IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 64 OF 2023

(Originating from Court of Resident Magistrate of Dar es Salaam at Kisutu Civil case no 167 of 2021)

BAGHAYO A. SAQWARE.....APPELLANT

VERSUS

SALAAMAN HEALTH SERVICES.....1ST RESPONDENT

DR. ABDI WARSAME HIRSI.....2ND RESPONDENT

JUDGMENT:

14th Dec 2023 & 23rd Feb 2024.

KIREKIANO; .J

Before the Court of Resident Magistrate of Dar es Salaam at Kisutu, the appellant herein sued the respondents for declaratory orders, payment of the loss of income, general damages interest and costs. According to the plaint, the claims emanated from the allegation of breach of contract for consultancy services by the respondents. Following preliminary objection raised by the respondents, the trial court made an order striking out the plaint and held that the plaintiff now the appellant had no cause of action against the 2nd respondent.

The trial court also ruled that the dispute was employment contract thus it had no jurisdiction to adjudicate the same. The appellant is aggrieved with this decision he has preferred this appeal setting forth five grounds of appeal thus: -

1. *The trial court erred in law and facts for deliberately entertaining the raised preliminary objections while they required evidence to reach their finality.*
2. *That trial court erred in law in deciding that the Appellant had no cause of action against the 2nd Respondent while there is an establishment of a privy relationship between the appellant and the 2nd Respondent which is also featured in the Plaint plus its annexure (s)*
3. *The trial court erred in law by ruling out that, it has no jurisdiction to try the suit while it is crystal and undisputed that the suit is centered on a consultancy engagement/contract for services from which the same had jurisdiction to entertain*
4. *The trial court erred in law by concentrating on a monthly payment modality in determining that the appellant and the 1st Respondent had an employment contract while the said mode is a shared feature for both employment contracts and independent contractor's agreements.*
5. *The trial court erred in law by failing to consider the Appellant's arguments in opposing the Preliminary objections hence arriving at a decision which is contrary to the laws.*

Briefly stated the factual background of the appeal is that the appellant is an insurance and management expert who renders financial and management services. In 2020, the first respondent desired to improve hospital performance and its general operations. The 1st respondent sought management expertise from the appellant.

On 11th April 2020, the appellant agreed with the 1st respondent to provide management, consultancy and advisory services to the 1st respondent for consideration of Tshs 6,000,000/= per month or 40% of net profit generated. The second respondent signed the contract as director general of the 1st respondent.

The appellant claims were that the 1st and 2nd respondent did not honour their side of the bargain hence they were in breach of the contract. The appellant thus sued the respondents claiming the relief indicated.

The trial court found that the 2nd respondent did not feature as a part of the contract then there was no cause of action against the 2nd respondent. On the aspect of jurisdiction to adjudicate the matter the trial court reasoned that there was an employee and employer relationship as the appellant opted to be paid monthly.

Hearing of this appeal was conducted by way of written submissions. The appellant had service of Mr. Mlyambelele Ng'weli learned advocate while the respondents were advocated by Miss Fauzia Kojaki learned advocate.

When this appeal came for mention on 14/12/2023 to ascertain parties' compliance with the schedule in filing submissions, the respondent did not appear, Mr Ngweli for the appellant informed this court that the appellant submission was timely filed but the respondent filed the submission outside the scheduled date that was 06/12/2023.

I wish to address this aspect before going to the merit or otherwise of the appeal. According to the record, on 08.11.2023 this court made an order in the presence of the parties directing that the appeal shall be heard by way of written submission. The appellant had to file written submissions on or before 22.11.2023, the respondent had to file written submissions before 06.12.2023. The record shows that the appellant filed submission timely but the respondent filed submission of 08.12.2023. To that end, one important aspect certainly ensued that is, there was no compliance with court order.

It is now settled that filing written submissions is tantamount to the oral hearing. There are several authorities including this court decision (Juma J as he then was) in **Saidi Mutamweza Mutwe vs Kondo Shomari (Civil**

Appeal 1 of 2008) [2010] TZHC 164 (23 August 2010) citing Rugazia, J, in **Fredrick A.M. Mutafurwa Vs. CRDB 1996 Ltd & Others, Land Case No.146 of 2004 (Land Div. DSM)** thus;

> *"The practice of filing submissions is tantamount to a hearing, failure to file the submissions has been likened to non-appearance. Failure to file their respective written submissions implies that parties have waived their right to present their written arguments in support of their respective positions*

I have also taken note that, the respondent submission was nevertheless filed out of time. It is on record that, the appellant also filed a rejoinder submission responding to these submissions filed out of time. To this end, upon reflection, I will take the generous view to accommodate the submissions which were filed by the respondent but also the rejoinder submissions. This will prejudice no part but serve justice in this appeal.

