IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CIVIL APPEAL NO. 05 OF 2023

(C/F Civil Case No. 04 of 2021 in the District Court of Mwanga at Mwanga)

AMANI VUMWE CENTER ……..…… APPELLANT

VERSUS

FURAHINI PARTNERS FOR SOCIAL CHANGES……..RESPONDENT

JUDGEMENT

Date of Last Order: 18.10.2023
Date of Judgment: 12.12.2023

MONGELLA, J.

The appellant herein is a Non-Governmental Organization (NGO) with its registered office at Mwanga district, Kilimanjaro region. The respondent is a Community-Based Organization (CBO) with her registered office also in Mwanga district, Kilimanjaro region. On 27.01.2018, the two entered into a contract for management or otherwise operation of Amani Vumwe (English Medium Pre and Primary) School registered with number KL.06/7/E.A002. located at Kichangare Mavisha area within Mwanga district in Kilimanjaro region for a period of 10 years. The agreement was that the contract would be executed in three phases. The 1st phase was 4

years and upon the appellant being satisfied, the contract would be extended to 3 years, then to another term of three years.

In 2020, the appellant allegedly found the defendant to be in breach of some terms and conditions of the said contract. A series of events followed, including the respondent filing a claim at the District Land and Housing Tribunal for Same at Same, which lead to the appellant being banned from entering the school.

Eventually, the appellant decided to file Civil Case No. 4 of 2020 in the district court of Mwanga at Mwanga seeking for the following orders: that, the respondent be held liable for breach of the School Management Agreement dated 27.01.2013; that, the respondent be permanently restrained from managing the Amani Vumwe (English Medium Pre and Primary) School; that, the respondent be condemned to pay her Tanzanian shillings One Hundred and Ten Million Only (TZS. 110,000,000= as specific damages; that, the respondent be condemned to pay her general damages as may be assessed by the court; costs of the suit and; any other relief the trial court deemed fit and just to grant.

The respondent denied the claim and filed a counter claim thereto accusing the appellant for interrupting with their work, especially by blocking the use of the NMB Bank account they had handed over to them upon signing the contract. The bank account was meant to be used for payment of school fees by parents, so the blocking frustrated payment of expenses for the school. The respondents

claimed the following reliefs: a declaration that halting her to operate NMB Bank account no. 40202300340 was irrational and contrary to their agreement; a declaration for bank account no. 40202300340 be restored to the position status of the date of their agreement; the appellant be ordered to pay to the her all monies withdrawn from bank account No. 40202300340 as the monies were intended to run the school; the appellant be ordered to pay her general damages to the tune of Tanzanian Shillings One Hundred and Fifty Million; the appellant be ordered to pay punitive damages to the tune of Tanzanian Shillings Fifty Million (Tsh.50,000,000/=) as compensation for the disturbance she caused her and; any other reliefs) that the court finds just and fit to grant.

The trial court and parties agreed on the following issues to guide the determination of the controversy between the parties:

1. *Whether the defendant had breached the contract?*

2. *Whether the procedures followed to issue the notice of termination of contract were in accordance with the requirement of the contract?*

3. *Whether there is any specific damage the plaintiff had suffered?*

4. *What are the reliefs) the parties are entitled too.*

The appellants paraded 4 witnesses: PW1, Andrew Moses Maganga; PW2, Paulina Mndeme; PW3, Rose Mndeme and PW4, Loveness Lameck Ally. On the other hand, the respondent had 2 witnesses: DW1, Isiaka Hassan Msuya and DW2; Sebastian Rwegerera.

The testimony on record was to the effect that: on 27.01.2018, PW1, drafted and executed the alleged 10-year contract between the parties. The contract was tendered by him and admitted as exhibit P2. PW2 and DW1 were among the parties that executed the contract. The agreement had a mediation clause therein, clause 6 (iv) which indeed forms the gist of the appeal at hand.

In 2020, the appellant found the respondent was in breach of some conditions. On 19.11.2020, the appellant issued a notice to the respondent (Exhibit P3) listing the alleged violations and notifying her of a joint meeting to be held on 02.12.2020. PW2, the alleged owner of the plaintiff/appellant organisation, PW3 who is PW2's daughter and Director of the appellant, DW1, the director of the respondent and DW2 an ally of the respondent attended the said meeting. The minutes of the said meeting were admitted as Exhibit P4. On 24.12.2020, the respondent was served with a notice of termination (Exhibit P7) which stated that "having found that the respondent violated the alleged conditions, the appellant was terminating their contract." On 01.01.2021, a demand notice (Exhibit P8) was issued to DW2 and subsequently, the respondent was forced out of the School.

