THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC CIVIL APPEAL NO. 04 OF 2023

(Originating from Civil Case No. 20 of 2021 from the District Court of Mtwara at Mtwara)

Sheria Rashid Maarifa ..... **APPELLANT**

VERSUS

Bakari Said Uvango ..... **RESPONDENT**

JUDGEMENT

Date of last Order: *17.08.2023*

Date of Judgement: *18.12.2023*

Ebrahim, J.

Aggrieved by the decision of the District Court of Mtwara in Civil Case No. 20 of 2021, the Appellant herein has preferred the instant appeal raising three grounds of appeal as follows:

1. The trial court erred both in law and fact for failure to properly evaluate the evidence on record and hold that the Appellant did not breach the contract.

2. That the trial Court erred in both law and fact in assessing and granting general damages to the Respondent.

3. That the trial Magistrate erred both in law and fact in not deciding in the counter claim.

Going by the proceedings on records, the Respondent herein (Plaintiff in the original case) sued the Appellant herein (Defendant in the original case) for breach of contract they entered on 15th October, 2015 – **exhibit P1**. According to the terms of their contract, the Appellant was to buy a house from the Respondent at a purchase price of Tshs. 120,000,000/-. The house is situated at Plot No. 824 Shangani West within Mtwara Municipality. Further, they agreed that out of the purchase price, the Appellant shall pay for the Respondent the amount of 37,800,000/- that the Respondent owed Agricultural Inputs Trust Fund (AITF). The Appellant failed to honour such agreement and paid the Respondent only Tshs. 5,000,000/-, hence the instant case.

In his defence, the Appellant averred that the agreement dated 15th October, 2015 was superseded by another arrangement of which the Appellant was supposed to pay AITF a total of Tshs. 38,800,000/-. The Appellant paid AITF a deposit of Tshs. 10,000,000/- and deposited his Certificate of Title for Plot No. 200A, Block 2, Ukuni Bagamoyo but on 13th January 2016, AITF rescinded the

arrangements and refunded the Appellant his down payment and returned the title deed. Thus, **exhibit P1** was rendered inoperative as it was frustrated by AITF.

The Appellant further, raised a counter claim claiming against the Respondent for payment of Tshs. 39,000,000/- being special damages suffered for breach of tripartite agreement dated 1st February 2026 and Tshs. 5,000,000/- advanced to the Respondent as a gesture of goodwill.

After hearing the evidence from both sides, the trial court found the Appellant to have breached the contract and ordered him to pay Tshs. 77,200,000/- to the Respondent and Tshs. 30,000,000/- as general damages and 12% interest from the date of judgement until payment in full.

When this appeal was called for hearing, the Appellant was represented by advocate Steven Lekey; while the Respondent appeared in person.

The appeal was argued by way of written submission and both parties adhered to the schedule set by the court. I shall not

recapitulate the submissions but shall refer to them in the course of addressing the grounds of appeal.

Counsel for the Appellant opted to start with the 3rd ground of appeal, however, for convenience purposes, I shall address the grounds of appeal in seriatim.

Indeed, as correctly observed by the counsel for the Appellant the first appeal is in the form of re-hearing. I am therefore obliged without fail to re-visit and re-evaluate the entire evidence on record and subject the same into objective scrutiny; and if merited arrive to this court's own findings of fact. I am inspired by the position stated in the case of **Shah Vs Aguto** (1970) 1 EA 263 cited with authority in the case of **Peter Vs Sunday Post** (1958) EA 424 where it was held at page 492 that:

> *"It is a strong for an appellate Court to differ from the finding on a question of fact of a judge who tried the case and who has had the advantage of seeing and hearing the witness. An appellate court has, indeed jurisdiction to review the evidence* ***in order to determine whether the conclusion originally reached upon that evidence on records and find out whether the appellant's defence can stand or otherwise***". [Emphasis added].

See also the cited cases by the counsel for the Appellant of **Siza Patrice V R**, Criminal Appeal No. 19/2010; and **D.R. Pandya Vs Republic** [1957] EA 336.

Thus, in order to re-evaluate the evidence effectively, I find it befitting to visit the evidence on record from both parties albeit in summary.

