

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA SUB-REGISTRY)

AT ARUSHA

(PC) CIVIL APPEAL NO. 01 OF 2024

(C/F Ngorongoro District Court, Civil Appeal No. 09 of 2023, Original Civil

Case No. 50 of 2023 of Loliondo Primary Court)

HUMPHREY CONSTRUCTION LIMITED.....1ST APPELLANT

BERNAD KINANDA.....2ND APPELLANT

VERSUS

GESMA NYAMHANGA MAHEWA..... RESPONDENT

JUDGMENT

25/4/2024 & 6/6/2024

KIWONDE, J.:

This is the second appeal. The appellants, being dissatisfied with the decision of Ngorongoro District Court (the first appellate court) has preferred this appeal based on six grounds of appeal namely; -

1. That the first appellate court erred in law and in fact in holding that the non-payment of stamp duty for exhibit M1 does not affect the substance of the main case and cannot be a ground to vary the decision of the trial court.



2. That after finding that exhibit M1 is chargeable with stamp duty the first appellate court erred in law and in fact in giving the respondent opportunity to pay the required stamp duty and penalty instead of expunging the exhibit M1 from the evidence on record.
3. That after finding that the alleged contract for construction, exhibit M1 was unstamped, the first appellate court erred in law and fact in using the same exhibit to hold that the respondent had a contract for service with the first appellant to decide the appeal on merit before payment of stamp duty.
4. That the learned Senior Resident Magistrate erred in law and fact in holding that the case between the parties herein is pure breach of contract of which the primary court has jurisdiction to determine.
5. That the first appellate court erred in law and fact in holding that the allegation of forgery was not proved in respect of signature and names contained in exhibits M1.
6. That the first appellate court erred in law and fact in holding that the award of general damages of TZS.

10,000,000/= for the alleged breach of contract by the trial court was proper.

The brief background of this appeal is that the appellants, on 29/3/2023 entered into a contract with the respondent to construct a school building at Wasso, Loliondo, Ngorongoro District in Arusha region to be completed within six months. The respondent, while in the process of construction but before finishing, the appellants breached the contract by stopping him. Thus, he claimed for specific damages at the tune of TZS. 3, 027, 250/= used at the construction and general damages at the tune of TZS. 10,000,0000/=.

The appellants contended that they had a normal contract with the respondent but it ceased due to his underperformance. They also said the respondent was paid according to his work and owes them nothing.

At the conclusion of the trial, the case was decided in favour of the respondent. The first appellant was to pay the respondent general damages to the tune of TZS. 10,000,000/= and costs of the suit.

Being aggrieved by the decision of the trial court, the appellants unsuccessfully appealed at Ngorongoro District Court, hence, this appeal.

On 21st March 2024, it was agreed by the counsels and ordered by the court that the appeal be disposed of by way of filing written submissions, and both sides filed them.

Having considered the rival submissions from the counsel of the parties, the issue for determination is whether the appeal finds merits or otherwise.

I will begin my deliberations with the first, second and third grounds of appeal which were argued jointly. It was argued that the first appellate court wrongly held that non-payment of stamp duty does not affect the substance of the case. The counsel for the appellants submitted that exhibit M1 was an instrument chargeable with stamp duty, the same was wrongly admitted at the trial court by lacking stamp duty. The first appellate court maintained the decision of the trial court based on the said exhibit and gave the respondent seven days to fulfil the requirement of stamp duty Act. He cited the case of **Zakaria Barie Bura v. Theresia Maria John Mubiru** (1995) T.L.R 211.

However, the respondent's counsel supported the decision of the first appellate court which did not nullify the decision of the trial court based on the issue of stamp duty. He referred to the case of **Mohamed Abood as the Attorney of Walid Abood Salehe Versus D.F.S Express Lines**

Ltd, Civil Appeal No. 282 of 2019, Court of Appeal of Tanzania at Dar es Salaam, (reported in Tanzlii) to the effect that the issue of stamp duty is a procedural matter, and it does not go to root of the case. The counsel argued further that when exhibit M1 was tendered at the trial court, the appellants were represented by the same counsel and he did not object to it, thus, he is barred from challenging its admissibility at the appellate stage.