Upon hearing the matter, the trial court, found Clause 6 (vi) of the Contract (Exhibit P2) was not complied with and thus struck out the matter with costs awarded to the respondents. Aggrieved, the appellant has lodged the appeal at hand on the following grounds:

1. *That, the trial Court erred in law and in fact by failing to determine the central issue of breach of contract paused by the parties as issue number 1.*

2. *That, the trial Court erred in fact and in law by being selective on the issues raised (number 1, 3) thus ended up with erroneous decision.*

3. *That, the trial Court erred in law by framing its own issue of arbitration and decided upon the issue without affording the parties (Appellant and Respondent) right to be heard to the issue.*

4. *The trial Court erred in law and fact by striking out the suit, which was proper before the court.*

5. *That, the trial Court erred in law and fact by misconstruing clause 6(vi) of exhibit P2 interpreting the word "Usuluhishi" to mean Arbitration instead of Mediation and based its whole decision on the wrong interpretation of the said Clause number 6(vi) of the exhibit P2; thus, ending up making an erroneous decision.*

6. *The trial Court erred in law and fact by rendering and delivering erroneous, problematic decree.*

7. *That, the trial Court erred in law and in fact behold it did not pay attention to the nature of the case, complexity of the*

case, interest of children (students) involved in the case. Hence neglected children welfare. (sic)

The appeal was argued in writing whereby the appellant was represented by Mr. Yoshua Mambo, while the respondent was represented by Ms. Magdalena Kaaya, both learned advocates.

Mr. Mambo submitted on the grounds of appeal in seriatim. Arguing on the 1st ground, he contended that the trial court erred in failing to determine the central issue which was on breach of contract as found in pleadings. An act he termed as breach of procedure. Insisting that the court ought to determine every issue raised by the parties, he cited the case of **Alisum Properties Limited vs. Salum Selenda Msangi** (Civil Appeal 39 of 2018) [2022] TZCA 389 TANZLII.

Addressing the 2nd ground, Mr. Mambo averred that the trial court was selective in issues to determine. He contended that, cases must be determined on issues framed or grounds raised on record. That, in this matter four issues were raised as found in the trial court proceedings. He faulted the trial magistrate for disregarding the 1st and 3rd issues which amounted to serious breach of procedure and occasioned miscarriage of justice to the appellant. He cemented his argument with the case of **Alnoor Shariff Jamal vs. Bahadur Ebrahim Shamji**, Civil Appeal No. 25 of 2006, CAT at Dare es Salaam (unreported).

As to the 3rd ground, he averred that the trial court raised a new issue in composing its judgement. Explaining the said new issue, he said that it was on arbitration proceedings. He complained that the issue was not framed during proceedings. While acknowledging that the court has the power to amend or add an issue, he contended that it should accord a reasonable time to the parties to produce documents and lead evidence on the additional issue.

Mr. Mambo further contended that the parties in this case were not accorded the opportunity to address the court on the new issue of arbitration. He considered such omission as amounting to a fundamental procedural error that occasioned miscarriage of justice to the appellant who was denied the right to be heard enshrined under **Article 13 (6), (a) of the Constitution of the United Republic of Tanzania, 1977**. He further cemented his arguments with the case of **Alisum Properties Limited vs Salum Selenda Msangi** (supra).

On the 4th ground, Mr. Mambo averred that the trial court erred in striking out the suit since the appellant had complied with the mediation clause (*usuluhishi*) under Clause 6 (vi) of Exhibit P2. He contended that the parties attempted to settle their dispute amicably, but the same was not successful.

Arguing on the 5th ground, he averred that the trial court erred in misconceiving clause 6 (vi) of Exhibit P2 by interpreting the same as arbitration instead of mediation. He argued that the trial court

based its whole decision on the wrong interpretation of the clause as the decision was based on formalities in arbitral proceedings. He had the view that the parties as testified by DW1 and DW2, meant clause 6 (vi) of Exhibit P2 to be one of mediation.

On the 6th ground, Mr. Mambo contended that the trial court delivered an erroneous, problematic decree to the extent that they failed to comprehend the order in the said decree. He had the stance that the decree contradicted **Oder XX Rule 6 of the Civil Procedure Code** [Cap 33 RE 2019].