In proving his case at the trial court, the Respondent told the court that they entered into a written contract with the Appellant on 15.10.2015-**Exhibit P1.** The terms of the agreement among others were for the purchase of the Respondent's house located at Plot No. 824 at Shangani West at the consideration of TZS. 120,000,000/-. From that amount, they also agreed that the Appellant shall pay the National Agriculture Input Trust Fund (AITF) TZS. 37,800,000/- on behalf of the Respondent as he owed them. The remaining balance to be paid to the Respondent. Respondent testified further that Appellant only paid him TZS 5,000,000/- and paid nothing to AITF resulting to the collapsing of his business and himself falling sick. The execution of their agreement was supposed to be finalized on 30.10.2015. He denied the existence of any other contract between himself and the Appellant. He said if there is

any, it should have his signature. Responding to cross examination questions, he denied to have written a letter to AITF on 26.10.2015.

Defending his position, the Appellant (DW1) herein admitted to have entered into an agreement with the Respondent on 15.10.2015 for the purpose of purchasing the house described above **exhibit D1**. He also admitted the purchase price of TZS 120,000,000/- out of which TZS 82,200,000/- was to be paid to the Respondent and TZS 37,800,000/- was to be paid to AITF on behalf of the Respondent for the debt owed. He further told the court that according to clause 6 of their agreement, they were supposed to get consent from AITF to have the document and failure of such consent parties shall revert to their original position. DW1 testified further that on 21.10.2015, the Respondent received a letter from AITF **(exhibit D2)** in response to his letter concerning the discharge of title deed. He said however, even before a response the Appellant and the Respondent met with AITF officials to discuss about the issue. According to the terms in **exhibit D2,** the Appellant was supposed to pay TZS 10,000,000/- of which he did and deposited his title deed as security and they were also required to sign a tripartite agreement – **Exhibit D3.** The Appellant and AITF

signed but the Respondent did not, the act that according to the Appellant frustrated the whole arrangement. Consequently, AITF wrote a letter returning to the Appellant the deposited amount and the title deed-**exhibit D4.** He finally prayed for the court to assist him to get his right as outlined in the counter claim.

Responding to cross examination questions, he admitted that between himself and the Respondent they have signed only one agreement – Exhibit D1. Responding further, he admitted that they were required to agree with each other before the agreement could be discharged. Also that Clause 6 of exhibit D1 does not say where the consent it to come from. He also admitted that exhibit D4 was written on 13.01.2016 whilst exhibit D3 is written 01.02.2016. Thus, he answered what started was exhibit D4 and then exhibit D3. He also admitted to have paid all the amount as it appears in exhibit D4.

Counsel for the Appellant has strongly argued that the trial court did not evaluate and consider the exhibits tendered in court by the Appellant i.e., exhibits D1-D4. He cited the case of **Bahati Kabuje Vs Republic,** Criminal Appeal No. 252 of 2014. Clause 6 of exhibit D1 states that it was requisite to obtain necessary consents

failure of which parties revert to their original position. In interpreting clause 6 of exhibit D1, he cited a persuasive case of **IBM Tanzania Limited Vs Sunheralex Consulting Co. Ltd,** Commercial Case No. 9 of 2020 which talked about looking at all evidence in a case in determining the conduct and intention of the parties. He further referred to exhibit D2, D3 and D4 on the need to have a tripartite agreement and the efforts done by the Appellant of depositing his title but the Respondent failed to sign such agreement; hence, frustrated the process. He thus urged the court to see that the frustration had the effect of putting parties to their original position before the agreement was executed.

In reply, the Respondent submitted that in order to ascertain as to whether the trial court properly evaluated the evidence, the same can be determined from the issues framed and the evidence. In this case the main issue was whether there was a breach of contract and which party breached the said contract. On that point, the respondent referred to the admission by the Appellant that he did not pay the respondent the money he ought to have paid. He challenged the claim by the Appellant that the contract could not be fulfilled because the Respondent frustrated it for

failure to sign the tripartite agreement. As for the meaning of frustration of the contract, he cited the case of **Ms. Kanyarawe Building Contractor Vs AG and Another** [1985] TLR 161. On that point, he said since the contract was not frustrated by an action which is out of human control; the contract was not frustrated but the Appellant failed to perform his financial obligation. He argued further that the lack of consent as argued by the Appellant could not have frustrated the contract otherwise he could not have paid the money to the AITF.

Indisputably, is the fact that parties in this case entered into a purchase agreement (Exhibit P1/D1) whereby the Appellant herein agreed to purchase the house of the Respondent herein.

The Appellant is complaining that he failed to make good payment to the Respondent because he did not sign the Tripartite Agreement (Exhibit D3) which required the Appellant to pay AITF **Tshs. 38,249,800/-** and the remaining balance of Tshs. 81,751,000/- to the Respondent. Thereafter, the Appellant shall be availed by the AITF with the Certificate of Title No. 2669 in respect of a house situated at Plot No. 824 Located at Shangani West Mtwara Township in the name of Bakari Saidi Uvango.

