IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB-REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 25867 OF 2023.

(Originating from the judgment and decree of the Resident Magistrate court of Kinondoni in Civil Case no 12 of 2022 Hon. Kiswaga, PRM)

THUMBSUP COMPANY LIMITED..... APPELLANT

VERSUS

THE BOARD OF TRUSTEE OF

IFAKARA HEALTH INSTITUTE..... RESPONDENT

JUDGMENT:

22nd May & 14th June 2024

KIREKIANO, J:

The appellant herein instituted a Civil Suit before the Resident Magistrate Court of Kinondoni at Kinondoni against the respondent claiming over Seventy Million Tanzanian Shillings (70,000,000/=) as compensation for breach of contract and loss of income. The appellant also claimed over the respondent general damages, costs of the suit and any other relief as the Court may deem fit.

Briefly stated, it was the appellant's case at the trial court that the appellant entered into a one-year agreement with the respondent to provide printing and designing services for the year 2021/2022. It was the appellant

case that the respondent would send e-mails to the plaintiff and other suppliers who had been pre-qualified to present their quotations. The appellant claimed that there was a letter from the respondent informing them that they had been pre-qualified and that the contract starts on 27th September 2021 and ends on 30th June 2022; the same was admitted as Exb. P-1.

The implementation of the same was that once the respondent needs a product or services in respect of printing and designing as per the demands from end users, it will send e-mails to them and others who were shortlisted, they will send the quotations, and the bidder who meets their requirement will get the tender.

The appellant claimed that other pre-qualified bidders did receive e-mails up to 10 e-mails per single month while his company only received two e-mails from February 2022 to June 2022, thus triggering the appellant to inquire the respondent why that was happening; they assured him that they had no problem with their company.

He claimed that his company was suspended without formal notice. Since the appellant could provide services according to their agreement as a pre-qualified, he was illegally denied this opportunity by the respondent.

In the respondent's case, it was stated that they invited the appellant managing director after approaching him to join the institution and sign the collaboration agreement. Under the collaboration agreement, the appellant's managing director was offered free access to the offices. He admitted to having advertised the tender for 2021/2022, and the plaintiff started doing business without the respondent's knowledge.

After noticing that, they requested the managing director of the appellant to sign a conflict-of-interest statement to declare that he had no financial interest, which he signed. They further noticed that the appellant's managing director was getting internal information on all designing and printing tenders, giving him more advantage over competitors.

With regards to the claim that other pre-qualifiers were getting more tenders, he said that there was no proof of the same and denied all the claims as they have no basis and prays the suit to be dismissed with cost for lack of merit

The trial court framed three issues for determination, namely, **first,** whether there was a binding contract between the parties; s**econd**, whether there was a breach of contract; and **third**, what the relief parties are entitled to.

Upon full trial involving one witness for the appellant and two witnesses for the respondent, the trial Court found no merit in the appellant's suit and dismissed the suit. The trial Magistrate concluded that the appellant failed to prove the case on balance of probabilities. Further, the trial court found that the plaintiff's claim was based on the fact that it had been selected as pre-qualified, which in law does not amount to the award of tender (offer) nor its acceptance, which means there was no binding contract between the parties.

Dissatisfied by the Court's decision, the appellant preferred this appeal on the following grounds.

1) The Honourable trial Magistrate erred both in law and fact by holding that there was no binding contract between the appellant and the respondent.

2) That the honourable trial Magistrate erred both in law and fact for failure to analyse and evaluate the evidence tendered before the court, thus reaching the wrong conclusion that there was no binding contract between the parties in the suit.

3) The Honourable trial Magistrate erred both in Law and Fact by dismissing the suit while the Appellant had established that there was a contract and that the same was breached by the respondent.

Both parties were represented, with the appellant represented by Mr Ndanu Emmanuel, learned counsel, and the respondent by Mr Thomas Joseph Massawe, learned counsel. This appeal was heard through written submissions, and both parties complied with the submission schedule. The three grounds of appeal are interrelated and boil down to significant aspects of the existence of a contract, or otherwise; they will be disposed of collectively.