It is rightly argued that documents chargeable with stamp duty, if admitted in evidence while unstamped, they are in violation of section 47(1) of the Stamp Duty Act, Cap 189 (R. E 2019). The law requires the contracts to be duly stamped for them to be admissible in evidence. This was a position in the cases of **Josephat L.K Lugaimukamu v. Father Canute J. Muzuwanda** [1986] T.L. R 69 and **Transport Equipment Ltd v. D. P Valambhia** [1993] T.L. R 91.

However, the remedy where the document bears no stamp duty is to allow a party seeking to tender it to pay the amount chargeable and then the matter proceeds. This is per proviso to section 47 (1)(a) of the Stamp Duty Act, Cap 189 (R. E 2019) and the case laws cited above, especially that of **Lugaimukamu** (supra).

For that matter, it is clear that had this matter been raised at the trial, the respondent would have been allowed to pay for the stamp duty and the case to proceed. Therefore, it would not change anything in the decision of the trial court. Since it was not raised at the trial and the appellants had the service of an advocate, so, I regard the matter an afterthought and ignore it.

In the case of **Elibariki Mboya Versus Amina Abeid**, Civil Appeal No. 54 of 1996 (unreported) when the court was faced with almost similar situation, it held that non-stamping of the instrument did not constitute a basis for faulting the decision of the lower court as per the provisions of section 73 of the Civil Procedure Code, Cap. 33 (R.E. 2019). Accordingly, the court allowed the appeal and made an order that the respondent to pay the chargeable duty on the contract of sale.

Guided by the cited authorities, I concur with the first appellate court that the fact that Exhibit M1 was not stamped cannot nullify the whole proceedings and decision of the trial court and it was correct to allow the respondent to pay chargeable duty and the fine within the time. See the case of **Mohamed Abood as the Attorney of Walid Abood v. D.F.S Express Lines Ltd** (supra). Thus, these grounds of appeal are found with no merits.

Coming to the fourth ground of appeal, the counsel for the appellants argued that the first appellant did not enter into a contractual relationship with the respondent rather they had an employer- employee relationship. He said the respondent was employed by the first appellant for a specific task of construction and all the materials were supplied by the first appellant. Thus, the respondent's claim was unpaid remuneration and damages for breach of employment contract. The primary court lacked jurisdiction as it turns into a labour matter, and it was supposed to be filed at the Commission for Mediation and Arbitration (CMA).

On the other hand, Mr. Bwemelo supported the decision of the lower court that they both had a contractual relationship. He added that if the appellant and the respondent had an employer-employee relationship there was no need to prepare the quotation showing the costs of the building of classrooms, office, and latrines, he could have been paid monthly salary as other employees. He prayed for this ground too to be dismissed.

In determining who is an employee, section 61 of the Labour Institutions Act, Cap 300 (R.E 2019) provides that for the purpose of labour law, a person who works for, or renders services to any other person is presumed, until the contrary is proved to be an employee, regardless of

the form of contract, if any one or more of the following factors is present: that is to say, (a) the manner in which the person works is subject to the control or direction of another person, (b) the person's hours of work are subject to the control or direction of another person, (c) in the case of person who works for an organization, the person is a part of that organization, (d) the person has worked for that other person for an average of at least 45 hours per month over the last three months, (e) the person is economically dependent on the other person for whom that person works and or renders services, or (f) the person only works for or renders service to one person.

From this position of the law and as per Exhibit M1, the appellant and the respondent had a contractual relationship. This is due to the fact that exhibit M1 is very straight forward that the appellants entered into a contract with the respondent to construct school building within six months and they agreed the amount to be paid. Thereafter, their contract would come to an end. Their relationship does not fall in any of the factors enumerated above in the cited provision. Thus, the issue of labour dispute does not arise and the primary court had the jurisdiction to hear and determine the matter. I find no reason to fault the decision by the first appellate court.

