IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CIVIL APPEAL No. 03 OF 2023

(Arising from the District Court of Sumbawanga at Sumbawanga in Civil Case No. 07 of 2021)

IUCN NATIONAL COMMITTEE

FOR THE NETHERLANDS FOUNDATION.....APPELLANT

VERSUS

KAENGESA ENVIRONMENTAL CONSERVARTION SOCIETY (KAESO).....RESPONDENT

JUDGMENT

28/02/2024 & 06/05/2024

MWENEMPAZI, J.:

The appellant herein is a legal person, an incorporated Dutch National Committee of the International Union for Conservation of Nature in Netherlands, whereas the respondent is also a legal person, a society existing under the provisions of the Societies Act [Chapter 337 R.E. 2002] and with a certificate of compliance issued under the Non-Governmental Organizations Act. No. 24 of 2002.

The core of the misunderstanding between the two sides arose as the result of a Partnership Agreement they both executed on or about the 13th

day of March, 2017 for the implementation of a project known as Shared Resources, Joint Solutions (SRJS) Tanzania which was restricted to the time frame of the 1st day of January 2017 to the 31st day of July 2020.

At the District Court of Sumbawanga (trial court), the appellant filed a suit against the respondent herein, in which the appellant's complaint against the latter contained the following;

i. *The declaration that the respondent is in breach of the partnership agreement for* ***Shared Resources, Joint Solutions*** *(SRJS) Tanzania Project.*
ii. *An Order requiring the respondent to forthwith and unconditionally surrender and return to the appellant the Project properties.*
iii. *An order requiring the respondent to prepare and submit to the appellant Final Report including the Audited Financial Reports.*
iv. *Payment of General Damages at the rate to be assessed by the Court.*
v. *Interest on the decretal sum at Court rate from the date if judgment to the date of payment in full.*
vi. *An order for costs of the original suit*

vii. Such other reliefs as the Court will deem fit to grant in the circumstances of the original suit.

Nevertheless, the defendant (respondent herein) denied all claims and prayed for the dismissal of the suit and filed a counter-claim against the plaintiff (appellant herein) as reconstructed hereunder, that;

i. The defendant repeats paragraph 1-18 of her Written Statement of Defence and states that the plaintiff breached the Partnership Contract as pleaded.

ii. By way of counter claim in this suit, the Defendant claims from the plaintiff: -

a. An order for specific performance of the contract (Partnership Agreement SRJS) executed on 13.03.2017 and 14.03.2017 between the Plaintiff and the Defendant.

b. General damages as shall be assessed by the court.

c. Interest at Court rate post-judgment to the date of payment in full.

d. Costs of and incidental to this (original) suit.

e. Such further orders or reliefs this honourable (trial) court deems just, equitable and convenient.

When the suit came up for determination before Hon. G. J. William - SRM on 01/09/2021, in presence of both parties, the court ordered thus: -

i. *Dismissal of the plaintiff's suit [main suit] for lack of merit.*

ii. *The Plaintiff was ordered to pay Tshs. 100,000,000/= as the General Damages to the Defendant.*

iii. *The interest rate of 7% per annum from the date of the judgment to the date of satisfaction in full.*

iv. *Costs of this (original) suit to be borne by the Plaintiff.*

Aggrieved by the said decision of the trial court, the appellant filed this appeal to this court which consists of eight (8) grounds which are as reconstructed hereunder;

1. *That the honourable trial court erred in law and in fact by holding that the appellant breached the Partnership Agreement for the SRJS project.*
2. *That the honourable trial court erred in law and in fact by holding that the respondent is the rightful owner of the project properties both utilized and unutilized.*
3. *That the honourable trial court erred in law and in fact by holding that properties purchased using the Appellant's funds and aimed for the project are not recoverable upon breach or discontinuation of the agreement.*

4. *That the honourable trial court erred in law and in fact in holding that the respondent had no obligation to report and account for the project funds disbursed under the Partnership Agreement for the SRJS project.*
5. *That the honourable trial court erred in law and in fact by awarding the respondent specific damages which were neither specifically pleaded nor proved.*
6. *That the honourable trial court erred in law and in fact by awarding TZS 100,000,000.00 as general damages.*
7. *That the honourable trial court erred in law and in fact by failing to subject the evidence to judicial scrutiny.*
8. *That the judgment of the honourable trial court is otherwise wrong and faulty at law.*

As per the reconstructed grounds above, the appellant prayed for this honourable court to be pleased to set aside the impugned decision of the trial court, and enter judgment in favour of the appellant and costs of this appeal be borne by the respondent.

Again, in her reply to the grounds of appeal, the respondent denied all the grounds as filed by the appellant, and prayed that this court be pleased to dismiss this appeal in its entirety.

On the scheduled dated for hearing, the appellant enjoyed the legal services of Mr. Daniel Welwel, learned advocate while the respondent was represented by Mr. Mathias Budodi also learned advocate. Both parties sought to argue their submissions by way of written submissions and their prayer was granted by the court.

Mr. Welwel submitted first that his side will submit on each ground in turn. He started off that, in the first ground of appeal, the Appellant challenges the decision of the lower court in finding that, the Appellant breached the Partnership Agreement for the SRJS project (Exhibit **P-1**). That, the trial court found that the Appellant breached the Agreement because it failed to give 90 days' notice to terminate the agreement as required by clause 4.1 (pages 23 and 24 of the judgement). That, the trial court erred in making this finding and in penalizing the Appellant after finding as it did that the Appellant was in breach.

