IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 189 OF 2023

(Originating from Civil Case No. 193 of 2021 Resident Magistrate Court of Dar es Salaam at Kisutu)

SALEH AWADHI BADAR ..... APPELLANT

VERSUS

MWANZO MWISHO AUTOSPARES ..... RESPONDENT

JUDGEMENT

Date of last order: 22/04/2024

Date of Judgement: 07/06/2024

NGUNYALE, J.

The respondent sued the appellant in Civil Case No. 193 of 2021 for breach of contract seeking payment of specific damages in the tune of 19,585.62 USD and other necessary reliefs as prayed in the plaint. The appellant in his WSD counterclaimed payment of 41,383,800/= as specific damages as costs incurred due to the respondent act of supplying him with defective spare parts. Earlier in December 2017 the

respondent and the appellant entered into a contract of supply of spare parts. The respondent supplied the appellant motor vehicle spare parts worth USD 54,506 in agreement that the appellant will be paying the same by monthly instalments of USD 10000 dollars within six months from the date they concluded the contract. The appellant paid part payment of USD 35000 and defaulted payment of the remaining amount on allegations that the spares supplied to him were defective thus he incurred those costs which he counterclaimed.

The trial court subjected the matter to full trial, at the end of the trial the case was decided in favour of the respondent per judgment dated 18th July, 2023. The court was satisfied that the appellant engaged in the act of breach of contract without good cause by ignoring to fulfil his promise of making payment in full. He was ordered to pay the outstanding sum of 19,585.62 USD and general damages in the tune of 5,000,000/= Tshs. The counter claim was dismissed for want of evidence; it was found to be an afterthought. The appellant was aggrieved with the decision of the trial court, he preferred the present appeal premising five grounds of appeal that; **one**, the trial court erred in law and fact to pass a judgment without proper analysis of evidence on record **two**, the trial court erred in law and facts to pass judgment

by disregarding the appellants evidence **three**, the trial court erred in law to proceed with a case without proper party before it **four**, the trial court erred in law and facts to dismiss the counter claim without giving reasonable reason and **five**, the trial court erred in law and facts to award special, general damages and interest thereon without supportive proof thereof.

Having in mind the rival submission, the grounds of appeal and the record of appeal, I proceed to determine the appeal by determining the first and second grounds of appeal together and the remaining grounds of appeal each will be determined separately. At the end, the court will rule out as to whether the appeal has merit or not guided by law and court practice.

The first and second grounds of appeal are about analysis of evidence, as I have said, I proceed to determine the two grounds of complaint together. It is a rule of law that evidence should properly be subjected to analysed and evaluation for proper determination of issues in dispute.

In respect of the first ground of appeal, the appellant Counsel submitted that analysis and evaluation of evidence by the courts is essential. In support of that position, he cited the case of **Leonard Mwanashoka**

vs Republic, Criminal Appeal No. 226 of 2014 Court of Appeal Sitting at Bukoba where it was stated that; -

> *"...failure to evaluate or an improper evaluation of evidence inevitably leads to wrong or biased conclusion and inference resulting in miscarriage of justice..."*

The Counsel went on to submit that the evidence of the respondent was to the effect that some spares were defective thus he inserted a clause that '***mnunuzi anakubali kununua kama vilivyo'***. The clause establish that the respondent knew that some spare parts are defective thus he inserted the above provision in the contract exhibit P2. It was the view of the appellants that the trail court ought to evaluate such evidence which would lead the court to draw inference that the respondent acted in bad faith during the period of entering into the contract which led to misrepresentation thereof. The proper analysis and evaluation of evidence especial exhibit P5 would establish that the goods supplied to the appellant were defective.

In reply to this ground of appeal the respondent insisted that the evidence was properly subjected to evaluation by the court by determining all issues raised by the court. The issues were **one**, whether the defendant entered the sale agreement wit the plaintiff **two**, whether there was misrepresentation on the part of the defendant to counter

claim in signing the sale agreement **three,** if issues above is answered in the affirmative, whether the plaintiff in the counterclaim incurred the loss due to misrepresentation and what reliefs. It was the view of the respondent that all issues were properly addressed in favour of the respondent to this appeal. There was no failure of evaluation to this case as submitted by the appellant even the case of **Leonard Mwanashoka** (supra) he cited is irrelevant because the facts do not match to the present case. The clause he quoted from the contract does not amount to admission of the defectiveness of some of spare parts on the part of the respondent nor misrepresentation.

On the 2nd ground that the trial court disregarded the appellant evidence. It was the submission of the appellant Counsel that all unfit spare parts were not sold i. e the shock absorbers were not fit for sale and the appellant tendered customer return receipt tendered as exhibit D2 collectively, to show the unfitness of the shock absorbers supplied, the appellant tendered exhibit D3 and exhibit D4 to prove that the defective spare parts are kept in the go down in Lusaka Zambia. The trial court did not consider all the strength of these evidences to determine the counter claim and did not consider the fact that the

respondent did not act in good faith during signing the contract as he supplied unfit spare parts which caused loss counterclaimed.