I have gone through all the exhibits tendered in court. In exhibit D2, a letter from AITF of 21.10.2015 responds to a letter of the Respondent of 15.10.2015 of the request by the Respondent to transfer the loan to the Appellant on the condition that Tshs. 38,249,800/- owed to the AITF by the Respondent be paid by the Appellant. The letter required the Appellant to start by depositing TZS 10,000,000/- and another collateral and finish the remaining balance of TZS 28,249,800/- after the Appellant has secured his loan amount. Another condition in terms of Clause 6 of exhibit D2 is that there shall be a Memorandum of Understanding which shall state a condition that upon the discharge of the Certificate of Title of a property subject of this matter, the Appellant shall still owe the AITF TZS 28,800,000/-. What I gained here is that there was supposed to be executed a Memorandum of Understanding of which did not state between which parties but exhibit D2 did not call for a Tripartite Agreement which the Appellant claims that it was frustrated by the Respondent for failure to sign the same.

Secondly, what surprises this court more is that the purported Tripartite Agreement was signed by AITF on 1st February 2016, but a letter returning the deposit amount of TZS 10,000,000/- deposited

by the Appellant together with his Title Deed was of 13.01.2016. If the initial agreement between the Appellant and the Respondent was frustrated by the act of the Respondent of failing to sign the Tripartite Agreement which was signed on 1st February 2016, then how come the letter returning the deposit was written on 13.01.2016 whilst the process of signing the purported Tripartite Agreement has not even begun? If at all, exhibit D4 is clear that unless full amount owed by the Respondent is paid; certificate of title in respect of the house of Respondent would not be discharged. I have seen no other letter rescinding exhibit D4.

At this juncture, I find no any frustration caused as the Appellant was well informed that Exhibit D4 recanted clause 4,5 and 6 of exhibit D2. Hence, there was no more the issue of memorandum of understanding. All that was required was for the Appellant to pay the agreed amount to AIFT but he did not. I further subscribe to the holding of this court in the cited case of **Ms. Kanyarwe Building Contractor Vs AG and Another (supra)** that:

"The doctrine of frustration may be invoked where events occur that make the performance of the contract impossible and ***these frustrating events are not the fault of either party****"[emphasis is mine]*

From the above observation therefore and as correctly stated by the Respondent, the Appellant failed to perform contractual obligation to the Respondent; he cannot cover himself with the umbrella of frustration of contract or lack of consent.

Coming the issue of general damages, counsel for the Appellant relying on the case of **Cooper Motor Corporation Limited Vs Moshi Arusha Occupational Health Service** [1990] TLR while appreciating the power of the trial court in the assessment and award of general damages, he invited the court to see that there was no foundation or any reason stated for the award of TZS 30,000,000/- to the Respondent. He was of the view that had the court considered the deliberate mission by the Respondent to execute a tripartite agreement, it would not have awarded such amount.

In response, the Respondent stressed the rule of the thumb that the award of general damages is the discretion of the trial court and the trial court took into consideration the breach of contract by the Appellant. He referred the court to the case of **Tanzania Saruji Corporation Vs African Marble Company Limited** [2004] TLR 155 which defined general damages as probable or direct consequence of the act complained of where the defendant's

wrong doing was a cause of a significant cause of damage. He further referred to the provisions of **section 73(1) of the Law of the Contract Act, CAP 345 RE 2019** which imposes a liability to a party breaching a promise (contract) to compensate the other party which suffered from such breach.

The question for determination however is whether the award of Tshs. 30,000,000/- as general damages was justifiable.

General damages have been well elaborated in the case of **TANZANIA SARUJI CORPORATION V AFRICAN MARBLE COMPANY LTD** (supra) as herein below:

> *"General Damage are such as the law will presume to be the direct, natural or probable consequence of the act complained of, the defendant's wrongdoing must, therefore, have been a cause, if not the sole, or a particularly significant, a cause of damage."*

Thus, general damages are those elements of injury that are the proximate and foreseeable consequence of the defendant's wrong conduct. See also the case of **Anthony Ngoo & Another V Kitinda Mar'** Civil Appeal No. 25/2014.

I am alive to the principle of the law that general damages are awarded by the court after consideration and deliberation on the

evidence on record able to justify the award. The court has discretion in the award of general damages, the discretion that must be exercised judiciously i.e., by assigning reason. Again, the award of general damage is a province of a trial court and appellate courts are discouraged to interfere. However, the appellate court may only interfere upon being satisfied that the trial court in assessing the damages applied a wrong principle of law, misapprehended the facts, has made a wholly erroneous estimate of the damage suffered that resulted to the amount awarded to be inordinately low or so inordinately high.