He clarified that, firstly, by its nature the Agreement is a framework contract running for up to four years. PW-1 testified before the trial court that during the four years of the framework the transition from year one to the other is not automatic.

He then insisted that, the conditions for going to the second year is that the Respondent must submit the following; **one**, progress report covering

activities of year one; **two**, financial report; **three**, work plan and budget for the next year. That, if the Appellant is satisfied, then the parties will execute contract for the following year. The learned counsel stated that this procedure repeats itself until the fourth year of the Agreement, and that it was the testimony of all witnesses of the Appellant (PW1, PW2, PW3, PW4 and PW-5), and that even DW1 (the Respondent's director) confirmed this understanding of the Agreement.

In that regard, the learned counsel clarified further that the four years are not automatic contract term but each year has its own contract with distinct activities and budget, that the trial court erroneously treated the Agreement as a 4 years' automatic contract contrary to the mechanics of the project, and that because of this incorrect conclusion the trial court wrongly construed the import of clause 4.1 and 4.3 of the Agreement.

The learned counsel added that, secondly, the notice of termination in terms of clause 4.1 of the Agreement is relevant only when the contract for the specific year is in execution. That, this clause does not govern situation where parties after completion of one year have not gone to the second year. He proceeded that, thirdly, the trial Magistrate misconstrued the import of Exhibits P-2 and P-3. That, these are not notice within the meaning of clause 4.3 of the Agreement. As submitted above, notice of

termination does not cover the process of transitioning from one year to the other. This clause only deals with termination during subsistence of a year contract/programme. He then insisted that Exhibit P-2 clearly says at page 3 para 2, and he quoted as hereunder;

> *"...IUCN NL will not enter into and or sign a contract with KAESO for 2018".*

That, this is not a notice to terminate the 2017 contract but, it is a notice that the Appellant will not sign the 2018 contract.

He then submitted that, for these reasons he humbly prays that the trial court's finding that the Appellant breached the Agreement for failure to issue notice of termination is erroneous.

Submitting for the second ground of appeal where the Appellant challenges the trial court's finding on ownership of the project properties itemised in paragraph 6 of the plaint. The learned counsel submitted that; the Appellant contends that the project properties belonged to it but the Respondent claimed that it owns the properties. The trial court agreed with the Respondent but he urges that this finding of the trial court is legally and factually incorrect on the following grounds.

That, firstly at page 25 of the judgment the trial court made a finding that no "serious evidence" was led by the Appellant to prove that the project properties were purchased using the Appellant's funds. That, contrary to this finding, the learned counsel submits that all Appellant's witnesses (PW1, PW2, PW3, PW4 and PW5) clearly testified that the project properties were acquired using the funds of the Appellant under the Agreement. That, their evidence was not credibly controverted by way of cross-examination or contra evidence.

Secondly, the learned counsel submitted that the Respondent's accountant (DW2) clearly confirms (page 72 of the typed proceedings) that money to buy the vehicle came from the Appellant. That as such no proof is required given the unequivocal admission of the Respondent's accountant who is very much versed with the financial affairs of the Respondent.

Thirdly, Mr. Welwel proceeded that Appellant's evidence is that the partners of the Respondent along with other project implementing partners had a meeting in which an idea of purchasing a motor vehicle for the project was discussed and later the Appellant agreed to have project funds utilised to purchase the same. That, the trial court discounted this evidence because minutes of the said meeting were not tendered. That,

this is not just unfair but also, with respect, an illogical finding because oral testimonies of the Appellant's witnesses were not controverted. He added that, what is more, as alluded above, there was clear admission by the Respondent that the project properties were financed by the Appellant.

Fourthly, the learned counsel submitted that the trial court found that since the motor vehicle registration card is in the name of the Respondent then it must be the Respondent's property in terms of Section 2(a) of the Road Traffic Act, Cap 168 (pages 26-28 of the judgement). He then humbly submitted that, in line with the points above, there is no doubt that the Appellant financed acquisition of the project property.

Nevertheless, all Appellant's witnesses testified that the registration of the motor vehicle in the name of the Respondent was for convenience as it was the only implementing partner based in Sumbawanga. It is trite law that registration card is prima facie evidence of ownership of the motor vehicle unless it is proved otherwise. He then referred this court to the case **of Innocent Mdetnu @Tusker Mdemu vs Jonas Albert & Another**; DC Civil Appeal No. 6/2009 HC at Iringa.

Mr. Welwel then added that another relevant and binding precedent is the case of **Nacky Esther Nvange vs Mihayo Marijani Wilmore &**

Another, Civil Appeal. No. 207/2019 (CAT @ Dar es Salaam), whereas in this decision of the Court of Appeal (page 22) it is crystal clear that source of fund for purchase of the motor vehicle whose ownership is in contest is important. If it is proved that the same was purchased by funds of a person other than the registered in the card, then a claim by that other person (the funder) is a proof rebutting the registration card. In this case the proof is none other than the Respondent's own admission. He insisted that, the position of the law is that what matters is the intentions of the parties inferred from circumstances and the relationship of the parties. He again referred this court to the case of **Registered Trustees of Islamic Propagation Centre (IPC) vs the Registered Trustees of Thaaqib Islamic Centre (TIC)**, Civil Appeal No. 2 of 2020 (CA at Mwanza).