The respondent in respect of the second ground of appeal insisted that the evidence of the appellant was properly considered by the trail court. Exhibit P5 clearly established that the spare parts were genuine and fit for use during buying them abroad. Exhibit D2 presented by the appellant lacked support from any authority from Zambia dealing with testing the conformity of goods. There was no proof that the spare listed in exhibit D2 were the respondents spear parts. The document exhibit D3 as tendered was a document of 05/05/2022 i.e five years later from the date of entering into the contract. The counterclaim would have succeeded if the appellant would prove presence of misrepresentation or bad faith.

I am in agreement with the appellant that evidence must be subjected to careful analysis and evaluation by the court for the ends of justice. The issue is whether the evidence of the parties was subjected to proper and sound evaluation. In the present case the trial magistrate considered at length the evidence on record and he was satisfied that the appellant and the respondent entered into a contract of supply of the spare parts the fact which is not disputed at his stage. It is not

disputed basing on the testimony of PW1, DW1 and DW2. He was also satisfied that the appellant engaged himself in part performance of the contract i.e making part payment alleging that the spares supplied were unfit. The trial magistrate noted that there was no evidence raising complaint to the respondent that the spare parts were unfit during the period agreed for making payment. The complaints of the appellant that the spare parts were unfit came three years later after the same were sold to the appellant. Therefore, the complaints of the appellant came as an afterthought long time after the expiry of six months which the appellant was expected to complete execution of the contract. Thus, the counterclaim was found to be unfounded. The way the trial court analysed evidence on those points of fact, I have no reason to fault his findings of fact at this stage. The 1st and 2nd grounds of appeal are bound to fail, the evidence on record was subjected to proper analysis.

The 3rd ground of appeal the appellant complain that the trial court erred to proceed with a case without a proper party before it. The appellant submitted that only a person recognized under the law can sue or be sued, and those persons might be natural or articial persons as ruled in the case of **Kanisa la Anglikana Ujiji vs Abel s/o Samson Heguye**, Labour Revision No. 5 of 2019 High Court of Tanzania. He also

cited the case of **Geofrey Mgaya vs NBC Ltd Songea Branch & 2 Others**, Land Case No. 1 of 2019 High Court of Tanzania at Iringa where it was held that a company must sue or be sued in its registered name displayed in the certificate of incorporation. The respondent sued in the name of Mwanzo Mwisho Autospares instead of Mwanzo Mwisho Autospares Limited the name which is under the certificate of registration exhibit P1. It was the view of the appellant that the mistake is fatal because the proceedings does not reflect as to whether the respondent is a natural person or not. The respondents in reply submitted that omission of the word Limited in the contract and in the suit is not fatal because Mwanzo Mwisho Autospares and Mwanzo Mwisho Autospares Limited mean the same entity. He referred the court to the case of **Christina Mrimi versus Cocacola Kwanza Ltd**, Civil Application No. 113 of 2011 where the court of appeal in a similar mistake ruled that the same is not fatal. Even DW1 in his testimony in the trial court admitted that he knows the respondent and that the contract he entered with her, even the part payment he paid in honour of the very contract.

The respondent went on to submit that the appellant is saying that he was right to enter into the contract with the respondent, he was right to

receive goods from the respondent, he was right to make part payment to the respondent, in the counterclaim he was right to sue the respondent but when he failed to honour the terms of the contract he wants to escape liability on this hopeless reason. He said that the appellant should be estopped from this hide.

There is no dispute that the agreement between the appellant and the respondent and in the suit before the trial court the respondent was identified as Mwanzo Mwisho Autospare and not Mwanzo Mwisho Autospare Limited as identified in the certificate of incorporation exhibit P1. The only dispute is whether the omission is fatal or not. The appellant is of the view that the omission if fatal because the respondent was not a proper party in the proceedings. I fully subscribe to the position submitted by the appellant that only recognized persons can sue or be sued before the court of law the position which has been set in a number of decisions including the case of **Kanisa la Anglikan Ujiji** (supra) cited by the appellant. The rigid legal approach to this matter supports the position that the case was filed by an improper party the view which suggests striking out the suit or nullification of the proceedings depending on the stage and circumstance of the case. This stance was referred by this court in the case of **Geofrey Mgaya versus**

NBC Limited Songea Branch & 2 others, Land Case no.1 of 2019 where the court referred the case of **The Registered Trustees of the Catholic Diocese of Arusha v. The Board of Trustees of Simanjiro Pastoral Education Trust,** Civil Case No. 3 of 1998 where it was held that:

> *"a party to court proceedings **who does not have natural or legal personality is a non-existent party in the eyes of the law**. The court held further that, a suit by a plaintiff or against a defendant, **who lacks natural or legal personality/capacity cannot be maintained for incompetence, and must be struck out**."* (Emphasis added)