Now, submitting in support of the appeal, Mr. Ng'weli argued on the first ground that, the objection raised at the trial court on the cause of action was not a pure point of law. The same contained mixed law and facts. He cited **Karata Ernest and others Vs Attorney General Civil revision no 10/2010** to the effect that, objection with mixed issues of facts and law ought to be argued normally in trial.

To put it differently, Mr Ng'weli's stance was that the objection that the appellant had no cause of action was a matter of evidence and thus could not dispose of the matter. In support of this position, he cited **Shose Sinare Vs Stanbic Bank Tanzania Ltd and another Court appeal no 89/2020** on page 18.

On the second ground, the counsel for the appellant referring to paragraphs 6 and 10 of the contracts, argued that there were promises made by the 2nd defendant (the 2nd respondent) thus it was not logical for the trial court to hold that there was no cause of action established. He cited the decision in **Zebedee Mkondya Vs Best Microfinance Solution Ltd and four others in Commercial case no 95 of 2016** on page 7 but also **NBS holding Construction VS Shirika la Uchumi na Kilimo Ltd (SUKITA)** at page 6.

With regards to the third ground of appeal, the counsel for the appellant submitted that the contract between the appellant and 1st respondent speaks louder by itself that the former is not an employee. He referred para. VII of part 2 of the consultancy contract stipulate that the consultancy is not an employee, agent or representative and that in that sense parties became bound by the terms of the agreement as the same cannot be revised by any means other than amendment by the parties.

To reinforce his stance, he cited the case of **Osun State Government vs. Dalami Nigeria Limited Sc. 277/2002** cited in the case of **Miriam E. Maro vs. Bank of Tanzania, Civil Appeal No. 22 of 2017, CAT at Dar es Salaam (unreported) at pg. 13** to the effect that once parties have freely agreed on their contractual clauses, it would not be open for the court to change those clauses which parties have agreed between themselves. He concluded that it was wrong for the trial court to contemplate the agreement as an employment agreement while the agreement had declared the relationship between the parties.

On the fourth ground, the appellant's counsel submitted that the trial court misdirected by adjudicating on the contract to be employed merely monthly. This could also be the case in another contract other than employment contract.

On the fifth ground, the counsel for the appellant was of the complaint that the submission and cases cited opposing the preliminary objections were not considered by the trial court.

In reply Miss. Fauzia for the respondents maintained that the appeal is time-barred. Her submission in respect of the grounds of appeal were very brief. On the first ground of appeal, she argued that the trial court correctly

disposed of the case on a preliminary objection as none of the objections required evidence. In the 2nd 3rd 4th and 5th ground the respondent submitted together that the relationship between the appellant and the 1st respondent is an employer-employee relationship, of which the trial court had no jurisdiction.

In his rejoinder, Mr Ngweli maintained that the question that the appeal is time-barred was determined by this court in a ruling dated 5th October 20123.

Having heard the parties' submission, I have also gone through the ruling of the trial court and the pleadings as submitted in the trial court.

On the first ground, the complaint to be resolved is whether the objections posed in the trial court were a pure point of law. This ground is interrelated with the second ground which is whether the appellant had cause of action against the defendants.

When objection posed involves cause of action, the same poses two aspects thus; **firstly,** if the plaint does not disclose the cause of action, then it is a matter of law the remedy will be to reject the same. See, **John Byombalirwa v. Agency Maritime International (Tanzania) Ltd [1983] TLR 1. Secondly,** after finding the cause of action is disclosed,

whether the plaintiff's cause of action exists against the defendant so named in the plaint, this is a question of fact which will require evidence.