In his submission, Mr Ndanu, on the issue of the existence of a Contract, submitted that the trial magistrate was wrong to rule out that there was no contract as well as the advertisement for tender is not an offer within the meaning ascribed under Section 2 of the Law of Contract rather it is regarded as an invitation to treat. He submitted that the trial magistrate erred in comprehending the concept of offer and acceptance as far as advertisement is concerned and finally reached a wrong conclusion. He invited this Court to read the book **Law of Contract in East Africa by R.W Hodgin on pg. 21** where the author states: -

> *"Much newspaper space is devoted to tenders. The school that invites tradesmen to compete for stationary or book contracts is asking them to make offers. Consequently, the*

school is the acceptor and not bound to accept the lowest tender".

He also referred to the case of **Gibson v Manchester City Council (1971) all ER 183.**

The Counsel added that the appellant made an offer to the respondent, who accepted the offer. Exhibit P-1 was a letter from the respondent informing the appellant that she was pre-qualified. From there, the appellant started getting requests to provide quotations for the needed services from the respondent, as stated by DW-1 on pg. 8 of the trial Court's judgment that he was awarded three out of fifteen "tenders"on printing and designing services up to the tune of 25,791,732/= which is equivalent to 43% of the tenders.

He referred to Section 2(1)(a), (b), (e), and (h) of the Law of Contract (supra) and said that the appellant's act of submitting the tender documents to the respondent was proposing. The respondent accepted, and a proposal, when accepted, becomes a promise. Hence, an agreement enforceable by law is a contract.

He submitted that the evidence tendered before the trial Court proved the existence of a binding contract as the respondent never laid any evidence to disprove the same. He insisted that the trial magistrate failed to analyse

and evaluate properly the evidence tendered before the Court, thus reaching the wrong conclusion that there was no binding contract between the parties.

He referred to the case of **Justus Ntidandetse vs CRDB Bank PLC, Miss. Civil Application No. 41 of 2021**, and invited this Court to assess the records of the Lower Court and find that the trial Magistrate erred in holding that there were no binding contracts.

Responding to the appeal, Mr Massawe submitted that the trial Court rightly decided that there was no binding contract, as per the reasoning in the judgment. He submitted that it is undisputed that the respondent approved a list of prequalification vendors for the financial year 2021/2022, and the appellant was among those shortlisted for the printing designing services with another one known as Calibre First Group.

He submitted that being on a list of prequalified vendors does not give a supplier an automatic right to supply or offer services without being requested. He submitted that the appellant's allegation that the list of pre-qualification vendors was as good as a supply contract was incorrect. He referred to **Section 3 of the Public Procurement Act, Cap 410 (R.E 2022),** which defines prequalification as *"a formal procedure whereby*

suppliers, contractors, or consultants are invited to submit details of their resources, and capabilities which are screened prior to invitation to tender on the basis of meeting the minimum criteria on experience, resources, capacity and financial standing".

He submitted that the book of **Law of Contract in East Africa** (supra) and the case of Manchester City (supra) cited by the appellant are distinguishable from the case at hand. Section 2 (1) (a), (b), and (e) of the Law of Contract (supra), as cited by the applicant, they never proved when a binding contract was signed between the appellant and the respondent, and no exhibit tendered to confirm the same.

The counsel for the respondent finalised this by praying that this Court consider the pleadings because the trial Court was in a better position to assess the evidence and make the best judgment.

In a brief rejoinder, counsel for the appellant added that apart from exhibit P-1, which informed the appellant they were qualified and listed among the service providers, substantial evidence from the parties' conduct shows a binding contract between the appellant and respondent. These include e-mail correspondence between the appellant principal and

respondent's officers, the investigation report, and payments proving a contract.

On my part, this being a first appeal, this Court must evaluate the entire evidence on record and come to its conclusion as it was discussed in the case of **Future Century Ltd v TANESCO, Civil Appeal No. 5 of 2009, CAT at Dar es salaam** where it was held;

> *"This is a first appeal. The principle of law established by the Court is that the appellant is entitled to have the evidence re-evaluated by the first Court and give its findings."*

The grounds of appeal laid down by the appellant lie in the issue of existence of contracts between the appellant and the respondent. It was said in the book of Sir P.C Mogha titled **"The Principle of Pleadings India"** (14th edition) that: -

> *"In a suit brought on a contract, the contract must first be alleged, and then its breach, and then the damages. The actual contract which was in force between the parties should alone be alleged..." (page 269).*

The respondent denied having entered into any contract with the appellant, while the appellant alleged a contract between them. That being the case,

the parties were in disputes mainly over whether there was a contract between them and whether the respondent breached it.