The modern and progressive legal approach suggests broad interpretation of the laws in favour of the substantive justice and opposed to legal technicalities. In the case at hand the respondent submitted that the mistake is not fatal because the appellant was aware with the person they were contracting. Even if there was a mistake by missing the word 'Limited' still the appellant had in mind that he entered the contract with the respondent herein. In the case of **Alliance Life Assurance Limited versus Elihuruma Ngowi**, Civil Appeal No. 487 of 2021 the Court of Appeal of Tanzania sitting at Dar es Salaam ruled that the omission in a name of a party/person which does not cause any

doubt to the identity of a party to the proceedings is not fatal. In the instant case the omission to put the word 'Limited' did not cause any doubt to the identity of the respondent as the party to the agreement and the suit. The appellant in the whole time was in mind that he was trading with the respondent thus he was able to make part payment in honour of the contract. And when the suit was filed, he complied to all procedures, the doubts he started in the course of the proceedings knowingly that she is the one he concluded a contract with him. Therefore, the third ground of appeal melts down.

In the 4th ground of appeal, the appellant complained that the trail court dismissed the counter claim without giving reasonable reasons. In support of this ground of appeal the appellant Counsel submitted that the respondent supplied to him the spare parts which were unfit thus the customers in Lusaka Zambia were returning the same after purchasing. Thus, he deserved specific damages from the appellant due to the fact that he supplied defective spares which at the end were not sold. He incurred costs to transfer the same to Zambia and other storage costs. He submitted that the stance took by the trial magistrate that the defect was communicated to the respondent three year after they concluded the contract was wrong because the evidence of DW2 testified that he

called the respondent on the same year 2017 and exhibit P3 which tells that communication was done 2019 that the spare parts were defective. Therefore, the counter claim of the appellant hold water.

In response, the respondent submitted that it is a bit strange that after the appellant confiscated the remained balance alleging defectiveness of the spare parts. He raised counter claim on top of the confiscated balance. The counter claim deserve dismissal for want of proof. The appellant failed to prove existence of misrepresentation and defective spare parts. He came to prove defects relying on the documents of testing the goods 2022 to the goods which were transferred to Zambia since 2017.

The trial magistrate considered at length the counter claim and found that the same was not proved on the balance of probabilities. The terms of the agreement were to the effect that payments were to be made within six months from the date the appellant was supplied with the spare parts. Unfortunately, the appellant came with the complaint outside the terms of the agreement. Parties are bound by the terms of the agreement, the appellant raised complaints after he defaulted payment according to the agreement. In such a circumstance the counter claim cannot stand the test of proof. The trial magistrate

considered well the issue of counter claim, I have no reason to fault his findings. At page 16 of the typed judgment the trial magistrate ruled; -

> *"The parties are supposed to be guided by the contract exhibit P2 on record. It does not cross any mind of a prudent wise man that, a spare bought under a standard contract as in exhibit P2 can be disputed of its genuineness 3 years later after the same was sold to the defendant/plaintiff in the counter claim.*
>
> *The plaintiff in the counter claim had stated in court that, he reported over the defectiveness of the spares to the defendant/plaintiff in the main case orally through one Nassor who introduced him to the plaintiff/the defendant in the counter claim who ought to have informed the plaintiff in the main case. Unfortunately, the plaintiff in the counter claim failed at least to bring one Nassoro to testify with a view to corroborate the testimony of the plaintiff in the counter claim. Even if one Nassor would have testified still exhibit P2 on record did not provide such room of the return for the spares after the same were bought from defendant/plaintiff in the main case...."*

I therefore support the finding of the trial court that, the counterclaim was baseless. The 4th ground of appeal also fails.

The last ground of appeal, the appellant complains that the trial court erred in law and facts to award special and general damages and interest thereon without supportive proof thereof. In my view, this is not a ground of appeal to detain the court because things are obvious. There is no dispute that the appellant paid part payment of USD 35000 out of USD 54506 agreed in the agreement exhibit P2. Since it was proved that the appellant was in breach of the contract the appellant was entitled to the special damages as proved. The appellant has submitted that award of general damages is a discretion of the court though such discretion must be exercised judiciously. He cited the case of **Finca Microfinance bank Ltd vs Mohamed Omary Magayu**, Civil Appeal No. 26 of 2020 High Court of Tanzania at Mbeya where it was held that general damages are awarded based on the discretion of the court where such discretion is exercised judiciously. In the present case he complained that no reason was advanced to grant such general damages. In reply the respondent stated that the cited case is irrelevant and misplaced. In awarding general damages, the trial magistrate said that the amount has been awarded because of the time the appellant stayed with the respondent money. I think the award met the ends of justice, the appellant was entitled to specific damages as proved and general

damages as granted based on the discretion of the trial court. The last ground of appeal has no merit also.

On the whole then, the appeal lacks substance. It is hereby dismissed with costs. Order accordingly.

Dated at Dar es Salaam this **07th** day of **June, 2024**.

D. P. Ngunyale

JUDGE

Judgement delivered this **07th** day of **June, 2024** in presence of the Eliezer Msuya for the appellant.

D. P. Ngunyale

JUDGE