In concluding Mr. Welwel submitted that the evidence and circumstances are clear, that the Appellant financed acquisition of the project properties as part of the project under the Agreement. That, the project properties were under the control of the Respondent (because of being a Sumbawanga local organisation while other partners are headquartered in Dar es Salaam). The Agreement contemplates existence of the project properties and that the Respondent has not established if there is an alternative explanation for the Appellant to finance acquisition of

properties for the Respondent, that the trial court failed to properly address itself and thus made a wrong decision.

Submitting for the third ground of appeal, the learned counsel for the Appellant insisted that the Appellant's complaint is that the lower court's finding that the project properties are not recoverable upon breach, termination and/or discontinuation of the Agreement. That the trial court determination that these are not recoverable because no specific clause said so. Mr. Welewel did admit that there is no specific clause which provides for treatment of project properties in the event of termination or discontinuation of the Agreement. He however submitted that the trial court failed to properly deal with this issue in order to ascertain intentions of the parties and unique circumstances of this matter.

He clarified further that, firstly, it is not contested that the Appellant financed the acquisition of the project properties, whereas these properties were aimed for the project under the Agreement. That, for that reason alone, as long as the project subsists, project properties must be recoverable in order to be utilised for the very purpose for which the properties were purchased. That, respectfully, he argued that it is bizzare to suggest that if one partner is removed from the project (for whatever reason) the removed party should retain project properties while the

project is ongoing. That, nowhere in the Agreement this can be justified. That the Respondent cannot retain the project properties because the project was ongoing and also for the reason that the Respondent is not the owner of the properties.

Secondly, he submitted that inference should be drawn from clause 3.13 of the Agreement which details treatment of the project properties after completion of the contract. That, the Agreement requires that the receiving partner is required to submit a proposal on how it wishes to use the project properties and can only utilise the project properties for the use(s) as approved by the Appellant. That, this imputes that even after completion of the project the receiving partner is not free to utilise project properties as they wish, it is still the prerogative of the Appellant to determine how these properties will be used.

He added that, the reason is clear, the Appellant is the actual owner of the project properties hence the power to determine how they are to be utilized. That, the receiving partner (the Respondent in this case) does not own the project properties and does not have the freedom to use the same as they wish.

Mr. Welwel then argued that, now, the question which the lower court failed to properly address is this: if even after completion of the project

the project properties will remain properties of the Appellant and can only be utilised with approval of the Appellant what should be the position when the project is still ongoing? That, had the lower court address its mind correctly it would have determined that the project properties were recoverable.

Coming to the fourth ground, the learned counsel believe that it is fairly simple. He argued that the trial court decided that Respondent had no obligation to report and account for the project funds disbursed under the Agreement, and the only premise for this determination is the impugned finding that the Appellant breached the Agreement (page 31 of the judgment). The learned counsel humbly submitted that the trial court erred in deciding this way and again he had reasons for believing so as proceeded.

That, firstly, the Appellant on the first ground disputes that it is in breach of the Agreement. That it is also clear in the above submissions that clause 4.3 of the Agreement is inapplicable in the circumstances of this case. He submitted more that, now, since the only reason for the determination that the Respondent had no obligation to report and account for the project funds is the finding of who is in breach, the fourth ground of appeal should succeed.

He proceeded that secondly, the moment funds are disbursed, the obligation to report and account ensues. That, and, this obligation is independent of the question of breach. Mr. Welwel added that, whether or not the Appellant later breached the Agreement is not relevant here as that does not remove the reporting obligation for funds already disbursed. That it is therefore irrelevant whether or not the Appellant had dirty hands (as the trial court erroneously decided). That, for reporting purposes once funds are disbursed, the Respondent had the duty to account.

He then thirdly submitted that; the lower court asked a strange question (page 31 of the judgment) namely to whom the report could be given? Mr. Welwel argues that, to the mind of the trial court, the Appellant terminated the Agreement now the court wonders where will the report go? He submitted that the answer is very simple, termination or not, since the Respondent received the project funds, it had obligation to report and account and that is done to the party which disbursed the funds.

Fourthly, Mr. Welwel argued further that, the Respondent confirms that they had obligation to report to the Appellant. That, during cross-examination, DW1 admitted that it was his duty to send the report to the Appellant (page 70 of the typed proceedings).

Submitting for the fifth ground, Mr. Welwel submitted that the problem is the manner the lower court dealt with the question of special damages. at page 32 of its judgment where it granted Tshs. 75,000,000/= as special damages. The Counsel believes there are two fundamental problems in this regard.

He clarified as follows that, one, special damages are required to be specifically pleaded. That this is trite law. It is on record that the Respondent preferred a counterclaim which had no claim for special damages. That, in the reliefs sought, the counterclaim did not pray for any special damages,

Secondly, it is trite law that special damages must be specifically proved. That, there is no iota of evidence on record in support of the un-pleaded special damages. He added, during cross-examination of DW1, he was asked to provide evidence of the claim for special damages. That, from his response it is clear that the special damages were not proved. He thus claimed that the claim for special damages is for salaries, but he had no details as to salaries for each of the employees. He did not tender the exhibit of employment contracts or payroll or payslips for past salaries or work plan or budget. He had no evidence whatsoever and DW2 who is the accountant avoided this claim altogether,

Mr. Welwel referred this court to the case of **Zuberi Augustino vs Anicet Mugabe [1992] TLR 137**, at page 139 the Court of Appeal of Tanzania had this to say;

> *"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved."*

The learned counsel then insisted that, the Respondent failed both in specifically pleading and then proving the special damages. That, it is not surprising that in the decree special damages are miraculously excluded. That, the trial court must have come to a late realization that the special damages are not awardable in this case. But the lower court's judgment cannot be left as it is now, as it will create confusion and unwarranted contradiction arising from the clearly faulty finding.