As to the 7th ground, he contended that the trial court did not pay attention to the nature of the case and its complexity whereby it involved the interest of the children. He contended that the trial court neglected the welfare of the children which was contrary to the **Law of the Child Act, 2009,** which calls for determination of matters of welfare of the children with priority. He alleged that the case involved welfare of nursery to grade seven students. That, the dispute affected proper running of the school as teachers had to be terminated. It also affected the supply of food to boarding school students, supply of books and stationaries and payment of salaries to teachers. In that respect, he had the stance that the case ought to have been decided on merit.

Arguing further, Mr. Mambo averred that this court is clothed with jurisdiction to analyze evidence, re-evaluate the same and make its own findings as ruled by the Court of Appeal in the case of **Kaimu**

Said vs. Republic (Criminal Appeal 391 of 2019) [2021] TZCA 273 TANZLII. In the premises, he invited the court to analyze and re-evaluate the evidence on record and make its own findings. He finalized his submission by praying that the appeal be found with merit and the decision of the trial court and decree be quashed and set aside.

In reply, Ms. Kaaya jointly addressed the 1st and 2nd grounds of appeal. She averred that the trial court did not determine the 1st and 3rd issues but only addressed the 2nd issue. Conceding to the appellant's counsel's argument, she argued that it was important for the trial court to first address the 1st issue to determine whether the respondent breached the contract and then proceed to address the 2nd issue. In the premises, she had the view that the trial magistrate erred in determining one issue alone.

Addressing the 3rd ground, she denied the assertion that the trial magistrate framed her own issue and denied the parties the right to address the court on the same. She further averred that as reflected in the judgment of the trial court, the trial magistrate addressed the 2nd issue, but the problem was that she determined the same as an arbitration instead of mediation and thus caused the entire judgement to deal with a matter that was not brought by parties.

Replying to the 4th ground, Ms. Kaaya averred that the trial court properly struck out the suit as it was prematurely filed before the

court. With regard to the 5th ground, she admitted that indeed the trial court erred in misconstruing clause 6 (vi) of the contract by terming the same as arbitration instead of mediation. Still, she argued that the matter ought to have gone to mediation and if dissatisfied by the outcome, then to the court, instead of issuing a notice for termination of contract.

As to the 6th ground, she averred that the variation between decree and judgment is curable under **section 96 of the Civil Procedure Code** as the appellant could still file an application for corrections and prefer the same before this court as a ground of appeal.

On the 7th ground, Ms. Kaaya contended that the same was baseless as the court has nothing to do with the welfare of children as the school is still running and children are still accessing their basic needs which among others is to get better education in good environment. She added that the teachers' contracts are not terminated and their salaries are paid and that is why the school is still running contrary to the allegations by the appellant.

Concerning the prayer by the appellant that the matter be determined by this court, she averred that the same would be improper since this court would be addressing issues not determined at the trial court. She instead prayed that this court quashes and sets aside the judgment and decree of the trial court and remit the file to the trial court for the same to be determined

as per relevant issues. She also prayed that the court waives costs of the appeal as the mischief was not occasioned by the parties.

I have considered the submissions from both parties' counsels and gone through the trial court record. Upon observing the grounds of appeal, I found that the 1st and 2nd grounds are similar, while the 3rd, 4th and 5th are somehow related to each other. In that respect, I shall collectively address the 1st and 2nd grounds; then collectively the 3rd, 4th, and 5th grounds, and finally address the 6th and 7th grounds separately, if need be.

Starting with the 1st and 2nd grounds, the appellant faults the trial court by failing to determine all the issues raised before it and only focused on the 2nd issue leaving the 1st issue which was core. The general rule is that courts are required to determine all issues raised before them. See, **Victor Raphael Luvena vs. Magreth Ephraim Kawa & Others** (Civil Appeal No.25A of 2021) [2023] TZCA 17526 TANZLII; and **Alisum Properties Limited vs. Salum Selenda Msangi** (supra).

