

**UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**HIGH COURT OF TANZANIA**

**MOROGORO SUB-REGISTRY**

**AT MOROGORO**

**CIVIL APPEAL NO. 19 OF 2023**

*(Arising from Civil Case No.9 of 2022 of the Resident Magistrate's Court for Morogoro)*

**BAMA BUILDING CONTRACTORS..... APPELLANT**

**VERSUS**

**LEWICO CO. LTD..... RESPONDENT**

**JUDGEMENT**

**09/02/2024**

**MALATA, J**

This judgement is in respect of Civil Appeal No. 19 of 2023 by the appellant herein challenging Ex-parte judgement in Civil Case No. 9 of 2023 by the Resident Magistrate's Court for Morogoro. The trial court awarded ex parte reliefs in favour of the respondents and ordered for;

1. Payment of general damages to the tune of TZS 20,000,000/=
2. Cost of the suit.

Aggrieved thereof, the appellant herein appealed to this court raising five grounds of appeal, that;

1. The trial Magistrate erred in law in admitting exhibit P1 the mining Agreement for which stamp duty on the said agreement was not paid,
2. The trial Magistrate in law and facts in granting general damages whereas there was no cogent evidence to establish breach of contract and thus no cause of action,
3. **Without Prejudice**, the trial court erred in granting general damages while there was no proof that the respondent had made any investment in the anticipated mining project,
4. **Without prejudice**, the trial Magistrate erred in fact and law in awarding excessive general damages,
5. The trial Magistrate erred in law in awarding cost to the respondent while there was no proof that the respondent had issued and served upon the appellant a pre action notice

In nutshell, **LEWICO CO. LTD** and **BAMA BUILDING CONTRACTORS**, the parties herein concluded a contract for mining of quartz which had taken place at Melela within Morogoro region. On 03/09/2021 was the kick off date for the contracted works. During execution, the appellant is alleged to enter into another contract to perform same activity in contravention of the contract between the parties herein. However, the said company which concluded contract with the appellant herein was not made known during trial either by name or owners. Further, there was no contract tendered in court to prove the same.

The respondent aggrieved thereof, thence filed Civil Case No. 9 of 2023 in the Resident Magistrate's Court for Morogoro. The appellant herein was served with plaint but failed to file written statement of defence as such hearing proceeded ex parte thus the impugned Ex parte Judgement.

At the trial the respondent claimed for;

1. Payment of specific damages to the tune of TZS 190,000,000/=
2. Payment of general damages to the tune of TZS 100,000,000/=
3. Interest at the decretal sum at the rate of 32% from the date of filing to the date of judgement

4. Interest at bank rate from the day of judgement to the date of full payment

5. Cost to be provided for.

On 24/10/2023 this appeal came for hearing and the parties appeared through advocates, whereas Mr. Abdallah Ally learned counsel appeared for the appellant while Mr. Daudi Mkilya learned counsel appeared for the respondent.

Submitting in support of the first ground, Mr. Abdallah Ally submitted that exhibit P1 the contract was admitted without payment stamp duty. He submitted that, **Exhibit P1** was admitted in contravention of section 47 (1) the Stamp Duty Act, Cap.189 R.E.2019.

Despite the fact that, there was no objection at the time of tendering as the case proceeded Ex-parte, in itself does not do away with mandatory requirement of law, section 47 supra, only because it proceeded exparte. He referred this court to the case of **First National Bank (T) Ltd Vs Yohane Ibrahim Kaduma and Marianne Kusaga Kaduma**, Commercial case No.128 of 2019 where the court refused to admit a document for failure to comply with section 47(1) of the Stamp Duty Act, Cap.189 R.E.2019.

Mr. Abdallah Ally asked the court to expunge **Exhibit P1** as it was illegally admitted and used as evidence to prove the case.

Mr. Abdallah Ally conjoined and prayed to argue together grounds of appeal number 2, 3 and 4. He submitted that, the plaintiff/the respondent herein did not describe and state how the contract was breached by the appellant. That, throughout the respondent's evidence there is nowhere stated how the appellant breached the contract, thus warranting the award of general damages to the tune of TZS 20,000,000/=.

He further submitted that, general damages are awarded on discretion of the court however, it has to be exercised judiciously. He referred this court to the case of **Antony Ngoo and another Vs. Kitinda Kimaro**, Civil Appeal No. 25 of 2014 at page 15 para 3 Where the court held that, there must be consideration and deliberation on the evidence on record to justify the award and that the judge must assign reasons for the award.

As to the last ground, he faulted award of cost of the case that it was not justified thence in line with section 30 (1) of the Civil Procedure Code. He also referred to the case of **Mohamed Salmin Vs Jumanne Omary Mapesa**, Miscellaneous Application No.4 of 2014.