Submitting on the sixth ground, Mr. Welwel submitted that this ground is equally simple with the previous ground whereas in this ground the Appellant challenges the award of general damages. That the trial court awarded damages on three considerations;

i. That unproven allegations against the Respondent were communicated to third parties "including LEAT, SNV evidenced by Exhibit P1 and P2;

ii. Because of these allegations the Respondent could not get other donners;

iii. The Respondent's image was tarnished. That, for these considerations the trial court awarded Tshs. 100,000,000/= as general damages (page 33 of the judgment), Mr. Welwel submits that the trial court erred in this regard.

He then submitted firstly for this sixth ground that, under the Agreement, the Respondent was to implement the project as a consortium of organizations. That, other participating organizations including LEAT and SNV, it is therefore factually incorrect to find, as the trial court did, that there was third party publication of allegations which the trial court determined are unproven. That, the Respondent did not give evidence of third-party communication.

He secondly submitted that, Exhibit P1 does not evidence third party publication as erroneously found by the trial court. That, this is the Agreement and contained no allegations. Likewise Exhibit P2 is not proof of third-party communication. That, this is a letter written to the Respondent. Only people within the project had notice of it and no third party as decided by the trial court.

Thirdly, he submitted that, there was no evidence laid by the Respondent to prove that she failed to get other donners because of the Appellant's allegations. That, there was no proof that the Respondent had made applications for funds from other donors and their applications were declined because of whatever the Appellant had alleged.

Fourthly the learned Counsel submitted that, what is contained in Exhibit P2 is not unproven allegations. That, there is ample evidence on record that indeed what is stated in this document is a recount of what transpired between the parties. There is no demerit of defamation to justify the finding on image tarnishing and that, in that event this was not a defamation suit and therefore the trial court made a wrong consideration in determining the general damages, more so because contents of Exhibit P2 are not in contest as per parties' clear pleadings (see paragraph 13 of the plaint and 11 of the written statement of defence).

Fifthly, the learned Counsel argued that, in the alternative assuming, which is denied, that the Respondent was entitled to general damages the amount awarded is inordinately high and is awarded on basis of wrong considerations. That, this court has powers to intervene and either disallow the general damages or reduce the quantum of general damages. He compared his argument to the case of **Cooper Motors Corporation**

(T) Ltd v. Arusha International Conference Centre [1991] TLR.165 (CA).

On the seventh and eighth grounds of Appeal, he submitted that, the Appellant's complaint is that the trial court did not subject evidence on record to judicial scrutiny and that read in whole the judgment is faulty and lacks objectivity. He clarified that, in addressing the issues before it the trial court did not analyse evidence of the Appellant's witnesses and offer reasons for disbelieving them.

He added that, on record, the Appellant has registered a myriad of complaints against the Respondent's actions (see for instance Exhibits P2 and P3) and detailed account of PW1. That, the trial court avoided to address the evidence and give a reason for deciding to find in favour of the Respondent. He insisted that, by reading from the judgment it appears the trial court anchored the judgment on the finding that the Appellant breached the Agreement because it gave no notice of termination. This foundation is very problematic.

He proceeded that, firstly, as he had submitted above, this finding is legally and factually incorrect because of the nature of the Agreement being the framework contract and each year has its own contract. This is the centre of the first ground of appeal.

Secondly, that assuming that indeed the Appellant is in breach for want of notice of termination (which is denied), this on itself does not defeat the Appellant's suit. The suit has to be determined on its own merits. That, the Appellant could be in breach as the court found as regards to notice but that is not the answer to the suit. It appears the trial court mistakenly believed that if the Appellant is in breach then the Respondent must be innocent. Also, the trial court seems to have found (without legal basis) that if the Appellant is in breach then it has no right to sue for breaches of the Respondent supposedly because it did not come with clean hands. That, both of these are legally untenable and factually wrong. A judgement founded on this mistaken and wrong premises can only be wrong.

Thirdly, he argued that, the trial court had the duty to examine allegations of the Plaintiff and make findings on each issue. Likewise, for the counterclaim the trial court was required to examine the evidence of the Respondent. That the trial court failed to discharge the duty to subject the evidence to judicial scrutiny. The resultant judgement cannot be left to stand because it emanates from proceedings in which trial court failed to objectively analyse the evidence. This court as the appellate forum has power to re-evaluate the entire evidence subject the evidence to critical

scrutiny and come to its own independent findings and decision. That, the Appellant invites this court to do just that. In support of his argument, Mr. Welwel referred this Court to the case of **Suzan Peter Mbaria vs Barikiel Joseph Bee,** Civil Appeal 6 of 2022) [2022] TZHC 14266 (24 October 2022)

Winding up his submissions, Mr. Welwel submitted that on the basis of the above submissions, it is beyond rational controversy that the trial court's judgment is legally and factually wrong. For the reasons, the he submits and prays that the appeal be allowed; the impugned judgement be set aside and this court be pleased to enter judgement with costs in favour of the Appellant.