In this appeal, the trial court was faced with the second aspect pondering whether the plaint disclosed cause of action against the second respondent. In a similar scenario in the cited case of **Shose Sinare** the Court of Appeal found that there were two mixed points of fact and law and held at page 18 thus;

> *'High Court's observation, on the other hand, means that the appellant did not have a cause of action against the first respondent, which is a matter of evidence. That is why we said, the judge decided a point of mixed law and fact as if it was a single pure point of law, which was not the case'*

Citing **Mohamed Enterprises (T) Limited v. Masoud Mohamed Nasser, Civil Application No. 133 of 2102** (unreported), The court observed that;

> *"Where a preliminary objection raised contains more than a point of law, say law and facts, it must fail"*

Being so guided, having reflected on the parties' arguments on this point, I find merit in the first and second grounds that the objection on cause of action against the 2nd respondent was not a pure point of law capable of

disposing the matter, it was therefore a misdirection on part of the trial court to entertain the same.

On the third ground, the trial court relied on paragraph 4 of the contract on remuneration and compensation and concluded that since there was an agreement to pay the respondent 6,000,000 monthly then the same qualified the contract as the employer-employee dispute. This is also the appellant's complaint on the fourth ground that the trial court ought to have looked at the contract as a whole.

Mr Ng'weli maintained that going by **Part 2 paragraph VII** the same indicated the nature of the contract, thus;

> *"The consultant shall perform all such services as an* ***independent contractor*** *to the hospital.* ***The consultant is not an employee, agent or representative of the hospital*** *and has no authority to act for or to bind the hospital without its prior written consent."*

As it would appear in the pleading and parties' submission there is no dispute on the existence of this contract. The counsel for the appellant urged this court to make a finding that the parties were bound by the terms of this clause. The respondent counsel in her submission did not respond to this

argument. The excerpt above appears in the terms and conditions of the party's contract.

It is expected that when parties set terms and conditions in the contract and both agree to them, then it means they formally accept a legal agreement binding them. I have considered the cases cited by the appellant and by the parties at the trial court among them being, **Simon Kichele Chacha Vs. Aveline M. Kilawe, Civil Appeal No. 160 of 2019, Philipo Joseph Lukonde Vs. Faraji Ally Said, Civil Appeal No. 74 of 2019, (CAT) at Dodoma**, and in **Consolidated Civil Appeals No. 22 and 155 of 2020.**

All these cases emphasize that parties shall be bound by the terms of the contract to which they freely agree. In **Lulu Victor Kayombo Vs. Oceanic Bay Limited & Another, (unreported) pg. 11**. Citing the case **Unilever Tanzania Ltd. Vs. Benedict Mkasa Trading as BEMA Enterprises, Civil Appeal No. 41 of 2009**, the Court of Appeal held that;

> *"Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses which parties have agreed on themselves, it is not the role of the Court to redraft clauses in the agreement, but enforce the clauses where parties are in dispute".*

Given the above, it is my considered view that the trial court ought to have looked at the whole contract to establish its nature, as such the parties in the contract agreed to the condition which was lucidly clear that the appellant would work as an independent contractor and not as an employee. The third and fourth grounds of appeal have merit and I accordingly allow the same.

In the fifth ground, the complaint is that the appellant's submission was not considered at the trial. I have revisited the submission, by the parties at the trial court. Admittedly, while the parties addressed the points of objection, they cited and submitted numerous precedents in support of their positions. It is not reflected in the ruling that the same or any were considered by the trial court and it is unclear how such omission occurred. On face of record therefore the complaint in the fifth ground is justified.

While I have in mind that the impugned decision was determined at the preliminary stage. This court being the first appeal has the right to reevaluate facts as they appeared in the trial court and come up with its decision. This is a position applauded in several decisions including Maria **Amandus Kavishe vs Norah Waziri Mzeru & Another (Civil Appeal No. 365 of 2019) [2023] TZCA 31 (20 February 2023) thus;**

The first appeal is in the form of a re-hearing, therefore the Court must reevaluate the entire evidence on record by reading it together and subjecting it to critical scrutiny and, if warranted arrive at its conclusion of fact:

It is in the same spirit I find that the complaint in the fifth ground is equally addressed. All said and done this appeal is merited the same is allowed, the order of the trail court striking out the plaint is set aside. The trial court should proceed to determine the suit on merit.

A. J. KIREKIANO

JUDGE

23.02. 2024.

COURT:

Judgement delivered in chamber in the presence of Miss Penisia Mbilinyi holding brief of Mlyambelele Ng'weli learned advocate for the appellant and in presence of Salum Nasoro first respondent's principal officer.

Sgd

A.J. KIREKIANO

JUDGE

23.02.2024