In reply thereof, Mr. Mkilya learned counsel responded to the submission in respect to ground no.1 that, Exhibit P1 was admitted unobjected thence is valid. As to the issue of failure to comply with section 47 (1) of the Stamp Duty Act, he admitted that, Exhibit P1 did not comply with the requirement however he submitted that, the failure did not vitiate the said evidence. He submitted that, this court can order for payment of the same by invoking oxygen principle under section 3A and 3B of the Civil Procedure Code, Cap.33 R.E.2019.

Submitting in respect to grounds 2, 3 and 4, Mr. Mkilya Daudi submitted that, the court was satisfied that, the respondent suffered general damages, he referred to the testimonies by PW1 at page 17 of the proceedings and what the court ruled on the point. He further submitted that, the awarded general damages of TZS 20,000,000/=was not excessive and that the same was given discretionary by the court after consideration of breach by the appellant herein.

Finally, he submitted that, the fifth ground is with no merits as the court found that the respondent suffered costs thus need to be reimbursed, thus the award of costs. He asked the court to dismiss the appeal with cost for want merits.

By way of rejoinder, Mr. Abdallah Ally, reiterated that there no evidence proving breach of contract by the appellant.

As to the mischief in Exhibit P1, he submitted that it cannot be cured by this court ordering payment of stamp duty at this stage and invocation of overriding principle. He thus prayed the court to allow the appeal with cost. This court has gone through testimonies by the sole respondent's witness referred to as PW1. He specifically testified that,

*".....the contract started on 03/09/2021 and existed till now.one side of Nzaro Badi Mruma breached the said contract by contracting with another contractor. I continued to be at Melela and claimed for my rights. I claimed for production costs and our investment costs etc. My claim was against Nzaro Badi who owned a company known as Bama Building Contractor Ltd.*

*My company suffered a cost of TZS 190,000,000/= which was the cost for clearing the said place and production.*

*We suffered the transport costs which was TZS 100,000,000/=*"

(Page 17 of the proceedings)

That is what PW1 testified in proof of the claimed amount arising from breach of contract entered between the parties herein.

The issue which to be determined is whether the respondent proved breach of contract by the appellant, thence warranting the award of general damages to the tune of TZS 20,000,000/=

To start with, it is a cherished principle of law that generally, in civil cases, the burden of proof lies on who alleges. I, am fortified by the provision of sections 110, 112 and 115 of the Law of Evidence Act, Cap. 6 of the Revised Edition, 2022 which state, inter alia that

Section 110 provides;

*(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

Section 112 provides that;

*'The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by law that the proof of that fact shall lie on any other person*



Section 115 provides that;

*In civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.*

The burden of proof does not shift unless stated by the law to that, effect.

In the case of **Paulina Samson Ndawavya vs. Theresla Thomas Madaha**, Civil Appeal No. 45 of 2017, unreported the court of appeal held that;

*"The burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason.... until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies has been able to discharge is burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party.'*

This position was repeated in the case of **Lamshore Limited & another vs. Bazanje K.U.D K, [1999] T.L.R 330**, the court held: -

*"The duty to prove the alleged facts is on the party alleging its existence"*

The above provision of law must be read together with section 73(1) of the Law of Contract Act, Cap. 345 R.E.2019 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."*

Having stated the governing principles, this court is now in a position to determine if the respondent's evidence proved existence of breach of contract by the appellant remediable under the contract or law.

Reading between lines of PW1's evidence as quoted herein above, it is clear that, the testimonies had these; **one**, that the contract started on 03/09/2021, **two**, that one Nzaro Badi Mruma breached the said contract by contracting with another contractor, **three**, that respondent claimed for

production costs and investment costs **four**, the respondent's claim is against Nzaro Badi Mruma who owned a company known as Bama Building Contractor Ltd, **five**, the respondent suffered a cost of TZS 190,000,000/= which was the cost for clearing the said place and production and **six** the respondent suffered the transport costs which was TZS 100,000,000/=.

Based on the fact number four as gathered from the respondent's testimony, the claim was against one Nzaro Badi Mruma who owned a company known as Bama Building Contractor Ltd for the reasons that one Nzaro Badi Mruma breached the said contract by contracting with another contractor. Read reasons number **two** and **four** herein above as gathered from PW1's testimonies on page 17 of the proceedings and as quoted herein above.

This means that, the claims were against Nzaro Badi Mruma who owned a company known as Bama Building Contractor Ltd not against the appellant herein. The parties to the Exhibit P1 as per PW1's testimonies are **LEWICO CO. LTD** and **BAMA BUILDING CONTRACTORS LTD**. PW1 testified that the Nzaro Badi Mruma was the owner of a company known as Bama Building Contractor Ltd, the appellant herein. If the claims were directed to the owner of the company, then was he afforded right to be heard? There is no record to that effect.