In response, the counsel for the respondent, Mr. Budodi submitted that on the first ground of appeal, that it is our view that the appellant's allegations lacked justifications as shown herein below;

That, the appellant's contention is not substantiated as the alleged contract entered for each year before the breach of contract were neither established in evidence nor tendered before the trial court. The appellant breached the partnership agreement as was the one who terminated the contract as testified by PW4 at page 44 of the typed trial court's proceedings. Hence, the allegations by the appellant that the trial court

erroneously treated the agreement as a 4 years' automatic contract is unfounded. In that view, the trial court properly construed the contents of clause 4.1 and 4.3 of the exhibit P1.

He further added that, the allegations that the trial court misconstrued Exhibit P2 and P3 and that the notice of termination in terms of clause 4.1 of the Partnership Agreement is relevant only when the contract for specific year is in execution lacks merit and thus cannot stand in absence of the alleged contract of specific year before the termination of exhibit P1. This is supported by PW1's testimony as at page 23 of the typed trial court's proceedings, PW1 testified that the partnership agreement is a framework agreement of 4 years then the contract is renewed. In that view it is certain that the 1st ground of appeal has no merit.

Mr. Budodi then submitted against the 2nd ground of appeal that; it is the trite law that the one who alleges must prove his allegations to the required standard that is on the balance of probabilities. Mr. Budodi then quoted Section 110(1) of the Evidence Act, Cap 6 R.E 2022 which provides that:

> *"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."*

The learned counsel added that, as correctly observed by the trial court at page 25 and 26 of the typed judgment, that apart from mere allegations of the appellant failed to prove his ownership of the alleged project properties to the required standard, and on the appellant's contention that the money to buy the vehicle came from the appellant, the same should be disregarded as at page 60 and 68 of the typed trial court's proceedings DW1 testified that the money to buy the vehicle didn't come from the appellant. At page 25 of the trial court's proceedings PW1 testified that the project motor vehicle was bought in 2017 by the name of consortium. However, it is certain by the testimony of DW2 that the respondent had one motor vehicle whereas the registration card bears the name of the respondent. That, it is his side's view that the respondent is the rightful owner of the vehicle in the eyes of law as the same was registered in the respondent's name. Mr. Budodi then cited Section 2(1) of the Road Traffic Act, Cap. 168 which defined the owner in respect of the registered vehicle to mean that;

> *"Owner- (a) in the case of a vehicle which is for the time being registered under this Act and is not being used under a hiring agreement or hire-purchase agreement, means the person appearing as the owner of the vehicle in the register kept by the Registrar under this Act."*

He then clarified further that, it is trite law under section 15 of the Road Traffic Act (supra) that the person in whose name a motor vehicle is registered shall be presumed to be the owner of the motor vehicle. In support of his argument, he then referred to the case cited by the appellant, the case of **Nacky Esther Nyange vs Mihayo Marijani Wilmore & Another** (supra) at page 22, where the Court held that;

> *"In line with the submissions of Ms. Nassir and Ms. Rwechungura,* ***we find with no doubt that exhibit P2, the registration card of the motor vehicle proved that the second respondent was the registered owner of the said motor vehicle as stipulated in section 15 of the Tanzania Road Traffic Act.....****since the said motor vehicle had already been registered in the name of the second respondent, the deed of gift inter vivos would have no evidential value when compared to the registration card as per section 15 of the Road Traffic Act. In addition, there was no evidence adduced by the appellant to prove that the said motor vehicle was purchased through the family funds let alone prove the existence of the family account."*

Mr. Budodi then proceeded further that, as reasoned and observed by the trial court from page 25 to 28 of the trial court's judgment, no evidence

that justified that the appellant provided the fund to buy the alleged properties. The mode used to provide the money to the respondent to purchase the alleged properties was neither established nor proved. And hence it is his side's view that the second ground of appeal has no merit.

Arguing against the 3rd ground of appeal the learned counsel submitted that, it is his side's submission that as agreed by the appellant's counsel there is no specific clause in the exhibit P1 that provide how the project properties should be treated upon breach or termination of the contract. He added that, as stated herein above, there is no evidence tendered before the trial court to justify that the appellant provided the money to buy the project properties rather it was merely testified that among the obligations of the appellant was to fund the project so as to strengthen the capacity of the respondent. In that regard, Mr. Budodi insisted that the trial court was just to find that the properties can never be recovered as the appellant being a party who breached the contract would benefit from his own wrong. In that view, the 3rd ground of appeal is devoid in merits.

Coming to the 4th ground of appeal, Mr. Budodi submitted against it that, it was correctly reasoned and observed by the trial court at page 31 of the typed judgment that, since the appellant breached the contract by

failure to fulfill her obligation under exhibit P1 then the appellant had no right to demand the report from the respondent. That, the trial court finding was well grounded on the evidence on record as it is revealed at page 59 of the typed trial court's proceeding when DW1 testified that he didn't tender the financial report of 2017 since the appellant had breached the contract. The same was testified by DW2 at page 73 of the typed trial court's proceedings. In that regard the 4th ground of appeal lacks merits.