Concerning the fifth ground of appeal, it was complained that the first appellate court erred to hold that forgery was not proved. The counsel for the appellants challenged the authenticity of exhibit M1 that it was questionable as there was a difference between exhibits M1, U1, U2, and U3 as they show different names and signatures of the first appellant's Managers. Further, the said SU3, Dismas Soka said he did not sign exhibit M1 and it is not the seal of the first appellant.

On his part, Mr. Bwemelo argued that forgery of exhibit M1 was not proved by the appellant as the signature alleged to be forged appeared on exhibit U3 only and it was hard to make a comparison. So, the issue of forgery was considered and determined by the first appellate court.

Indeed, the concern of forgery was discussed and determined by the first appellate court. The reason for rejecting this allegation was that DW3 had no evidence other than mere words of mouth. The appellant relied on the issue of forgery under Exhibit U2 and U3 which had different names, Humprey Soka and Humprey Jonas Soka with no explanations why the names were different. Further Exhibit U2 was not signed by the alleged director to make comparison of the signature.

Further as the Director whose signature appeared on exhibit M1 was not called as witness at the trial court as a witness, it was difficult for the

court to determine the issue of forgery. To constitute forgery, it must be proved by evidence that a person made or signed the document which he had no authority so to do. Thus, it requires sufficient evidence to prove forgery. Since in the matter at hand, there was no enough evidence, then forgery was not established. The first appellate court was right so to hold.

Finally, on the sixth ground of appeal, the counsel for the appellants submitted that as the trial court held that the appellants did not breach any contract and that the claim for specific damages was not proved, there was no need to order payment of general damages at the tune of Tshs. 10,000,000/=.

The counsel faulted the lower courts on reason that the award of the said general damages was too excessive compared to the specific damages claimed by the appellant TZS 2,500, 250/=. Thus, they prayed for it to be reduced if the decision of the trial court would stand. He cited for reference the case of **Cooper Motor Corporation Ltd v. Moshi/Arusha Occupational Health Services** (1990) T.L.R 96.

The counsel for the respondent resisted this argument because the award of general damages is in the discretion of the court which does not need to be pleaded nor proved. He added that the prayer of the counsel for the

appellant for general damages to be reduced should not be considered as they did not state reasons for why it has to be reduced.

Truly, general damages are awardable at the discretion of the court, but the same must be exercised judiciously. This is a position in **Jafari Hussein Sinai and Another Versus Silver General Distributors Limited and 5 Others**, Civil Appeal No. 271 of 2017, Court of Appeal of Tanzania at Tanga and **Tanzania Sanyi Corporation V. African Marble Company Ltd** [2004] TLR 155.

In the case at hand, it is evident that the appellants breached the contract before the expiration of the time specified in their contract. Although the respondent failed to prove specific damages, it does not bar the court to grant and assess general damages. These are two distinct reliefs.

However, the general damages awarded at TZS 10, 000, 000/= was too excessive. It is not shown how the courts below reached to such decision. The only reason for awarding such amount was said to be due to breach of contract. There is no evidence as to the extent of damages the respondent suffered. The aim of awarding general damages is to atone and or restore the victim or party for the loss suffered and not to enrich him at the expenses of others.

So, this ground of appeal finds merits and it is allowed. The order awarding the respondent general damages at TZS 10, 000, 000/= is hereby set aside. Instead, general damages are reduced to the tune of TZS 3,000,000/= only.

In the upshot, the appeal is partly allowed to the extent explained above.

For that reason, I give no order as to cost.

DATED at ARUSHA this 6th June 2024.



F. H. KIWONDE

JUDGE

06/06/2024

Court: Judgment is delivered in the court room in the presence of Ms. Leticia Leonard counsel for the respondent also holding brief of Mr. Mitego Methusela for the appellants, the respondent and Maryciana (RMA) this 6th June 2024 and the right of further appeal is explained.



F. H. KIWONDE

JUDGE

06/06/2024