Additionally, if the respondent decided to lift veil and direct the claims to the owner of the appellant, then he ought to have lift veil to implead the shareholder/ owner for purposes of affording him right to be heard. The above position gets legal authority from the decision of **Yusufu Manji Vs. Edward Masanja and Abdallah Juma** (2006) TLR 127 where the court of appeal principled that;

*(i) While a company is at law a different person altogether from the subscribers, in certain special and exceptional circumstances, the Court may go beyond the purview of this principle by what was described in Salomon v. Salomon as lifting the veil;*

Borrowing the principle in the case of **Salomon v. Salomon & Co. Ltd.** (1897) A.C.22. the court had these to state;

*"The company is at law a different person altogether from the subscribers ...., and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee of them. Nor are*

*subscribers, as members liable, in any shape "or form, except to the extent and in the manner provided by the Act".*

In event therefore, the testimonies are to the effect that, the claim was directed to Mr. Nzaro Badi Mruma the owner of a company known as Bama Building Contractor Ltd, the appellant who is in law different person. Thus, there was no evidence by PW1 proving that, the appellant herein entered into another contract in contravention of any clause of Exhibit P1.

In the event there was no case against the appellant ever been instituted and proved thereof.

Further, the respondent failed to tender evidence for breach of Exhibit P1 by the appellant nor mentioned the contractor which concluded contract with the appellant. The respondent was contractually and legally bound to prove. However, no single evidence was given by the respondent, let alone attempt. Assuming there was claim laid against the appellant, still the respondent failed to table evidence on the breach of any article or clause of Exhibit P1. This court went further asking whether there was a mention of clause of Exhibit P1 alleged to have been breached and how but gathered none.

The above re-evaluation and analysis of the evidence on record, placed this court to the answer that, there was no case with evidence laid down and proved against the appellant or one Mr. Nzaro Badi Mruma the owner of a company known as Bama Building Contractor Ltd for allegedly entering into contract with another contractor.

It is trite law that, for the award on breach of contract to be maintained, there must be a proof that; **one**, parties had contract with lawful object and consideration, **two**, the contract imposed conditions to the parties, **three**, that one party to contract is in breach of the said conditions, **four**, that the other party has suffered damages as result of breach, **five**, that the breach is contractually and legally remediable and **six**, that the plaintiff is litigating with clean hands.

In the present case, there was no proof of any breach thus the trial court judgement is rooted from unsubstantiated matters as result it has led to unjust enrichment on the respondent party. That was a contravention of sections 110,112 and 115 of the Evidence Act, Cap.6 R.E.2022 among others.

In the case of **Siza Patrice vs. Republic**, Criminal Appeal No. 19 of 2010 where the Court of Appeal held that;

*"We understand that it is a settled law that, the first appeal is in the form of re hearing. The first appellate court has a duty to reevaluate the entire evidence in an objective manner and arrive at its own findings of fact, if necessary."*

This court therefore has duty to intervene and substitute with the correct judgement in the circumstances.

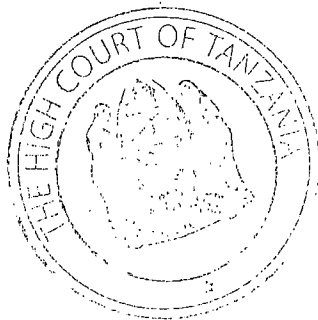
As the respondent failed to establish breach against the appellant, this court hereby allows the appeal and reverse the trial court's decision based on the afore stated reasons.

Having disposed the appeal based on grounds 2, 3 and 4, this court finds not fruitful to continue with the remaining grounds while the appeal has already been disposed as stated herein above.

In the upshot, I am inclined to agree with the appellant's position, thence allow the appeal and set aside the Judgement by the Resident Magistrate's Court for Morogoro. Cost to follow the event.

**IT IS SO ORDERED**

**DATED** at **MOROGORO** this 09<sup>th</sup> February, 2024

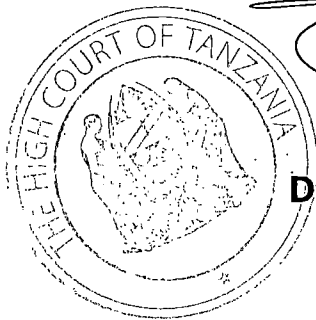


  
G. P. MALATA

**JUDGE**

09/02/2024

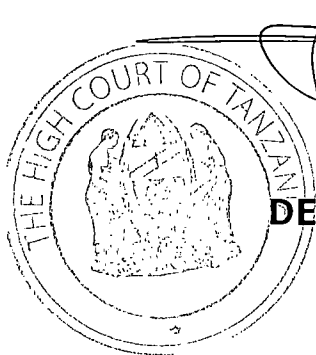
**JUDGEMENT** delivered at **MOROGORO** in chambers this 09<sup>th</sup> February 2024 in the presence of Abdallah Ally, learned counsel for the appellant who appeared through virtual Conference and Mr. Jackson Mashankara, learned counsel for the respondent.



  
S. P. KIHAWA  
**DEPUTY REGISTRAR**

09/02/2024

Right of appeal explained to the parties.



  
S. P. KIHAWA  
**DEPUTY REGISTRAR**

09/02/2024