The learned counsel proceeded by submitting against the 5th ground of appeal that, the respondent in his counter claim established that there has to be a specific performance of the contract by the appellant thus among of the relief sought was that the trial court has to make an order for specific performance of the contract (exhibit P1). That the testimony of DW1 proved the operation costs to be paid thus at page 58 of the typed trial court's proceedings DW1 prayed for the respondent to be paid the operation cost to the tune of Tshs. **75,000,000/=** as a specific performance of the contract. In that regard the trial court decision was based on the pleadings as well as the evidences on record. Hence the 5th ground of appeal has no merit.

He then argued against the 6th ground of appeal that, it is respondent's view that the trial court correctly assessed the general damages to be

awarded and assigned reasons as to why the amount of TZS 100,000,000/= has to be awarded to the respondent as the general damage. It is a trite law that assessment of damages is a domain of the trial court. This is in view of the fact that the trial court is placed in a much better position to do so than the appellate court can do. He supported his argument by citing the case of **Anthony Ngoo & Another vs Kitinda Kimaro**, Civil Appeal No.25 of 2014, the Court of Appeal of Tanzania at Arusha (unreported) at page 15

> *"The law is settled that general damages are awarded by the trial judge after consideration and deliberations on the evidence on record able to justify the award. The judge has discretion in the award of the general damages. However, the judge must assign a reason...."*

He added that, it is certain at page 33 of the typed judgment of the trial court that the trial Magistrate assigned reasons to justify the award of TZS 100,000,000/= as the general damages. It is apparent that the trial court evaluated the evidence on record and found *inter alia* that the respondent being the reputable non-governmental organization its image was tarnished and thus the respondent could not get other donors. Having found so, the trial court awarded the aforesaid general damages. In that

view he prays this honourable court to find that the 6th ground of appeal has no merits.

Lastly, Mr. Budodi submitted against the 7th and the 8th grounds of appeal that are unfounded and devoid in merits. That, it is his side's view that the decision of the trial court was grounded on evidence adduced during the trial. It is trite law as held in the case of **Hemed Said vs Mohamed Mbilu [1984] TLR 113**, that the person whose evidence is heavier than that of the other is the one who must win. That, from the evidence on record, it is certain that the appellant's evidence was not sufficient to prove the case against the respondent to the required standard, and in that regard, he prays for this court to find that the 7th and 8th grounds of appeal have no merits. And in view of his arguments herein above, he prays for this honourable Court to dismiss this appeal with costs for lack of merits.

In rejoinder, the counsel for the appellant submitted on the fact that the Agreement being a framework contract as submitted by the counsel for the respondent lacks justification. He reiterates that, the evidence of all Appellant's witnesses is consistent that the Agreement is a framework contract. Exhibit P1 is itself clear. Clause 1.1 states it is a framework agreement "for **the maximum term of 4 years.**" Clause 1.2 requires that for each year a separate work plan and budget should be prepared.

There is, therefore, on record both oral and documentary evidence on nature of the Agreement Exhibit P1. That, at page 72 of he typed proceedings, DW2 confirms the nature of the Agreement and the requirement for preparing budget and work plan for each year as a condition for the Appellant to release funds under the Agreement.

Submitting for the 2nd ground, he re-joined on two points. First, in terms of section 15 of Road Traffic Act, Cap. 68, registration card is not conclusive evidence of ownership. That, it is merely prima facie evidence capable of rebuttal. This is the authority in **Innocent Mdemu @Tusker Mdemu** (cited in their submissions in chief).

Secondly, he submitted that, there is no dispute that the Appellant financed acquisition of the project properties. Starting point is the pleadings. Paragraph 6 of the plaint sets out the project properties financed by the Appellant. In paragraph 3 of the defence the Respondent does not dispute the financing but only challenges the ownership suggesting that the financial assistance by the Appellant aimed at capacity building of the Respondent hence the project properties belong to the Respondent. He added that, the problem with the Respondent's pleadings is that they are not backed by Exhibit P1. And at page 72 of the typed proceedings DW2 confirms that project properties were purchased using

funds from the Appellant. The learned proceeded that, may he also draw the Court's attention to the counterclaim that the Respondent has not sought an order declaring that the project properties belong to it.

On the 3rd in which the Respondent's argument is that the Appellant is in breach and so should not benefit from its own wrong. Mr. Welwel made a quick rejoinder which is that, firstly, assuming the Appellant is in breach (which is denied) the remedy in law is not to expropriate its properties as the Respondent has done and condoned by the trial Court. That, the remedy is to order compensation or specific performance. In fact, the Respondent's counterclaim sought to enforce the specific performance of the Agreement.

Secondly, he rejoined that as submitted above, since the Appellant financed acquisition of the project properties, it is entitled to dictate what happens to the properties it purchased through the Respondent.

Thirdly, on specific clause providing for treatment of the properties in the event of termination or breach, the Appellant's position is that it has the proprietary rights over the project properties. It is the Appellant's prerogative to determine what should happen to the project properties. Said differently, the Agreement does not provide for the Respondent to expropriate project properties under any circumstances. The Applicant's

complaint is that the trial Court did not give due attention to the real intentions of the parties.

Fourthly, he added if the Appellant was in breach why, then didn't the trial court grant the counterclaim? It is the Applicant's submission that the trial court was conscious that the Appellant was correct in refusing to go to year two of the framework Agreement. In totality of the things, it is the Respondent who, with assistance of the trial Court, benefitted from its own wrong.

Rejoining on the 4th ground, Mr. Welwel submitted that the issue as to whether the Appellant is in breach or not reporting for the funds disbursed and utilized by the Respondent is an obligation that is due on part of the Respondent and a right that has accrued on the part of the Appellant. Since this right had accrued the Appellant had right in law and contract to enforce it. For instance, at page 68 of the typed record, DW1 confirms that as at 17th of December 2017 the Respondent had a cash balance of TShs. 28,000,000/- under the Agreement. Since as directed in Exhibit P2 and D1 the Respondent had no further role in the project this balance should have been refunded. That, the money was neither refunded nor accounted for and the trial Court saw nothing wrong with the Respondent.

Mr. Welwel proceeded to rejoin on the 5th ground which concerns specific damages as follows. He insisted that, the special damages are not specifically pleaded in the counterclaim. There is no information in the pleadings regarding TShs. 75,000,000/- and no prayer is made for this mysterious figure. In absence of specific pleading and prayer, the award of special damages is untenable. This position is reinforced by the Court of Appeal in **Anthony Ngoo & Another vs Kitinda Kimaro** (cited by the Respondent at page 6 of the reply submissions). From page 16 to 17 of this decision the Court of appeal restated the position that special damages must be claimed specifically and proved strictly. This did not happen in the court below.

In addition to that, the learned counsel rejoined on the 6th ground which concerns general damages, that, the Respondent has relied on authority in Anthony Ngoo's case to contend that assessment of general damages is a domain of the trial court. This is true. The appeal is that in the exercise of its powers to assess general damages the trial court made wrong considerations and the judgement is tainted with misconceptions. At page 58 DW1 claimed that the Respondent was defamed but no particulars are given. In the submissions, the Respondent has contended that it is a reputable NGO but that is coming from the bar no evidence on record supports that assertion. He added that, as per the authority in Cooper

Motors (cited in their submission in chief) this Court can intervene and either reverse or reassess the general damages. The learned counsel's humble submission is that since the counter claim for specific performance failed, general damages should equally be disallowed.

Lastly rejoining on the 7th and 8th grounds, Mr. Welwel submitted that, on these grounds he reiterates the submission in chief and add for completeness that the trial court has failed to subject the Appellant's evidence to judicial scrutiny and come out with the reasoned judgement. Founded in a misconception, the trial court approached the case with a mistaken assumption that if the Appellant is in breach of the Agreement, then it is unnecessary to consider breaches of the Respondent. The entire judgement is premised on this sad fallacy.

That, for the foregoing reasons he submits that the appeal is meritorious and he invites this Court to allow it with costs.

After exhaustively reading the submissions from both camps and the records of the trial court without forgetting the grounds found within the memorandum of appeal as filed by the appellant, I have a view that the only determinant issue to be delt with by this court is ***whether this appeal is meritious.***

First and foremost, I do like to point out that this court being the first appellate court is obligated to re-evaluate the whole evidence to a fresh exhaustive scrutiny and draw fresh conclusions therefrom; but taking cognisance of the fact that it never had chance to examine the witnesses. See **Paulina Samson Ndawavya vs Theresia Thomas Madaha, Civil Appeal No. 45 of 2017** (unreported) where at page 17 it was held that;

> *"It is a duty of the trial court to evaluate evidence of each witness and make findings on the issues.* ***The function of the first appellate court is to re-appraise (reassess) the evidence on the record and draw its own inferences and findings having regard to the fact that the trial court had an advantage of watching and assessing the witnesses as they gave evidence."***
>
> [Emphasis added]

The above determination has been highlighted in a number of case laws such as in the case of **Kaimu Said vs The Republic, Criminal Appeal No. 391 of 2019** at Page 12, 2nd paragraph where it was held that: -

> "... *The High Court, as the first appellate Court was bound to analyze the evidence for both sides with the view to satisfy itself that the finding of the trial court was justified on the evidence."*

When reading the records before me, that is the records of the trial court, the grounds of appeal to this court and the submissions made by the learned counsels from both sides, it is evident that this matter is hinged on three major points which are;

i. The termination of the Agreement (Exhibit P1) between the two sides, as to which side is in breach of the same.
ii. Ownership of the project properties acquired during the existence of Exhibit P1 between the two sides, after the termination of Exhibit P1.
iii. The remedies awarded by the trial court in which the appellant has to pay the respondent.

As I have hinted above, the determination of this matter in hand will rely upon the above outlined points, rather than determining one ground after the other of which they all together circumnavigate the outlined points. Whereas, I will re-evaluate the evidence of every witness as they testified at the trial court and come up with a determination built by the records on hand alone.

As it has been revealed throughout the exchange of submissions from both sides, this matter emanates from the agreement/contract executed by both sides, in which it was tendered in evidence by the appellant and this court did admit it as Exhibit P1.

When the agreement between the two sides turns sour, its resolution including termination has been clearly clarified under **clause 4.1 of Exhibit P1** in which I find best to reproduce as hereunder that: -

> "***Either party may terminate the contract 90 days after giving written notice to the other party.*** *The parties agree to consult with each other as to the reason for termination and as to the effect of termination of the project, and to assist each other in the prompt settlement or transition of the project. The party terminating the contract is responsible for any reasonable operational costs that have to be made by the other party as a result of this termination. These costs must be declared to the party terminating the contract within the aforementioned 90 days. Costs made or declared after this period will not be taken into account."*
>
> **[Emphasis is mine]**

Being the first appellate court, I did go through the entire records of appeal in search of a notice particularly from the appellant's side but my search was not fruitful as there is no where any sort of notice from the party terminating the contract to the other party as Exhibit P1 requires.