There is however an exception to this rule. Such exception is when the court sits in its appellate jurisdiction and finds that one ground or issue raised therein can dispose of the entire appeal. Another exception is where the court sits as a trial court and finds that there are issues of law that could dispose of the whole matter. In such circumstances the court is at liberty to determine the issue of law first and shall only proceed to other issues if it does not dispose of

the matter to finality. This is well enshrined under **Order XIV Rule 5 of the Civil Procedure Code**. This provision was also considered by the Court of Appeal in the case of **Adam Wamunza vs. Kinondoni Municipal Council & Another** (Civil Appeal No.424 of 2020) [2023] TZCA 17512 TANZLII, to justify the 1st appellate court's act of determining the appeal on a single issue alone. The Court stated:

> "Upon consideration of the approach by the first appellate Judge, we found that the same was in order by dint of Rule 2 of Order XIV of the Civil Procedure Code which provides that where issues of law and facts arise in the same suit, and the court is of the opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first."

See also; **Ally Rashid & Others vs. Permanent Secretary, Ministry of Industry & Trade & Another** (Civil Appeal 71 of 2018) [2021] TZCA 460 TANZLII. In view of these authorities, it is clear that a trial court can determine a single issue in a case where such issue is of law and capable of disposing of the entire suit. Now the question to be asked in the matter at hand is whether the second issue determined by the trial court was one of law and capable of disposing the entire suit. For ease of reference, I wish to reproduce the second issue as hereunder:

> "Whether the procedures followed to issue the notice of termination of contract were in

accordance with the requirement of the contract."

As the above quoted issue goes, and as conceded by both parties' counsels, it is clear that the issue was based on facts and needed to be proved by evidence. As such, it is not an issue of law perse. In that respect, the trial court ought to have dealt with the rest of the issues as well. By omitting to do that, the parties' right to fair hearing was infringed.

With regard to the 3rd, 4th and 5th grounds of appeal, I find the underlying question is on whether the trial court raised a new issue in composing its judgment. It is well settled that courts, like parties, are bounds by pleadings. However, the court may still raise new issues as allowed under **Order XIV Rule 5 of the Civil Procedure Code**. However, where a court raises a new issue, it must accord the parties the opportunity to address it on the said issue. Failure to do so amounts to infringement of the right to be heard, thus causing injustice to the parties. See; **Alisum Properties Limited vs Salum Selenda Msangi** (supra).

Mr. Mambo held the view that the matter was determined on a new issue raised by the trial magistrate in composing her judgement. Ms. Kaaya somehow agreed with Mr. Mambo whereby she argued that the trial court dealt with a different matter all-together while determining the 2nd issue. I, in fact, share the view by both learned counsels that the trial court went astray when dealing

with the 2nd issue thereby unconsciously found itself entertaining a new issue. It is clear on record that the 2nd issue concerned adherence to procedures on issuing notice of termination of the contract in accordance with the terms of the contract between the parties. However, in its judgment, the trial court dealt with clause 6 (vi) on dispute resolution between the parties. The clause requires parties to first resolve their disputes amicably and if no solution is found resort to courts of law for adjudication.

The two issues are different in the sense that while the one on dispute resolution that the court dealt with deals with competence of the matter filed in court without prior seeking for amicable solution; the one on adherence to procedures before issuance of notice deals with competence of the notice of termination of the contract between the parties. In that respect, either an issue in respect of the competence of the matter before the court ought to have been framed and dealt with, or the court ought to have re-opened proceedings and accorded the parties the opportunity to address it on the issue before issuing its decision. In ***Mire Artan Ismail & Another vs. Sofia Njati***, Civil Appeal No. 75 of 2008 whereby the Court while citing with approval the case of ***Kluane Drilling (T) Ltd. v. Salvatory Kimboka***, Civil Appeal No. 75 of 2006 (CAT, unreported) held:

> "We are of the considered view that generally a judge is duty bound to decide a case on the issue on record and that if there are other questions to be considered they should be placed on record

> and parties be given an opportunity to address the court on those questions … we have found above that the effect of a failure to afford the parties the right to be heard on the issues raised *suo motu* by the High Court vitiated the decision."

In the spirit of the above decision, I find the trial court erred in deciding on a new issue it unconsciously framed during composition of judgment, without according the parties the right to be heard thereto.

In the circumstances, I quash the trial court judgement and orders thereto and order the case file to be remitted back to the trial court for it to deliberate on all the issues framed for determination of the case. Should the trial court still find the issue on competence of the matter before it for non-exhaustion of local remedies is still pertinent to dispose of the case, it shall accord the parties the opportunity to address it on the same and thereafter compose a judgement accordingly. Considering the fact that the fault was occasioned by the trial court, I order for each party to bear his/her own costs.

Dated and delivered at Moshi on this 12th Day of December, 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA