read at length and very carefully the entire written submission of the appellant, and that the

issues at the trial court were 83 bags of paddy and 23 bags of paddy too. That, it is apparent that the appellant has just bit around the bush instead of hitting the target. The respondent insists further that, all the grounds of appeal from the first Appellate Court to this Court are about Non existing case, as there was neither any case about 83 bags of rice nor was there any case about 23 bags of rice.

However, he further responds to the submission made by the appellant that, the subject matter in the trial court was the breach of contract whereby the appellant was not paid Tshs. 4,527,000/= emanating from a loan worth 105 bags of paddy to be paid in the future, this goes in line with the Contract between the parties signed on 07/07/2021 before the Makanyagio Ward Executive Officer.

He procceded that by quoting from the prelude of the trial Court in its first paragraph of page 1 it provides that: -

"Mdai Joyce Elias Michael alifika mbele ya Mahakama hii tarehe 24/09/2021 akimdai Gunya Bucheyeki Jumla ya fedha kiasi cha Shilling Millioni Nne na laki tano na elfu ishirini na saba (4,527,000/=).

Kwa maelezo ya mdai katika hati ya madai, ilielezwa kuwa madai haya yametokana na makubaliano hayo ya kumpatia mpunga gunia 105 kwa thamani ya fedha kiasi cha shilling! 4,527,000/= na kuahidi kumpatia mpunga huo ndani ya miezi sita toka Mwezi wa kwanza 2021 lakini mpaka leo hii mdaiwa hajaweza kumpatia mzigo wake huo gunia 105."

The respondent proceeded that it is better now before peeping in the matter to look for what paddy means and likewise what is the meaning of Rice. He did so by referring to **Oxford languages Dictionary,** in which it defined **Paddy** as rice before threshing or in the husk. In that, it means it requires almost 170 bags of paddy to get 83 bags of rice after husking paddy, and that while **Rice** means a staple food for 50% of the world's population.

He added that, having clarified so, it is quite clear that the first appellate Court though rightly gave a judgment in favour of the respondent but it acted on grounds of Appeal of a Non existing case which obvious is fatal in law.

Connecting with the Grounds of Appeal brought to this Honourable Court, he submitted that Ground 1 and 2 which are the basic issue of the

original case are about the Non existing case, attracting the view that the Court of first instance rightly reached at the best findings for its proper proceedings, proper perusal of evidence and proper judgment hence the Respondent's jovial appreciation of the Judgment.

In conclusion, the respondent submitted that alternatively, but without prejudice to the foregoing, in terms of the second, third and Fourth grounds of appeal, severally or jointly, he prays that the Appellant's grounds of Appeal be struck out with punitive costs as they are baseless for Appealing on grounds of Appeal on subject matter which was not heard at the Trial Court, that no Rice was the bases of that Trial Court proceeding to insist on.

In rejoinder, the appellant herein reiterates what she submitted on her submission in chief, but briefly adds to what has been submitted by the respondent that, before getting deeper into the matter, she wishes to put the facts clear, as in the instant case the Appellant who was the applicant before the trial primary court instituted the case claiming for Tshs 4,527,000/= (Tanzanian Shillings Four Million five hundred and twenty-seven thousand) being the value of the alleged 105 bags which

the respondent failed to handover to the appellant within the agreed period of time.

With regard to the respondent's submission that the grounds of appeal from the first appellate court to this court is about a non-existing case, the appellant reacts to it that it cannot be maintainable because, the respondent failed to understand that the amount of money that the appellant was claiming before the trial primary court was the result of the respondent's failure to handle over 105 bags of rice paddy and not from any other non-existing case as claimed by the respondent, therefore the grounds of appeal from the first appellate court to the instant court were rightly raised from the instant case.

She added that, the case being about breach of contract the remedy among others can be specific performance that's why even the trial court after clearly evaluating the evidence it ordered the respondent to pay 23 bags of rice paddy instead of the amount claimed, which entails specific performance.

That, the appellant clearly appealed in respect of the case which she instituted because she was not satisfied with the remedy which was awarded to her by the trial primary court. Therefore, what the respondent

claims is totally a failure to understand the gist of the case and how it originated, hence it is her humble prayer that this appeal be allowed with costs.

As she penned off, the appellant submitted that it is clearly known that a court cannot arrive to a right decision by determining wrong issues, or grounds of Appeal, that it was the respondent's submission that the first appellate court gave a rightly decision in favour of the respondent though acted on the wrong grounds of Appeal. As she clearly submitted above, that the respondent misdirected himself in his submission with regard to the course of action of this case.

After going through the submissions from both sides, I am convinced that it suffices to deal with the grounds of appeal altogether rather than one by one and in that the only determinative issue is ***whether the two courts below properly evaluated the evidence adduce before the trial court.***

However, it is a well-known principle that this court being the second appellate court, it should be reluctant to interfere with concurrent findings of the two courts below except in cases where it is obvious that the findings are based on misdirection or misapprehension of evidence or

violation of some principle of law or procedure, or have occasioned a miscarriage of justice. Therefore, this appeal will be determined basing on the above principle.

It is in the records that the appellant filed a suit against the respondent at the trial court claiming for payment of Tshs. 4,527,000/= being the amount worth of 105 sacks of paddy. It is also in the records that the appellant and the respondent appeared before the Ward Executive Officer and jotted down an agreement which reveals that the only number of sacks of paddy the respondent owes the appellant is 83 and not 105. See exhibit labelled **HM1.**

Therefore, the trial court was convinced that the amount claimed for was not proper and ordered the respondent to pay the actual number of 23 sacks of paddy weighing 90 kilograms and also paying the costs of the suit in the tune of Tshs. 10,000/= as the learned trial magistrate held that the appellant had partly proved her claim.

It was the holding of the first appellate tribunal that the appellant at the trial court did not prove her case in the balance of probabilities, as her witnesses were contradictory in nature and thus upheld the decision of the trial court.

In my fortified holding, I am convinced that the two lower courts did evaluate the evidence properly. As the matter of fact, the appellant filed a suit claiming payment of Tshs. 4,527,000/= being the net worth of 105 sacks of paddy. But again, she tendered an agreement which was between her and the respondent which revealed that the actual number of sacks of paddy the respondent owes her is only 83, in which he was to pay 60 sacks of paddy first and the remaining 23 would be paid the following year.

The evidence adduced by the appellant was indeed contradictory in which it could not support her claim of 105 sacks of paddy. In her submission above she did refer me to the case of **Charles Mwita Siaga vs National Microfinance Bank PLC** *(supra)* where it was held that the one who alleges must prove. I am confined by the decisions of the two courts below that the appellant had never proved her claim to the required standards in civil cases.

At this juncture, I am of the view that this appeal has no merits, and I proceed to dismiss it with costs.

It is so ordered.

Dated at Sumbawanga this 30th day of October, 2023.

T. M. MWENEMPAZI

JUDGE