Likewise, all the witnesses (PW1 to PW5) who were summoned to testify in favour of the appellant never referred Exhibit P1 and clause 4.1 in relation to the termination of the contract, it was only PW1 who referred Exhibit P1 as the agreement the appellant executed with the respondent and during cross examination at page 31 of the typed proceedings of the trial court, PW1 did admit that he did not send the Notice of Termination to the respondent. Indeed, an admission that he did not send a notice, is a deliberate breach of the contract.

It is a trite, when one party fails to fulfill its obligations as outlined in the contract, then, that party is in breach of the said contract. Once parties have duly entered into a contract, they must honour their obligations under that contract. Neither this Court, nor any other court in Tanzania for that matter, should allow deliberate breach of the sanctity of a contract.

In **Mohamed Idrissa Mohammed vs Hashim Ayoub Jaku [1993] T.L.R. 280** and **George Shambwe vs National Printing Company Limited [1995] T.L.R. 262,** it was the Court's holding that the duty the law imposes on parties to contracts, is to perform their contractual obligations. In this case at hand, the appellant did not perform her contractual obligations as Exhibit P1 required.

The second point which regards the ownership of the project properties once the contract has been terminated, my head is full of exclamation marks as to how did this vital issue slide through the eyes of the legal experts who were constructing Exhibit P1. I say so because, both learned counsels in this appeal do concede that in Exhibit P1 there is no any clause that has explained what happens to the project properties once the contract has been terminated. It is only clause 3.13 that narrates when the project is complete, what will happen to the project properties. In which, this matter at hand involves a project which was never completed.

Again, when one goes through the records of the trial court at page 31 during re-examination of PW1, he testified that, if the contract prematures or is terminated, the project properties remain to be the properties of the appellant. I failed to understand where this was extracted from as for Exhibit P1 it has not anywhere clarified anything close to what has been testified by PW1.

In this, I do join hands with what has been submitted by the counsel for the respondent, Mr. Budodi, as he submitted that, it is the trite law that, the one who alleges must prove his allegations to the required standard and that is on the balance of probabilities, and in support of his argument,

he quoted **Section 110(1) of the Evidence Act, Cap 6 R.E 2022** which provides that: -

> *"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."*

It is in the records as seen at page 25 and 26 of the typed judgment, that apart from mere testimonies from the witnesses of the appellant, they failed to prove the ownership of the alleged project properties to the required standard, as neither of the witnesses tendered any receipt of purchase nor document of ownership of the said project properties.

Furthermore, on the contrary to appellant's contention that the money to buy the properties including a vehicle came from the appellant, there has not been any documentary proof to the same, but rather only mere testimonies that the properties found in the possession of the respondent were the result of funds provided by the appellant. As per the records before me, one would easily believe that during the execution of Exhibit P1 the respondent had already possessed the project properties apart from the vehicle (with registration number T947 DKG) which was bought in 2017.

Without living any stone unturned, it was submitted by Mr. Budodi that, it is his side's view that the respondent is the rightful owner of the vehicle (with registration number T947 DKG) in the eyes of law as the same was registered in the respondent's name. And he cited Sections 2(1) and 15 of the Road Traffic Act, Cap. 168 and referred this court to the case of **Nacky Esther Nyange vs Mihayo Marijani Wilmore & Another** (supra) at page 22 in support of his argument. I do agree with the submission of Mr. Budodi as the appellant did not prove on the contrary that the said vehicle was either registered in her name or bought by her funds, in which it would have rebutted the ownership of the said vehicle being owned by the respondent. In absence of the said proof, my hands are tied to believe that the vehicle (with registration number T947 DKG) do belong to the appellant.

Moreover, it was expected of the appellant to provide the mode used in funding the project in which documentary proof of the process would have proven that the properties which are in possession of the respondent are indeed the results of funds provided by the appellant. In absence of the said documentary proof, I fail to believe that the project properties found within the possession of the respondent are indeed the results of the

appellant's funds, since the respondent existed even before the execution of Exhibit P1.

On the last part which concerns the remedies awarded to the respondent, I would refer to **Exhibit P1** at **clause 4.1** on the 4th line, which provides as follows: -

> *".....The party terminating the contract is responsible for any reasonable operational costs that have to be made by the other party as a result of this termination."*

It is in the records that, the respondent in his counter claim established that there has to be a specific performance of the contract by the appellant, as it is the party terminating the contract.

Nevertheless, as rightly submitted by Mr. Budodi that, it is a trite law that assessment of damages is a domain of the trial court. That, it is undisputed that, the trial court is placed in a much better position to assess the damages than the appellate court. This was the holding in the case of **Anthony Ngoo & Another vs Kitinda Kimaro** *(supra)* as referred to by Mr. Budodi.

Up until this juncture, I find no merits in this appeal as per the records before me declare that the appellant failed to prove her case against the

respondent to the required standard, and that is on the balance of probabilities.

Consequently, I find no reasons to interfere with the decision of the trial court, I therefore uphold the judgment of the trial court and the decree thereto as this appeal is dismissed in its entirety with costs.

It is so ordered.

Dated and delivered at Sumbawanga this 06th day of May, 2024.

T. M. MWENEMPAZI
JUDGE