Various cases of Court of Appeal have illustrated the above principle i.e., **Razia Jaffer Ali V Ahmed Mohamedali Sewji and 5 Others**, Civil Appeal No. 63 of 2005, which cited with approval the case of **Davies V Powell Duffryn Associated Colliers Ltd** [1935] 1 KB 354, 360; and **The Cooper Motor Corporation V Moshi/ Arusha Occupational Health Services (supra)**; to mention but a few.

In assessing the general damages, the trial magistrate after making a finding that it was the Appellant who breached a contract, proceeded to award the general damages to the tune of Tshs. 30,000,000/-. There was no any reasoning made for such award.

Having gone through the proceedings on record, the Respondent said that failure by the Appellant to fulfil his obligation caused his business to collapse and he fell sick. However, there was no any other material to confirm that the Respondent's business really collapsed or that he fell sick. Nevertheless, I would not be inconsiderate of the frustration and anguish caused in a business transaction where the other party fail to perform its obligation and fulfil its promise. However again, the Appellant admitted during the trial that he paid the money that the Respondent owed AITF and that fact has never been controverted. This means that later the Appellant fulfilled part of the agreement.

The award of general damage should act as a solitude for the anguish caused to the Respondent as the collapse of business or sickness was merely mentioned in court. It is on that base I find that the award of Tshs. 30,000,000/- is inordinately too high. In the circumstances, I find that the award of general damages to the tune of Tshs. 10,000,000/- would act as a solitude under the circumstances and saves justice of this case. Accordingly, the award of Tshs. 30,000,000/- is reduced.

Now the issue of counter claim. The law is settled that counterclaim is an independent action no doubt that the Defendant turns to be the Plaintiff with the same duty and burden of proof.

The Court of Appeal in the case of **NIC Bank Tanzania Limited Vs. Hirji Abdallah Kapikulila,** Civil Application No. 561/16 of 2018 (CAT-unreported) illuminated on the status of a counterclaim that:

> *"... a counterclaim is substantially a cross suit which should be treated, for all purposes as an independent action."*

The Appellant stated at para 19 of his counter claim that the act of his money i.e., TZS. 5,000,000/- that he paid to the Respondent remained unproductive caused him special damage of a total of TZS 39,000,000/-.

The law as it is requires special damages to be specifically pleaded and strictly proved – see the case of **Simac Limited Vs TPB Bank Plc,** Civil Appeal No. 171 of 2018; also the case **Zuberi Augustino V. Anicet Mugabe,** [1992] TLR 137. By specific it means the Appellant ought to have shown how did he arrive to the claimed amount with particularization and or itemization of the same. Surely, there is none apart from a mere table showing number of years, amount stayed idle and amount that could have been earned. How it was

supposed to be earned, there is no such proof. If at all, it is mere speculations which do not fall under the category of strict proof. I therefore hasten to state that the Appellant failed to prove the claimed amount in the counter claim.

The last question is what is the final verdict.

The Appellant insisted that clause 6 of exhibit D1 said that failure of parties to obtain consent parties shall revert to their original position as per the Agreement. The said clause did not specifically state which consent and from who. However, since the Appellant agreed to have already paid money to AIFT, there is no reverting to the original position as status has already changed and 3rd parties have already been involved in the transaction. That aside the time that has passed.

From the above background, this court orders as follows:

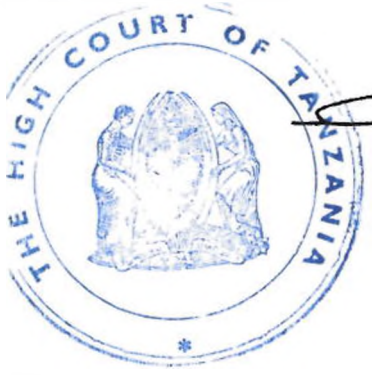
1. This appeal fails save for the reduction of general damages from TZS 30,000,000/- to TZS. 10,000,000/- to be paid to the Respondent.

2. The Appellant to pay the Respondent remaining balance of TZS 76,750,200/- as per their agreement.

3. The decretal sum to attract interest of 12% at the court rate from the date of judgement at the trial court to the full payment as ordered by the trial court.

4. Costs shall be borne by the Appellant.

Accordingly ordered.



R.A. Ebrahim

Judge

Mtwara

18.12.2023