The evidence on record shows that the appellant and the respondent had a business relationship (Exhibit P-1), a letter informing the appellant that she was pre-qualified for the financial year 2021/2022. Returning to exhibit P-1 contains a pre-qualification letter for 2021/2022, which includes the conditions to be fulfilled by the appellant before supplying any service to the respondent.

Other exhibits tendered by the appellant included e-mail communications to the respondent concerning tender issues and quotations. Apart from these, no document was pleaded or tendered in the trial Court, which proves the existence of the contract signed by the parties..

According to the appellant counsel, the trial Court misdirected itself, ruling out no binding contract between the parties. The trial Magistrate stated that:"The trial Court, in its findings, referred to Section 2 of the Law of Contract on the issue of offer and acceptance, that once an offer is given and the other party accepts that offer, then the contract will usually be binding on both parties. He then finalised that:

"Advertisement for tenders as done by the respondent is not an offer within the meaning ascribed under Section 2 of the Law of Contract Act, but rather it is regarded as an invitation to treat. For there is a binding contract, there must be a tender, and the said tender must be accepted; in the instant case, the plaintiff's claim is based on the fact that it has been selected as a pre-qualifier, which in law does neither amount to a tender (offer) nor its acceptance.

I am persuaded to agree with the trial Magistrate that there were no signing contracts between the parties as neither were tendered in Court, notwithstanding that both parties knew each other and had a business together. The appellant claimed they deserved to provide services to the respondent for the whole financial year and heavily relied on the e-mails tendered.

Exhibit P-1, a pre-qualification letter for the year 2021/2022, relied on by the appellant to prove the existence of the contract, contains conditions that must be fulfilled by the appellant. One of them is not to deliver goods/services to the respondent without a duly signed contract. No signed contract was pleaded and tendered by the appellant before the trial court to prove the existence of the same.

It is a settled law that parties are bound by their pleadings, as stated in the case of **Paulina Samson Ndawavya v Theresia Thomas Madaha, Civil Appeal No. 45 of 2017 (unreported)**. As such, it is pretty clear that one alleges the existence of fact bears the duty of proving it. This is provided under Section 110 of the Tanzania Evidence Act, Cap 6 R.E 2019 that: -

> *"110 (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."*

See also the decision of the Court of Appeal of Tanzania in the case of **Jasson Samson Rweikiza v Novatus Rwechungura Nkwama, Civil Appeal No. 305 of 2020** (29 November 2021) which held that:-

> *"It is a cherished principle of law that, generally, in civil proceedings, the burden of proof ties on the party who alleges anything in his favour. We are fortified by the provisions of sections 110 and 111 of the Evidence Act."*

It was the appellant's duty to prove all the claims against the respondent; the amount indicated by the appellant had no basis that they accrue from which contract proved by them.

In passing, it could be different if the appellant's alleged supply of goods following quotations were not paid or if some services the appellant did to the respondent were unpaid.

Going by the appellant's claims in the trial court and the subject of this appeal, based on evidence on record, this court is not persuaded by the appellant's case that there was evidence giving the appellant a framework binding contract to require the respondent to obtain goods and services from the appellant for the whole financial year 2021/2022.

From what has been discussed above, I am convinced that the trial Magistrate was correct in deciding that there was no Contract between the parties. All said, given the above reasons, I find that this appeal has no merit; the same is dismissed with costs.

A. J KIREKIANO

JUDGE

14.06.2024.

COURT:

Judgement was delivered to the chamber in the presence of Miss Maria Pengo, advocate, holding brief of Mr Emanuel Ndanu, counsel for the appellant, and Mr Thomas Massawe, Counsel for the respondent.

A. J KIREKIANO

JUDGE

14.06.2024